ADVISORY COMMITTEE
ON
RULES OF EVIDENCE

New York, NY
April 17, 2015

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ADVISORY COMMITTEE ON EVIDENCE RULES

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Brent R. Appel	JUST	Iowa	2010	2016
Daniel P. Collins	ESQ	California	2014	2017
Paul S. Diamond**	D	Pennsylvania (Eastern)	2009	2015
Stuart M. Goldberg*	DOJ	Washington, DC	----	Open
A. J. Kramer	FPD	Washington, DC	2012	2015
Debra Ann Livingston	C	Second Circuit	2013	2016
John T. Marten	D	Kansas	2014	2017
Paul Schectman	ESQ	New York	2010	2016
John A. Woodcock, Jr.	D	Maine	2011	2017
Daniel J. Capra Reporter	ACAD	New York	1996	Open

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

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Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge James C. Dever III**	***(Criminal)***
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ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

New York, New York

April 17, 2015

I. Opening Business

Opening business includes:

- Approval of the minutes of the Fall, 2014 meeting.
- A report on the January, 2015 meeting of the Standing Committee.
- A presentation of the FJC video on the 2014 amendments to the Evidence Rules.

II. Possible Amendment to Rule 803(16)

The agenda book contains a memo on consideration of a possible amendment to Rule 803(16), the hearsay exception for ancient documents. The question addressed is whether the exception needs to be altered or abrogated in light of the fact that electronically stored information is widespread, does not degrade, and can be fairly easily stored for 20 years. The Committee at the last meeting determined that Rule 803(16) was problematic but did not adopt a particular solution to the problem. The memo sets forth four alternatives for changing the Rule. The question for the Committee is whether to recommend to the Standing Committee that one of these alternatives be issued for public comment.

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

The agenda book contains a memo on consideration of two possible amendments that would allow the authenticity of certain electronic evidence to be proved by certificate. Both these proposals were preliminarily approved by the Committee at the last meeting. The memo sets forth proposed

text and Committee Note. The question for the Committee is whether to recommend to the Standing Committee that the proposals (or some variation of them) be issued for public comment.

IV. Possible Amendments to Provide More Uniformity in the Notice Provisions of the Evidence Rules

The agenda book contains a memo that discusses the notice provisions in the Evidence Rules. These notice provisions differ in many respects, often for no apparent reason. The memo discusses the possibility of proposing amendments that would make the notice provisions more uniform. The question for the Committee is whether proposed amendments should be submitted to the Standing Committee with the recommendation that they be issued for public comment.

V. Consideration of Possible Amendments Relating to the Hearsay Rule and Prior Statements of Testifying Witnesses

The agenda book contains a preliminary memo raising questions about whether the hearsay rule should apply to prior statements of testifying witnesses and, if so, whether the current hearsay exemptions for such statements should be broadened.

VI. Best Practices for Authenticating Certain Electronic Evidence

At its last meeting, the Committee agreed to start a project that would provide "best practices" for authenticating electronic evidence. The agenda book contains the first prepared sample of best practices for the Committee's review: authentication of email. The agenda book also contains a draft of a separate chapter on judicial notice as a means of authenticating electronic communications.

VII. Possible Addition of Hearsay Exception for Recent Perceptions

At its last meeting, the Committee decided to defer action on an amendment that would add a "recent perceptions" exception to Rule 804(b) — an exception that would be designed primarily to provide broader admissibility for electronic communications such as texts and tweets. The Committee directed the Reporter and Professor Broun to monitor developments in the case law on admissibility of texts and tweets, and to investigate the practice in the states that have such an exception. The agenda book contains two memos in response to the Committee's direction. The first is a memo by Professor Dan Blinka of Marquette Law School, discussing the Wisconsin practice under its recent perceptions exception. The second is the Reporter's outline of recent federal case law on electronic communications and the hearsay rule.

VIII. *Crawford* Outline

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

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Advisory Committee on Evidence Rules

Minutes of the Meeting of October 24, 2014

Durham, North Carolina

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 24, 2014, at Duke University School of Law.

The following members of the Committee were present:

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

Also present were:

Hon. Sidney A. Fitzwater, Former Chair of the Committee
Hon. Richard Wesley, Liaison from the Committee on Rules of Practice and Procedure
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Catherine R. Borden, Esq., Federal Judicial Center
Jonathan C. Rose, Chief, Rules Committee Support Office
Julie Wilson, Rules Committee Support Office
John K. Rabiej, Duke University Law School
David Levi, Dean, Duke University Law School
Donald Beskind, Duke University Law School

I. Opening Business

Welcoming Remarks

Judge Sessions welcomed everyone to the Committee meeting. He noted that it was his first meeting as Chair, and that he was grateful to the outgoing Chair, Judge Fitzwater, for doing so much to assure a smooth transition. He expressed his appreciation to Duke Law School, and especially to Dean David Levi and John Rabiej, for hosting the Committee.

Approval of Minutes

The minutes of the Spring 2014 Committee meeting were approved.

New Members

Judge Sessions introduced and welcomed the new Committee members, Judge Marten of the District of Kansas, and Daniel Collins, Esq., partner in the law firm of Munger, Tolles & Olsen.

Tribute to Judge Fitzwater

The Committee gave a well-deserved tribute to Judge Fitzwater, the departing Chair. The Reporter commented that Judge Fitzwater led the Committee with brilliance, dignity and grace, and that it was his guidance that let the Committee to sponsor three important Symposia — on the Restyling effort, Rule 502, and electronic evidence. The proceedings from all three Symposia have been published in law reviews, and the Electronic Evidence Symposium helped the Committee to establish its agenda for the current meeting and meetings going forward. The Reporter also noted that it was Judge Fitzwater who crafted the language for the amendment to Rule 801(d)(1)(A) that solved the problems that some had raised with the initial draft of the rule, and that led to the passage of the rule. Judge Sessions complimented Judge Fitzwater for his remarkable contributions to the rulemaking process and for his stellar qualities as a person and a leader.

Judge Fitzwater spoke and stated that being the Chair of the Evidence Rules Committee was the "best job" he ever had. He emphasized the importance of the Committee's work and the brilliance and dedication of members of the Committee, who were "the best and the brightest.". He thanked the AO staff for their dedicated efforts on behalf of the Committee. Judge Fitzwater noted that he had worked with the Reporter on the egovernment project when he was a member of the Standing Committee and that he and the Reporter continued that productive partnership while working on the Evidence Committee. He complimented the Reporter for his efforts for the Committee. Finally, Judge Fitzwater stated that Judge Sessions was an outstanding selection for the new Chair, and that the appointment of a person as accomplished as Judge Sessions was a tribute to the Evidence Rules Committee and the importance of its work.

June Meeting of the Standing Committee

Judge Fitzwater reported on the January meeting of the Standing Committee. The Evidence Rules Committee presented no action items at the meeting. Judge Fitzwater reported to the Standing Committee on the Electronic Evidence Symposium held in April 2014, and told the Standing Committee that the Evidence Committee's agenda in the future would be influenced by the ideas expressed at the Symposium.

II. Possible Amendment to Rule 803(16)

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

The Reporter prepared three possible alternatives for amending the Rule: 1) abrogation; 2) limiting the rule to hardcopy; and 3) adding the necessity-based language from the residual exception, so that information could not be admitted under Rule 803(16) unless the proponent could show that it was more probative than any other reasonably available evidence that could be admitted under one of the reliability-based exceptions.

Committee members at the Spring meeting expressed interest in a proposed amendment but asked the Reporter to provide more information on the factual premises supporting the change — specifically, whether ESI that is more than 20 years old is and will be widespread (as opposed to deleted), and whether it is easily retrievable.

At the Fall meeting, the Reporter prepared a detailed memo indicating that old ESI in fact is and will become even more prevalent, and that much of it is easily retrievable. Examples include the materials from every posted web page, which can easily be found on and retrieved from the Internet Archive; personal emails, texts, and social media postings; information in cloud storage;

and databases of old books and public documents.

At the Fall meeting, Committee members unanimously agreed that Rule 803(16) was problematic, as it was based on the false premise that authenticity of a document means that the assertions in the document are reliable — this is patently not the case. The Committee also unanimously agreed that an amendment would be necessary to prevent the ancient documents exception from providing a loophole to admit large amounts of old, unreliable ESI. But the Committee was divided on two matters: 1) whether an amendment was necessary at this point, given the fact that no reported cases have been found in which old ESI has been admitted under the ancient documents exception; and 2) which alternative for amendment should be chosen.

On the first question of whether an amendment is necessary at this point: Some members argued that the obscurity of the ancient documents exception will not last now that ESI either has reached or is reaching the 20-year-old point. They noted that litigation incentives will be bound to lead to proffers of old, unreliable ESI that could not be admitted under any other exception. As one member stated, "this is a time bomb." But others, including the DOJ representative (after speaking with others at the Department) thought it appropriate to wait and monitor developments; the worst that could happen is that there would be a period of time in which old ESI would be admitted before an amendment would take effect. Another member observed that the time period required for admissibility provided at least some protection against widespread abuse, as it is unusual that a document more than 20 years old will be useful in a litigation; thus the risks involved in waiting were not overwhelming. But another member noted that especially in criminal cases, where statutes of limitation have been lengthened as to many crimes, the risk of admitting old and unreliable ESI was quite real — especially user-sourced information such as texts, tweets and social media postings. Another member stated that if the rule is wrong, something should be done about it — there is no reason to wait and have a rule that is wrong on the merits remain on the books.

Finally, members, as well as Judge Fitzwater, noted that in any case the proposal should be held up until it could be packaged with other amendments.

On the second question of which alternative to adopt: A number of Committee members felt that the rule should just be abrogated, as it is based on a fundamentally flawed premise that authenticity of a document means that its contents are reliable. One member argued that the exception was especially pernicious because if unreliable hearsay is admitted, it will be especially hard to rebut after the passage of so much time. Another member stated that if the Committee were drafting the rules from scratch, it should not propose an ancient documents exception, but that abrogating an exception was a somewhat radical step.

One member preferred the proposal that would distinguish between paper documents and ESI. That member worried about the growing volume of ESI that is in fixed form, and noted that people don't stockpile paper the way they stockpile ESI. But other members noted that there might be a problem in distinguishing between ESI and paper. For example, why is a printout of a newspaper article on a website any different from the hardcopy of the newspaper? What rule would apply to a scan of an old hardcopy document?

One member suggested that the necessity-based alternative was preferable because abrogation seems extreme and it is appropriate to leave the matter of admissibility to the judge, with the instruction that the judge should be more careful in admitting old and potentially unreliable information. The necessity-based model is just telling the judge to be more careful.

Another member suggested yet another alternative, in the nature of burden-shifting. Under this alternative, hearsay could be admitted under the ancient documents exception unless the opponent could show that it was untrustworthy. The Reporter noted that this alternative could be effectuated by importing the untrustworthiness clause of the business records exception (Rule 803(6)) into the ancient documents exception. Another member argued, however, that this alternative would not be sufficiently protective, because with ancient documents, the very problem is that they are so old that it will be difficult to prove their untrustworthiness.

The Committee ultimately determined to revisit the proposed amendment to Rule 803(16) at the next meeting. The Reporter was directed to work up a formal proposal for each of the alternatives discussed. If the Committee decides to propose any amendments to other rules at that time, then any proposed change to Rule 803(16) might be part of a package.

III. Possible Addition of Hearsay Exceptions for Recent Perceptions (eHearsay)

At the Advisory Committee's Symposium on Electronic Evidence, Professor Jeffrey Bellin proposed amending the Evidence Rules to add two new hearsay exceptions: one to Rule 804(b), which is the category for hearsay exceptions applicable only when the declarant is unavailable to testify; the other to Rule 801(d)(1), for certain hearsay statements made by testifying witnesses. Both exceptions are intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. Professor Bellin contended that the existing hearsay exceptions, written before these kinds of electronic communications were contemplated, are an ill-fit for them and will result in many important and reliable electronic communications being excluded.

To solve the perceived problem, Professor Bellin proposed a modified version of the hearsay exception for recent perceptions --- an exception that the original Advisory Committee approved but which was rejected by Congress. Professor Bellin contended that the proposal will allow most of the important and reliable tweets and texts to be admitted, while retaining sufficient reliability guarantees that will exclude the most suspect of this category of statements. And he contended that the proposal fits well within evidentiary doctrine because it derives from a hearsay exception that the Advisory Committee approved --- an exception that though rejected by Congress has actually been adopted and applied in a handful of states.

The Committee considered the recent perceptions proposal at the Fall meeting. Preliminarily, there was general agreement that one part of the proposal — amending Rule 801(d)(1) to add an exception for recent perceptions — should not be adopted. The Committee was concerned that admitting prior statements of a testifying witness, on the ground that they are based on a recent

perception, would create problems in integrating with the other Rule 801(d)(1) exceptions. For example, the amendment would allow certain prior inconsistent statements to be admitted substantively even though they would not be admissible under the constraints imposed by Congress in Rule 801(1)(d)(1)(A) — the rule allowing only prior inconsistent statements made under oath to be admissible for their truth. The rule would also allow certain prior consistent statements to be admitted substantively even though they would not be admissible under the recently amended Rule 801(d)(1)(B). Moreover, the recent perceptions exception adopted by the original Advisory Committee was addressed to situations in which the declarant was unavailable. The Committee was not convinced that the reasons for admitting a recent perceptions statement when the declarant was unavailable were equally applicable to situations in which the witness *was* available for cross-examination.

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

The Committee then turned its attention to the proposal to add a recent perceptions exception to Rule 804. One member found that the requirements that Professor Bellin proposed to add to the original Advisory Committee proposal were problematic. For example, Professor Bellin proposed to limit the exception to "communications" rather than any statement; but this member found that distinction to be unwarranted because private statements can be just as reliable, or unreliable, as communications. Thus the distinction resulted in line-drawing without any payoff in terms of differentiating reliability. This member concluded that if an exception for recent perceptions were found appropriate, then the Committee should propose the exception as it was proposed to Congress in the 1970's. As to that proposal, he wondered whether there should be deference to the Congressional decision to reject the proposed amendment back then.

On the question of deference, another member responded that times had changed since the 1970's, most particularly in the explosion of electronic communications such as texts, tweets, and Facebook status updates. If the proposed exception covers the most reliable of those statements — and those statements would not otherwise be covered by the existing exceptions — then that would be sufficient justification for revisiting the recent perceptions exception as the Advisory Committee had proposed it, to be revised as necessary.

Professor Broun, the consultant to the Committee, then reported on the research he had done into how the recent perceptions exception had been applied in the few states that had adopted it. His review of the reported case law led to the following conclusions: 1) the exceptions had not been subject to widespread abuse and in fact had been used relatively infrequently — most often in cases

involving domestic abuse; 2) in many of the cases in which the exception was used, the hearsay statement might well have been admitted as a present sense impression or an excited utterance; 3) that said, the exception had been usefully applied in a number of cases where the statement was made a few hours or more after the event — more than would be permitted under the present sense impression exception — but appeared to be reliable under the circumstances.

Professor Broun acknowledged that a review of reported decisions does not provide a completely accurate account of how the exception is working, because the real work on the exception is done in trial courts, and a trial court's evidentiary rulings either admitting or rejecting the proffered hearsay are unlikely to be reviewed. A Committee member suggested that if the Committee decided to continue its work on the amendment, then it might be useful to call prosecutors and other litigators in the states using the exception to see how it has affected their practice.

Several members then expressed the concern that a recent perceptions exception would lead to the admission of unreliable evidence. One member noted that a written text or tweet might be difficult to interpret, given the lack of context that would exist with an oral communication. That member also noted that the more time that passes between the event and the statement, the more likely it is that the person who sends the text or tweet is relying not only on his own personal knowledge but also the texts or tweets of others about the event. Thus there is a risk that electronic communications well after the event are the result of crowdsourcing without any guarantee of reliability. Moreover, the nature of text messages and tweets is that they often describe an event that can't be verified as having occurred. This member suggested that if recent-but-not immediate statements are in fact reliable, they could be admitted under the residual exception. This member suggested that the residual exception might be more appropriate because it would focus the judge directly on questions of reliability — perhaps more effectively than the categorical requirements of a new exception.

Another member, in response, argued that the problem of determining whether a person who sends a text is relying on his personal knowledge as opposed to crowdsourcing is a question of foundation — adopting a recent perceptions exception would not mean that all statements made recently after an event would be admissible automatically, because the proponent would also have to establish a foundation of personal knowledge. This member also stated that the residual exception solution is problematic because the residual exception was intended to be used in only rare and exception circumstances; it would not be appropriate to essentially create a new exception for reliable texts and tweets in the residual exception, as that would lead to unpredictability and too much judicial discretion.

Another member contended that to the extent the recent perceptions exception was intended to expand admissibility of personal electronic communications, it would lead to the collateral cost of more disputes on authenticity. Questions would abound on whether a particular text or tweet was actually made by a particular person. While courts are of course already deciding authenticity questions presented by electronic evidence, a new exception embracing this evidence would raise more authenticity questions.

Both the public defender and the DOJ representative reported that an informal survey of their respective constituencies indicated uniform opposition to a proposed exception for recent perceptions. The public defender found no shortage of hearsay being introduced in a criminal trial, particularly under the broad exception for coconspirator statements. He contended that there was no need for another potentially broad exception that would admit texts and posts made so far after the event that memory has faded. He argued that experience shows that texts and other electronic personal communications can be quite unreliable, and unverified. The DOJ representative reported that the prosecutors and bureau chiefs she had contacted were opposed to the exception because it might open up a Pandora's box, and that they had found no problem in admitting reliable hearsay under the existing exceptions.

Other members expressed concern that with all the volume of potentially low quality material being produced by text and tweet — with information misreported and then those misreports widely distributed.

Ultimately, the Committee decided not to proceed on Professor Bellin's proposal to add a recent perceptions exception to Rule 804. It did not reject a possible reconsideration of a recent perceptions exception, however. The Committee asked the Reporter and Professor Broun to monitor both federal and state case law to see how personal electronic communications are being treated in the courts. Are there reliable statements being excluded? Are such statements being admitted but only through misinterpretation of existing exceptions, or overuse of the residual exception? The Reporter also suggested that he could go back to the original Advisory Committee proposal for recent perceptions and try to refine it for consideration by the Committee at the next meeting. The Committee agreed with the Reporter's suggestion. The Committee resolved to continue its consideration of a recent perceptions exception at the next meeting.

IV. Proposal to Amend Rules 901 and 902 to Provide Specific Grounds for Authenticating Certain Electronic Evidence

At the Electronic Evidence Symposium in April, Greg Joseph made a presentation intended to generate discussion about whether standards could be added to Rules 901 to 902 that would specifically treat authentication of electronic evidence. There are dozens of reported cases, both Federal and State, that set forth standards for authenticating electronic evidence. These cases apply the existing, flexible provisions on authenticity currently found in Federal Rules 901 and 902 and their state counterparts. Greg crafted specialized authenticity rules to cover email, website evidence and texts; these draft rules are intended to codify the case law, as indicated by the extensive footnoted authority that Greg provided. Greg suggested that analogous standards could be set up for other forms of electronic evidence such as online chats.

At the Fall meeting, the Committee reviewed the draft rules to determine whether to propose

them, along with any revisions, as amendments to Rule 901 and 902. One member noted that the proposed rule on emails had been adapted from Rule 901(b)(6), governing authentication of phone calls. He argued that the telephone rule was different at least in part because the major purpose of that rule was to establish who it was that answered the call; in the email situation, there is rarely a question of who received the email. Another member noted that the question of receipt of an email is not really about authenticity but rather about a presumption, that something properly sent is received.

One member argued that the proposal was a very helpful compendium of factors that might go into the authenticity question, but that it was too detailed for a rule. In many cases, none of the details in the proposal would actually be applicable, because the evidence could be authenticated in a simpler manner. He noted that the telephone rule itself was not detailed — it did not lay out all the factors that could ever be relevant to the authenticity question.

Another Committee member noted that listing authenticity factors in a rule might lose sight of the point that the factors must be weighed in each individual case, and that some factors might weigh more in some cases than others. That weighing process cannot be encapsulated easily in a rule. Other Committee members noted that the deliberate nature of the rulemaking process raises the danger that specifically stated grounds of authenticity for electronic evidence will be outmoded before they are even enacted. Such rules would probably have to be constantly amended to keep up with technology — which does not appear to be a problem with the flexible and broadly stated standards in the existing rules.

Another Committee member observed that none of the other Evidence Rules provide a list of factors that are relevant in determining whether an admissibility requirement is met — much less text that would provide the court guidance on how to weigh those factors. And while such guidance might once have been provided in a Committee Note — such as the Committee Note to the 2000 amendment to Rule 702 — the Standing Committee has recently discouraged the use of Committee Notes to provide significant detail that is not covered by the text.

In the end, the Committee determined that it would not proceed at this time with a rule amendment that would provide guidance on how to establish the authenticity of electronic evidence. But Committee members unanimously determined that the Committee could provide significant assistance to courts and litigants in negotiating the difficulties of authenticating electronic evidence, by preparing and publishing a best practices manual —along the lines of the work done by Greg Joseph in footnoting the support for his draft amendments. A best practices manual could be amended as necessary, avoiding the problem of having to amend rules to keep up with technological changes. It could include copious citations, which a rule could not. And it could be set forth in any number of formats, such as draft rules with comments, or all text with no rule.

The Committee directed the Reporter to prepare a memorandum on how a best practices manual on authentication of electronic evidence might be developed and prepared. The Reporter will provide a sample format on one or more types of electronic evidence. Once the best practices manual is prepared and approved, the Committee will determine (after consultation with the Standing

Committee) on the best way to have it published, whether under the auspices of the Committee or with some other designation.

Finally, the Committee considered, and rejected, a possible amendment to Rule 901 that would provide that production of an item in an action would constitute authentication of that item. The Reporter noted that the courts were divided on whether production equals authentication, and that it could be argued that the act of production of an item in discovery is tantamount to saying that the item is what the producer says it is. But several members of the Committee argued that a party to a litigation might produce a document knowing that it is inauthentic, e.g., a forged check. Thus it would be overbroad to conclude that all production concedes authenticity.

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

At the Electronic Evidence Symposium in April, John Haried made a proposal for two additions to Rule 902, the provision on self-authentication. The first would allow self-authentication of machine-generated information, upon a submission of a certificate prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of an electronic device, media or file by its "hash value" or other indication of reliability. These proposals are analogous to Rule 902(11) of the Federal Rules of Evidence, which permits a foundation witness to establish the authenticity and admissibility of business records by way of certification.

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

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

The Committee engaged in discussion on the certification proposals. Members uniformly agreed that it would be useful to promote rules that would make the process of proving authenticity for electronic evidence simpler, cheaper, and more efficient. Many Committee members remarked on the unnecessary expense, in the current practice, of having to call a witness to authenticate a web

page or other machine-produced evidence, when it ordinarily ends up that the witness is not cross-examined or that authenticity is stipulated at the last minute.

Discussion indicated three concerns about the proposal. First, in a criminal case, would admission of the certificates under the proposed rules violate the defendant's right to confrontation? As to this question, the Reporter commented that the Supreme Court has stated in *Melendez-Diaz v. Massachusetts* that admitting a certificate prepared for litigation does not violate the right to confrontation if the certificate does nothing more than authenticate another document or item of evidence. The Reporter also stated that the lower courts had uniformly held that certificates prepared under Rule 902(11) do not violate the right to confrontation, relying on the Supreme Court's statement in *Melendez-Diaz.* The problem with the affidavit found testimonial in *Melendez-Diaz* was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation. The certificates that would be prepared under proposed Rules 902(13) and (14) would not be certifying the accuracy of any contents or any factual assertions. They would only be certifying that the evidence to be introduced was generated by the machine (Rule 902(13)) or is a copy of the original (Rule 902(14)).

One Committee member observed that any constitutional concern about the certification provisions would be satisfied by including a notice-and-demand provision in each of the proposed rules. Under a notice-and-demand provision, the government would provide pretrial notice of the intent to use the certification process, and authentication could then be proved by certificate unless the defendant timely demanded production of the foundation witness. But after consideration, the Committee unanimously determined that a notice-and-demand provision was unnecessary. Such provisions cure confrontation concerns because they are a means of obtaining a waiver of the defendant's confrontation rights — a means approved by the Supreme Court in *Melendez-Diaz.* But because the certification process itself does not appear to raise confrontation concerns (as all that is being done is certifying authenticity) there is no reason to provide for the notice-and-demand procedure. Moreover, adding a notice-and-demand procedure to proposed Rules 902(13) and (14) would raise a question about why similar provisions are not added to the rules permitting certification of business records in criminal cases: Rule 902(11) for domestic records and 18 U.S.C. § 3505 for foreign records.

The second expressed concern about the proposed certification provisions was related to the first: any proposed Rule would have to clarify that all that the certification is doing is establishing that the proffered evidence is authentic. That is, there can be no certification about the accuracy of the underlying information in the proffered item. Thus, when Rule 902(13) provides for certification of authenticity for records generated "by a process or system that produces an accurate result" the certification would not mean that the specific results were indisputably reliable, only that the system described in the certificate produced the item that is authenticated. Similarly, a certificate offered as proof of authenticity of a web page does not dispose of a hearsay exception with respect to the content of the webpage. And a certification that the proffered item is a copy of the hard drive from the defendant's computer does not alleviate the government from having to prove that the defendant is the one who downloaded the information onto the original harddrive. Committee members

resolved that the necessary clarification about the limits of the certification proposals should be set forth in the Committee Notes to the proposed rules.

The final expressed concern was about proposed Rule 902(14) specifically. That proposal would permit authentication of a copy of an electronic device or storage medium by way of certification where the copy is shown to be authentic by its "hash value or a similar process of digital identification." Committee members concluded that the use of the term "hash value" was problematic because that term would be unknown to many people, and more importantly it could become outmoded by technological advances. The Committee unanimously agreed that the proposal should be changed to allow certification of authenticity of a copy that is found to be authentic by a "process of digital identification."

The Committee unanimously determined to proceed with drafting a formal amendment and Committee Note for proposed Rules 902(13) and (14), for consideration at the Spring 2015 meeting. The Reporter was directed to prepare language to the Committee Note that would specifically address any concern that certification of a copy of on electronic device or storage medium might be misused as certification of content, or as proof of any underlying connection between the defendant and the item in a criminal case.

VI. *Crawford* Developments

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

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

VI. Next Meeting

The Spring 2015 meeting of the Committee is scheduled for Friday, April 17 at Fordham Law School.

Respectfully submitted,

Daniel J. Capra

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Meeting of January 8–9, 2015
Phoenix, Arizona

Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on January 8 and 9, 2015. The following members were present:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esquire
Associate Justice Brent E. Dickson
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Susan P. Graber
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Judge Richard C. Wesley
Judge Jack Zouhary

Elizabeth J. Shapiro, Esq., represented the Department of Justice in place of Deputy Attorney General James M. Cole. Larry D. Thompson, Esq., was unable to attend.

Also present were Professor Geoffrey C. Hazard, Jr., consultant to the committee; Professor R. Joseph Kimble, the committee's style consultant; and Judge Jeremy D. Fogel, director of the Federal Judicial Center. Judge Anthony J. Scirica, Judge Sidney A. Fitzwater, and Judge Eugene R. Wedoff participated in a panel discussion chaired by Judge Sutton. Associate Justice Sandra Day O'Connor attended as an observer.

The advisory committees were represented by:

Advisory Committee on Appellate Rules —
Judge Steven M. Colloton, Chair
Professor Catherine T. Struve, Reporter (tel)
Advisory Committee on Bankruptcy Rules —
Judge Sandra Segal Ikuta, 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 Appellate Rules —
Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter (tel)
Advisory Committee on Evidence Rules —
Judge William K. Sessions III, Chair
Professor Daniel J. Capra, Reporter (tel)
Subcommittee on CM/ECF
Judge Michael A. Chagares, Chair

The committee's support staff consisted of:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Jonathan C. Rose	Secretary, Standing Committee; Rules Committee Officer
Julie Wilson	Attorney, Rules Committee Support Staff (tel)
Scott Myers	Attorney, Rules Committee Support Staff (tel)
Bridget M. Healy	Attorney, Rules Committee Support Staff (tel)
Andrea L. Kuperman	Chief Counsel to the Rules Committee
Frances F. Skillman	Rules Office Paralegal Specialist
Toni Loftin	Rules Office Administrative Specialist
Michael Shih	Law Clerk to Judge Jeffrey S. Sutton

INTRODUCTORY REMARKS

Judge Sutton called the meeting to order by thanking the Rules Office staff and the marshals for their service. He introduced one new member of the Committee, Associate Justice Brent E. Dickson of the Indiana Supreme Court. He also introduced Judge Sandra Segal Ikuta of the Ninth Circuit, the new chair of the Bankruptcy Committee, and Judge William K. Sessions III of the District of Vermont, the new chair of the Evidence Committee. Finally, he introduced Judge Anthony Scirica of the Third Circuit, who helped coordinate the afternoon's panel discussion on pilot projects.

He then summarized the results of the September 2014 Judicial Conference, which unanimously approved both the Bankruptcy Committee's one proposal and the entire Duke Package. The proposed amendments are now before the Supreme Court of the United States.

Finally, Judge Sutton announced that, on December 1, 2014, many other proposals took effect, including Criminal Rule 12 and a multitude of changes to the Bankruptcy Rules and Forms. He thanked Judge Raggi and Judge Wedoff for their efforts in making those proposals law.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The Committee, by voice vote and without objection, approved the minutes of its previous meeting, held on May 29–30, 2014, as well as a set of technical amendments to those minutes proposed by Professor Cooper.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton presented the advisory committee's report, set out in his memorandum and attachments of December 15, 2014 (Agenda Item 3). He reported that the committee has published a package of rules changes for public comment. It plans to consider those comments after the February deadline expires, and to give a complete report at the upcoming spring meeting. He then highlighted three items currently on the committee's agenda.

Informational Items

FED. R. APP. P. 41

The advisory committee is considering how to relieve the tension between two provisions of Appellate Rule 41. Rule 41(d)(2) requires a court of appeals to issue its mandate immediately after the Supreme Court denies a petition for certiorari. However, Rule 41(b) allows courts of appeals to "extend the time" for issuing mandates under certain circumstances. These provisions present two questions. May a court of appeals stay its mandate after certiorari is denied? If so, must it do so in an order, or does mere inaction suffice?

The Supreme Court has twice considered these questions. As to the first issue, it has assumed without deciding that a court of appeals has authority to delay issuing a mandate, but

only if "extraordinary circumstances" exist. As to the second, it has concluded that Rule 41(b) does not clearly foreclose delay through inaction.

Judge Colloton reported that the committee is inclined to insert the words "by order" into Rule 41(b) to clarify that a court of appeals may not delay a mandate by letting the matter lie fallow. (Those words had actually been removed from a previous version of the Rule, most likely to reduce redundancy). However, it is still working through the more fundamental question of whether such authority exists. It has considered reaffirming what Rule 41(d)(2) already appears to say: A mandate must issue immediately after certiorari is denied. But if appellate courts retain authority to recall an already-issued mandate under extraordinary circumstances, any change to Rule 41(d)(2) would serve little purpose. It thus might make more sense to codify the "extraordinary circumstances" rule. In either case, the committee will make a formal proposal to the Standing Committee, perhaps as early as the spring meeting.

DISCLOSURE RULES

The advisory committee has been considering what disclosures parties must make in briefs for a long time. Its review revealed a bevy of local disclosure requirements that augment the Appellate Rules to different degrees. Concerned that the Rules are insufficiently thorough, the committee is considering expanding their scope: for example, by extending them to intervenors, partnerships, victims in criminal cases, and amici curiae. It is also consulting the Committee on Codes of Conduct for additional guidance. Judge Colloton reported that, because the project remains ongoing, the committee may or may not be able to present a concrete proposal at the spring meeting.

One member proposed that, instead of taking the lead, the Appellate Committee should coordinate with judges at all levels of the federal judiciary. Another suggested that the Appellate Committee coordinate with its sister advisory committees, all of which have an interest in the outcome. In response, Judge Colloton noted that the project was still in a nascent stage and expressed willingness to solicit input from other committees once it had crystallized its thinking.

CM/ECF PROPOSALS

The advisory committee has been working with Judge Chagares and the CM/ECF subcommittee to resolve issues related to electronic filing. Judge Colloton deferred consideration of those issues to Judge Chagares's presentation.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta presented the advisory committee's report, set out in her memorandum and attachments of December 11, 2014 (Agenda Item 4).

Amendment for Final Approval

FED. R. BANKR. P. 1001

On behalf of the advisory committee, Judge Ikuta sought approval to amend Bankruptcy Rule 1001, the bankruptcy counterpart to Civil Rule 1. Rather than incorporate the Civil Rule by reference, the Bankruptcy Rule echoes its language. However, Rule 1001 does not reflect recent amendments—approved and pending—to Rule 1. The proposal brings Rule 1001 in line with those changes, stating that "These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding."

The committee, without objection and by voice vote, approved the proposed amendment to Rule 1001 for publication.

Informational Items

PROPOSED CHAPTER 13 NATIONAL PLAN FORM

The advisory committee has been working on a national chapter 13 plan form since 2011. Currently, more than a hundred chapter 13 forms exist. Led by Judge Wedoff, the committee distilled those forms into one. It also developed amendments to the Bankruptcy Rules to bring them in line with that form. After publishing the first version of the form and amendments in 2013, the committee received many critical comments. So it went back to the drawing board and published a revised proposal in 2014. The comment period has not yet expired, but the reaction to the revisions has been mixed.

Judge Ikuta reported that, in her view, the committee can fix specific concerns about the form. The real question is whether the need for national uniformity should override local preferences. She recommends implementing the national form incrementally—for instance, by making the form optional and asking various bankruptcy districts to opt into the form.

A professor wondered whether it was possible to make the national form an alternative to local ones. Judge Ikuta confirmed that his question tracked the committee's proposed incremental approach. By making the national form optional and soliciting compliance from individual districts, the committee hoped to build support for it over time.

An appellate judge asked why a national form was necessary. Professor McKenzie gave four reasons. First, the existing forms have generated a tremendous amount of confusion. Second, bankruptcy judges have an independent duty to scrutinize proposed plans, and a national form would reduce uncertainty about where such information may be found. Third, a national form could generate data more effectively. Finally, a national form would let entrepreneurs develop cheaper software for debtors' use.

Judge Wedoff explained why the committee decided to devise a national form in the first place. One bankruptcy judge said that, in the form's absence, bankruptcy courts could not easily

discharge their duty to independently scrutinize chapter 13 plans. And a bankruptcy lawyers' association said that its members had trouble processing chapter 13 forms from different jurisdictions—and lacked the resources to obtain local counsel. Professor McKenzie added that the committee surveyed the chief judge of every bankruptcy court in the country before getting the project started. The response was overwhelmingly positive.

A district judge asked about the reaction from bankruptcy practitioners. Their comments, Professor McKenzie said, were mixed. Some lawyers liked the idea so long as this word or that word could be changed. Others opposed it. A few lawyers candidly explained that they feared the competition an easily accessible national form would create.

FORMS MODERNIZATION PROJECT

The advisory committee's forms modernization project is almost complete. Unfortunately, the Administrative Office is having trouble integrating the new forms into its new CM/ECF system and may miss its December 2015 deadline—when the forms are scheduled to take effect. The question is whether to delay rolling out the forms until all technological kinks have been ironed out.

Judge Ikuta reported that the committee will discuss the issue at its April meeting, but she recommends releasing the forms on schedule. Doing so, she said, would not disrupt operations in the vast majority of courts. True, three bankruptcy districts give pro se debtors access to forms software on court-run computer terminals. But not enough debtors use that service to justify delaying the forms' national release.

A district judge said that the AO had told her that forms integration was mutually exclusive with the CM upgrade project. As it turns out, Judge Ikuta received that same answer too, but the AO changed its mind once it realized what the forms integration project entailed.

CM/ECF PROPOSALS

The advisory committee considered three of the CM/ECF subcommittee's proposals at its fall meeting. It will defer decision on two of them until the Civil Rules Committee acts. It is independently considering whether to redefine the word "information" to include electronic documents and the word "action" to include electronic action.

REPORT OF THE INTER-COMMITTEE CM/ECF SUBCOMMITTEE

Judge Chagares presented the subcommittee's report, set out in his memorandum and attachments of November 30, 2014 (Agenda Item 8). He announced that the subcommittee had successfully completed its work.

Informational Items

ABROGATION OF THE THREE-DAY RULE AS APPLIED TO ELECTRONIC SERVICE

The subcommittee previously proposed that parties should not receive three extra days to take action after electronic service. It worked with the relevant advisory committees to draft amendments to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45. These amendments, Judge Chagares reported, thus far have been well received.

ELECTRONIC SIGNATURES

The subcommittee previously proposed that Bankruptcy Rule 5005 be changed to provide for more flexible electronic signatures, but the Bankruptcy Committee withdrew that proposed amendment after public comment. After that withdrawal, the subcommittee asked the Administrative Office to figure out how local rules treated electronic signatures. Judge Chagares thanked the AO for its diligence and hard work.

The AO's exhaustive survey revealed that nearly every local rule treats filing users' login and password as an electronic signature. The various districts are not nearly so uniform when it comes to nonfilers, but the most prevalent rule requires the user to obtain and retain the signatory's ink signature. In light of these findings, Judge Chagares concluded, the Bankruptcy Committee's decision was probably correct. The local rules appeared sufficient to meet present needs, and any formal rulemaking risked being overtaken by rapid technological developments.

CIVIL AND CRIMINAL RULES REQUIRING ELECTRONIC FILING

The subcommittee previously recommended that Civil Rule 5(d)(3) and Criminal Rule 49(e) be amended to mandate electronic filing as opposed to merely permitting it. Judge Chagares reported that the advisory committees are still considering those proposals.

UNIFORM AMENDMENTS TO ACCOMMODATE ELECTRONIC FILING AND INFORMATION

The current rules do not appear to accommodate electronic filing and information. Thus, the subcommittee proposed defining "information" to include electronic documents and "action" to include electronic action. The advisory committees considered these proposals but reached different conclusions. For example, the Appellate and Civil Rules Committees have decided not to adopt them, while the Bankruptcy and Criminal Rules Committees have submitted them to subcommittees for further study. Judge Chagares reported that the proposal to redefine "information" appears to be the more viable of the two.

Dissolution of the Subcommittee

Judge Sutton thanked Judge Chagares, Professor Capra, Julie Wilson, and Bridget Healy for their hard work, and praised the subcommittee for fulfilling its mandate quickly and efficiently. Professor Capra reiterated Judge Sutton's comments and thanked his fellow reporters.

Judge Sutton and Judge Chagares have agreed that, now that the subcommittee has run its course, there is no need to keep it in place.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rose presented the Administrative Office's report (Agenda Item 10).

Informational Items

The Administrative Office is preparing an updated version of its 2010 *Strategic Plan for the Federal Judiciary*. Because the Long-Range Planning Committee will be meeting in March, Mr. Rose noted, the time for input is now.

Mr. Rose asked anybody corresponding with the Office to copy both the head of the Rules Office and Frances Skillman. That, he said, is the best way to ensure the message gets where it needs to go. He also summarized recent personnel arrivals and departures at the AO.

Finally, Mr. Rose announced that this meeting would be his last as head of the Rules Office. He thanked the committee for the opportunity to work with and learn from such talented people. Judge Sutton thanked Mr. Rose for his leadership and lauded his commitment to public service over a long and distinguished career. He also introduced Rebecca Womeldorf, Mr. Rose's successor, and described her impressive background.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi presented the advisory committee's report, set out in her memorandum and attachments of December 11, 2014 (Agenda Item 6). She announced that the amendments to Criminal Rule 12 have now taken effect.

Informational Items

FED. R. CRIM. P. 4

The Standing Committee previously approved for comment a proposed amendment to Rule 4 that would govern service of process abroad. Judge Raggi reported that the advisory committee has received no critical feedback on that proposal.

FED. R. CRIM. P. 41

The Standing Committee previously approved for comment a proposed amendment to Rule 41 to govern venue for searches of electronic devices whose location is unknown. The advisory committee held a lengthy hearing and reviewed extensive public comments. Judge Raggi reported that the critical response has largely focused not on the amendment itself but on concerns about electronic searches more generally.

These thought-provoking comments led the committee to request a response from the U.S. Department of Justice. The Department endorsed the proposal and suggested ways for the government to satisfy the particularity requirement if the amendment takes effect. Judge Raggi noted that the Federal Judicial Center might consider educating judges about how to analyze such warrant applications down the road. But that, she concluded, is a question for later. For now, the committee is debating whether the amendment needs to be changed. Judge Raggi expects the committee to propose something at the spring meeting, although the current proposal may be tweaked.

SUGGESTED AMENDMENT TO RULE 52

A Second Circuit judge asked the advisory committee to consider amending Rule 52 to provide fresh review—as opposed to plain-error review—for defaulted sentencing errors. He reasoned that, unlike a new trial, a resentencing proceeding imposes an incidental burden on the judiciary. And it is unfortunate when a prisoner is forced to remain in jail longer than he deserves.

Judge Raggi reported that the committee decided not to proceed with this request. Professor Nancy King, the committee's associate reporter, surveyed cases in this area and discovered that the number of defaulted sentencing errors is not high—and were typically corrected on plain-error review. The committee was also concerned that the proposal would generate extensive frivolous litigation. Finally, drawing on its experience with the 2014 Rule 12 amendments, it expressed doubts that the Supreme Court would be willing to create an exception to the general rule that defaulted claims are reviewed for plain error.

One appellate judge proposed an alternative. He suggested that the rules might be amended to reflect what many circuits have already held: that a clear guidelines-calculation error presumptively satisfies the last two elements of plain-error review. The judge acknowledged, however, that his suggestion came close to the edge of the committee's rulemaking authority. Another appellate judge wondered whether a different approach might solve the problem. In his circuit, a defendant can never forfeit a substantive reasonableness challenge, so arguments that a sentence is unjustly long are always reviewed afresh. Judge Raggi responded that, in her view, no judge should ever rely on the guidelines unless that sentence also satisfies the § 3553 factors. Plain-error review is enough to fix the vast majority of problems, and loosening Rule 52's standards would open the floodgates to a host of defaulted sentencing claims. She suggested instead that circuits interested in these alternative proposals adopt them as a local rule or as circuit-specific precedent.

FED. R. CRIM. P. 11

The judges of the Northern District of California asked the advisory committee to let judges refer criminal cases to their colleagues to explore the possibility of a plea bargain. Judges in that district had routinely used this procedure until the Supreme Court held that the Criminal Rules barred it.

Judge Raggi reported that the committee decided not to proceed with this request either. 95% of criminal cases are already resolved by plea bargains nationally, and the Northern District is no exception to that norm. More, implementing this change would create a host of practical problems—and might raise separation-of-powers concerns to boot.

Judge Raggi also reported that, at around the same time, a judge from the Southern District of New York published an article advocating judicial involvement in plea bargaining to reduce the risk that someone would plead guilty to a crime he didn't commit. The committee was not persuaded by this argument either. If a district judge is not convinced that a defendant is guilty of the crime to which he pleaded guilty, the judge should reject that plea under Criminal Rule 11.

HABEAS RULE 5

A judge from the Eastern District of Pennsylvania asked the advisory committee to amend Habeas Rule 5. Currently, that Rule requires a State to give a habeas petitioner copies of all exhibits attached to its response. The judge proposed relieving the State of that obligation in the absence of a judicial order to the contrary.

Judge Raggi reported that the advisory committee unanimously rejected this proposal. Every court expects these documents to be provided, and the States themselves have not complained about the problem.

FED. R. CRIM. P. 35

The New York Council of Defense Attorneys asked the committee to grant judges authority to reduce a sentence if (1) the defendant can identify new evidence casting doubt on his conviction, (2) the defendant can show he has been fully rehabilitated, or (3) the defendant can point to medical problems justifying his release.

Judge Raggi reported that a subcommittee is still examining this proposal, but she thinks it will not ultimately succeed. Proposal 1 effectively repeals AEDPA's statutory time limits on presenting such evidence in a habeas petition. Proposal 2 would subject the courts to a flood of rehabilitation claims. And Proposal 3 is redundant, since prisoners can already be released on humanitarian grounds when appropriate.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell presented the advisory committee's report, set out in his memorandum and attachments of December 2, 2014 (Agenda Item 5).

Informational Items

CM/ECF PROPOSALS

Judge Campbell reported that the advisory committee has finished considering the CM/ECF Subcommittee's proposals. It recommended that the Civil Rules mandate electronic filing and service with appropriate exceptions for good cause. It recommended against changing the Rules' approach to electronic signatures, having observed the Bankruptcy Rules Committee's experience. It also recommended against defining "information" or "action" to include "electrons" (e.g., electronic filing), although it remains open to making that change if the existing regime becomes unworkable.

FED. R. CIV. P. 68

The advisory committee considered several proposals to amend Civil Rule 68, which governs offers of judgment. The committee has studied the Rule twice in the last two decades, and it provoked a storm of controversy both times. Nevertheless, Judge Campbell reported that the committee is once again looking at the question—this time by surveying how the States implement their own offer-of-judgment procedures. The committee will consider next steps at its April meeting.

FED. R. CIV. P. 26

The advisory committee considered a proposal to add the presence of third-party litigation financing to the list of Civil Rule 26(a) disclosures. The committee agreed that the issue is important but determined that rulemaking is not yet appropriate. Litigation finance is a relatively new field. Besides, judges already have tools to obtain this information when relevant. And the absence of a mandatory-disclosure rule does not appear to hinder the resolution of cases involving litigation financiers.

FED. R. CIV. P. 23 SUBCOMMITTEE ACTIVITY

The advisory committee appointed a subcommittee to consider issues related to Civil Rule 23. Currently, it is charged with gathering facts to identify questions worth further study. So far, Judge Campbell reported, the subcommittee has spotted six primary issues. It plans to present a set of conceptual proposals to the full committee at its April meeting that may generate more concrete proposals for the fall. It is also considering convening a mini-conference in 2016 to evaluate any suggestions that might emerge.

One member asked the subcommittee to examine the procedures governing multidistrict litigation. He said that mass-tort MDLs make up half the federal courts' civil docket, and the rules regulating them may be worth reexamining. He also observed that the MDL bar is a small and tightly knit group of lawyers with links to the MDL Panel. None of this is to say that MDLs are being mishandled. But because MDLs occupy such a large part of the civil system, the subcommittee ought to ensure that the process is working.

Two members responded that, judging from their past experience with the subject, they doubted whether Rule 23—and for that matter the Rule 23 subcommittee—was the best place to address any problems MDLs might pose. Two judges who have presided over MDL cases also expressed their doubts. One reported that, in his experience, the MDL process *was* working. The other reported hearing complaints about the system, but those focused more on the process of MDL certification and counsel selection than on the process of trying MDL cases once certified. Both questioned whether a one-size-fits-all approach was possible or desirable. Finally, a practitioner pointed out that a small bar is an efficient bar. MDL trial firms get along with MDL defense firms, so MDL cases tend to run smoothly. And from most firms' perspective, the cost of entering the MDL arena is prohibitively high, making MDL cases poor investments.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions presented the advisory committee's report, set out in his memorandum and attachments of November 15, 2014 (Agenda Item 7). The committee considered proposals developed from its April 2014 Symposium on the Challenges of Electronic Evidence. The *Fordham Law Review* has published the proceedings from that Symposium.

Informational Items

FED. R. EVID. 803(16)

Evidence Rule 803(16) provides a hearsay exception for authenticated documents over twenty years old. Judge Sessions reported that this Rule has almost never been used, but it may become more significant in an era of electronic evidence. The advisory committee thinks this Rule is inappropriate but is still deciding what to do about it. One option is to leave it be. Another is to abrogate it or narrow it to exclude electronically stored information. Still another is to amend it to require a showing of necessity or reliability.

RECENT PERCEPTIONS

The advisory committee considered whether to add a new hearsay exception for electronically reported recent perceptions to Evidence Rules 801(d)(1) and 804(b). This change would arguably prevent reliable statements made in texts, tweets, and Facebook posts from being excluded.

Judge Sessions reported that the committee is continuing to study whether these changes are necessary. With respect to Rule 801(d)(1), the committee has decided not to change that provision without first asking whether prior statements of testifying witnesses should even be defined as hearsay. It will begin that study at its next meeting. With respect to Rule 804(b), the committee is continuing to monitor the caselaw to see if courts have actually been excluding reliable evidence of this sort. A district judge asked the committee to study whether a witness's prior statement should be treated as hearsay when that witness is available to testify. Professor Capra responded that such a rule might open the door to all prior consistent statements.

STANDARDS FOR AUTHENTICATING ELECTRONIC EVIDENCE

The advisory committee considered whether to amend Evidence Rules 901 and 902 to provide specific grounds for authenticating electronic evidence. Judge Sessions reported that, in the committee's view, devising authentication standards against a rapidly changing technological backdrop would create more problems than they would solve. However, it unanimously decided to develop a best-practices manual to guide courts and litigants.

FED. R. EVID. 902

The advisory committee considered two proposals to make it easier for litigants to authenticate certain kinds of electronic evidence. They mirror the self-authentication procedure for business records in Evidence Rule 902(11) by shifting the burden for proving inadmissibility to the opposing party. Judge Sessions reported that the committee unanimously supports these proposals and will consider introducing them as formal amendments at its next meeting.

CONCLUDING REMARKS

Judge Sutton concluded this portion of the meeting by recognizing four departing individuals for their service: Jonathan Rose, Andrea Kuperman, Judge Sidney Fitzwater, and Judge Eugene Wedoff. He summarized their remarkable achievements and thanked them all for their tremendous work on the committee's behalf.

PROMOTING JUDICIAL EDUCATION THROUGH VIDEOS

The committee considered the Federal Judicial Center's proposal to produce videos that would educate judges and lawyers about changes to the Federal Rules. Judge Sutton explained how the proposal came to be. Education has always been a key component of the Duke Package, which was designed in part to change the culture of civil litigation. Judge Fogel came up with the idea of disseminating information through video presentations. Initially, the FJC planned to create test videos for all of the rules that took effect in December 2014. However, the committee expressed concern that such videos—if released to the public—would constitute a form of post-enactment legislative history. So it postponed a final decision on the FJC's proposal until it could review a sample video.

Judge Fogel showed a sample film featuring Judge Sessions and Professor Capra, who discussed recent amendments to Evidence Rules 801 and 803. He acknowledged concerns about post-enactment legislative history but argued that the video format was a much more dynamic way to communicate information. He also explained that the videos would reach a wide audience even if restricted to judges and judicial employees. For example, a thousand viewers watched a recent webinar on § 1983 litigation.

Many members supported the FJC proposal. The Duke Package depends on education for its success, and videos might help reach previously inaccessible constituencies. Several judges recommended presenting the videos to their law clerks and at judicial meetings both private and

public. As for the legislative-history concern, that issue can be solved with a disclaimer—or a rule that no such video could be used in court.

One appellate judge expressed reservations. He argued that the written word is superior to video in conveying this sort of information. In response, a member proposed releasing the transcript of the video with the video itself. Another member suggested that the videos might be more useful if they provided practice tips. This triggered concerns that expanding the videos beyond the text of the committee notes would stretch the bounds of proper rulemaking.

Judge Sutton recommended that the FJC proceed slowly. He asked it to work with any committee chairs and reporters willing to produce videos describing significant rule changes that took effect in December 2014. Those videos would be then placed on the private judicial intranet. The committee could then use that experience to determine whether to continue the program and whether to make the videos public. He thanked Judge Fogel, Judge Sessions, and Professor Capra for putting together the demonstration video.

PANEL DISCUSSION ON THE CREATION OF PILOT PROJECTS

Introduction

Judge Sutton presided over a panel discussion on the creation of pilot projects to facilitate civil discovery reform. When coupled with the Duke Package reforms, pilot projects offer a powerful way to change litigation norms for the better and to gather data for future reforms in the process. By convening the panel, he hoped to give the Civil Rules Committee some potential projects to consider. Judge Sutton introduced the panelists: Judge Eugene Wedoff of the Bankruptcy Court for the Northern District of Illinois, Judge Anthony Scirica of the Third Circuit, and Judge Sidney Fitzwater of the Northern District of Texas. Finally, he welcomed a special guest: Associate Justice Sandra Day O'Connor, who joined the Standing Committee for this panel discussion and for the dinner that followed.

Judge Wedoff: Improving the Speed of Case Administration

PRESENTATION

Judge Wedoff spoke about the impact of "rocket dockets" on case administration. The term was first applied to the Eastern District of Virginia, which implemented a series of procedural reforms in the 1970s. It has since been applied to several other jurisdictions that have adopted similar procedures, including the Western District of Wisconsin and the Eastern District of Texas. But their reputations sometimes do not match the data. The Eastern District of Virginia is truly one of the fastest courts in the country—but the Eastern District of Texas operates *above* the nation's median case disposition time, and the Western District of Wisconsin has fallen off substantially. Meanwhile the Southern District of Florida works with remarkable speed despite not being labeled a rocket-docket court.

Based on this study, Judge Wedoff concluded that judges affect case-disposition time more powerfully than rules. Judges who impose credible deadlines, for example, resolve cases

faster than judges who don't. At the same time, efficient districts have certain procedural rules in common. For example, the Eastern District of Virginia sets short deadlines for discovery and trial that cannot be altered without a substantial showing to the court. For its part, the Southern District of Florida places every case into one of three tranches: expedited, standard, and complex. None of these tranches allows discovery to exceed one year.

DISCUSSION

The first question is whether to encourage district courts to adopt rocket-docket procedures district-wide. Many members said yes. Competition for litigants among courts can help everyone, said one professor, pointing to the creation of an omnibus hearing as an example of a useful procedural innovation that arose from one bankruptcy district's attempt to entice debtors to file there. Other committee members observed that, even if rocket-docket procedures make things harder for lawyers and judges, such procedures are *always* good for clients. And pilot projects implementing them may well change attorneys' hearts and minds in the process.

Attendees made several suggestions about what such pilot projects might look like. One recommended setting hard and credible trial deadlines. Another recommended capping not only a party's total deposition hours but also the number of hours he has available to conduct each deposition. He also recommended creating a tranches system for document production. And everybody who spoke emphasized the importance of making the pilot project mandatory.

The committee then moved to the question of implementation. Certain rocket-docket procedures—like the Eastern District of Virginia's weekly argument day—might conflict with local rules mandating one judge per case. More fundamentally, creating a rocket docket from scratch would be much harder than studying the ones that already exist, since district courts are unlikely to change in the absence of a strong leader backing the project.

One member counseled against implementing pilot projects too quickly. He recommended letting the FJC study the existing projects first, and moving only when the committee was sure that the projects' contents would work. Judge Sutton responded that he saw no reason why pilot-project advocacy should stop—especially since such advocacy isn't designed to mandate effective procedures but to suggest potentially useful ones. Another member agreed, and pointed out that studies and pilot projects could always take place simultaneously.

Finally, members sounded a note of caution about research methodology. One stressed the importance of getting independent opinions from participants, recalling an instance where rocket-docket practitioners were asked about their views on the process in full view of rocket-docket judges. Two district judges reiterated that numbers do not tell the whole story. Sometimes a case gets delayed for wholly appropriate reasons. And sometimes statistics are skewed by background factors not immediately apparent.

Judge Scirica: Requiring Initial Disclosure of Unfavorable Material

PRESENTATION

Judge Scirica explored the feasibility of requiring parties to disclose material unfavorable to their side by rule. In the 1990s, he said, the committee tried to do just that, but the proposal triggered a firestorm. Opponents argued that most cases did not require adverse disclosures, and that aggressive discovery techniques would ferret out such information in the cases that did. They also invoked the adversarial nature of the American justice system, arguing that a "civil *Brady* regime" would disrupt the attorney-client relationship. Eventually, the committee settled on a compromise position—explored through pilot projects in the Central District of California and the Northern District of Alabama—that retained initial disclosures but eliminated the requirement to disclose unfavorable material.

Today, Judge Scirica continued, an expanded initial disclosure regime might find a warmer reception. To test the waters, he envisioned two separate types of pilot projects. One would apply a robust but general initial disclosure regime to all civil cases. Another would apply a tailored initial disclosure requirement to certain categories of cases—say, employment discrimination or civil rights. The former is best left to the Standing and Civil Rules Committee, he advised; the latter, to a committee of experienced lawyers from both sides of the podium.

DISCUSSION

Every member who spoke expressed support for an expanded initial disclosure regime. One provided an especially powerful example from Arizona. In 1991, the Arizona Supreme Court adopted a robust mandatory disclosure rule that covered favorable and unfavorable material. The same debate took place. Now, however, Arizona's local rules have overwhelming support. In fact, seventy percent of lawyers who practice in both federal and Arizona state court prefer the state disclosure system to the federal one.

Another speaker, who served on the committee during its first attempt to mandate adverse disclosures, argued that the committee should not be traumatized by that experience. The committee, he said, had been right all along. And this time, it knows what pitfalls to avoid. For example, it will not keep the bar in the dark until the very end of the process.

The committee also endorsed category-specific disclosures. Many district judges have already embraced the Federal Initial Discovery Protocols for Employment Cases. One member reported that, although the Protocols encountered initial resistance, the employment bar now loves them because they generate information that would otherwise require a six- to seven-month discovery battle to get. Another member explained that the Southern District of New York had successfully implemented similar protocols for § 1983 cases that helped clear out its cluttered docket. One district judge advised the committee to make sure it doesn't define categories too narrowly. She has used the Employment Protocols for two years, in which time only three cases have qualified under its definition of "employment." Finally, one member reiterated his belief that the committee should not endorse new pilot projects without studying the existing ones more thoroughly.

Judge Sutton concluded that the committee appears to support studying an expanded initial disclosure system. This, he said, might be the time to try again.

Judge Fitzwater: Streamlined Procedure

PRESENTATION

Judge Fitzwater surveyed the many existing pilot projects that offer litigants streamlined procedures. According to the Institute for the Advancement of the American Legal System (IAALS), successful projects have five key features:

- a short trial that limits time to present evidence,
- a credible trial date,
- an expedited and focused pretrial process,
- relaxed evidentiary standards that encourage parties to agree to admission, and
- voluntary participation.

Judge Fitzwater then summarized two examples of what such a pilot project might look like. He could not find data about how often summary procedures had been used, but the procedures themselves are well-known. He started with the short-trial regime established by the District of Nevada in 2013. Litigants who opt into that system lose their right to discovery. In return, they receive a trial within 150 days of initial assignment, with a 60-day continuance available in limited circumstances. Evidence may be admitted without authentication or foundation by a live witness, and parties are encouraged to submit expert testimony through reports and not live testimony. At the trial itself, each party receives 9 hours to allocate among all trial phases as it chooses. The litigants present their arguments before a condensed jury—and once the trial is over, their ability to file post-trial motions is limited.

He then contrasted Nevada's system with the short-trial process in the Western District of Pennsylvania. That district does not eliminate a party's right to discovery but instead puts numerical limits upon it. Each party only has three hours to present evidence to the jury, with additional time for jury selection allocated at the judge's discretion. Finally, and most critically, the system bars parties from filing motions for summary judgment or motions in limine. Other pretrial motions may be filed only with leave of court.

Judge Fitzwater placed particular emphasis on this last provision. In the mine-run civil case, dispositive motions—not discovery disputes—were the main source of delay. Ironically, the Criminal Justice Reform Act's reporting procedures reinforce the incentive to work on motions, not cases: Judges must report a motion as pending after six months, but need not report a case as pending until three years elapse.

DISCUSSION

Many committee members expressed skepticism that a voluntary program would succeed. One pointed out that the Northern District of California abandoned a similar short-trial

procedure after litigants declined to use it. Several district judges on the committee who have given litigants an expedited-trial option encountered the same problem. In light of that experience, they recommended that any pilot project in this area be mandatory, not voluntary.

Judge Sutton asked Professor Cooper why his proposal in the 1990s to apply simplified procedural rules to small-stakes cases failed to gain traction. Professor Cooper explained that the proposal failed after a district judge pronounced it "elegant on paper but of no practical use." He also pointed out two potential implementation issues: First, different lawyers define a "small-stakes case" differently; and second, how should a simplified system treat a small-stakes case with a demand for injunctive relief?

One appellate judge recommended against defining "small stakes" using a dollar amount. She cited her experience with the Class Action Fairness Act, which contains a similar dollar-amount requirement, and collateral litigation over manipulation of that requirement. Another appellate judge warned that mandating streamlined procedures for certain categories of cases, but not others, will be tricky.

* * *

Judge Sutton summed up the conversation. At a minimum, he said, everybody agrees that the committee should study the many pilot projects in existence. And nobody thinks the committee should refrain from considering the possibility of civil litigation reform; the only worry is that specific reforms might be more complicated than anticipated. As such, he asked the Civil Rules Committee to study this topic and give its thoughts at the upcoming May meeting. He also advised it to consult Judge Fogel to see what FJC resources are available, and to coordinate with IAALS and the legal academy as well.

NEXT COMMITTEE MEETING

Judge Sutton concluded the meeting by announcing that the committee will next convene on May 28–29, 2015, in Washington, D.C.

Respectfully submitted,

Judge Jeffrey S. Sutton
Chair

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FORDHAM

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Hearsay Exception for Ancient Documents and its Applicability to ESI
Date: March 15, 2015

At its last meeting, the Evidence Rules Committee unanimously determined that Rule 803(16), the ancient documents exception to the hearsay rule was problematic, but there did not reach agreement on whether or how to solve the problem.

Rule 803(16) currently provides that if a document is authentic and over 20 years old, then all statements within the document fall within an exception to the hearsay rule. The reason for proposing a change to the rule is a concern about the widespread use of electronically stored information (ESI), with large amounts of ESI nearing the 20-year mark. The potential problem, as applied to ESI, is that ESI might be stored without much trouble for 20 years, and the sheer volume of it could end up creating an exception to the hearsay rule that would be much broader probably was intended — in fact broad enough to swallow up all the other exceptions for ESI more than 20 years old.

While the Committee unanimously voted to propose a change to the Rule, there was no consensus on which change should be proposed, or on whether a change should be proposed at this time. The minutes to the Fall, 2014 meeting describe it this way:

> At the Fall meeting, Committee members unanimously agreed that Rule 803(16) was problematic, as it was based on the false premise that authenticity of a document means that the assertions in the document are reliable — this is patently not the case. The Committee also unanimously agreed that an amendment would be necessary to prevent the ancient documents exception from providing a loophole to admit large amounts of old, unreliable ESI. But the Committee was divided on two matters: 1) whether an amendment was necessary at this point, given the fact that no reported cases have been

found in which old ESI has been admitted under the ancient documents exception; and 2) which alternative for amendment should be chosen.

On the first question of whether an amendment is necessary at this point: Some members argued that the obscurity of the ancient documents exception will not last now that ESI either has reached or is reaching the 20-year-old point. They noted that litigation incentives will be bound to lead to proffers of old, unreliable ESI that could not be admitted under any other exception. As one member stated, "this is a time bomb." But others, including the DOJ representative (after speaking with others at the Department) thought it appropriate to wait and monitor developments; the worst that could happen is that there would be a period of time in which old ESI would be admitted before an amendment would take effect. Another member observed that the time period required for admissibility provided at least some protection against widespread abuse, as it is unusual that a document more than 20 years old will be useful in a litigation; thus the risks involved in waiting were not overwhelming. But another member noted that especially in criminal cases, where statutes of limitation have been lengthened as to many crimes, the risk of admitting old and unreliable ESI was quite real — especially user-sourced information such as texts, tweets and social media postings. Another member stated that if the rule is wrong, something should be done about it — there is no reason to wait and have a rule that is wrong on the merits remain on the books.

On the second question of which alternative to adopt: A number of Committee members felt that the rule should just be abrogated, as it is based on a fundamentally flawed premise that authenticity of a document means that its contents are reliable. One member argued that the exception was especially pernicious because if unreliable hearsay is admitted, it will be especially hard to rebut after the passage of so much time. Another member stated that if the Committee were drafting the rules from scratch, it should not propose an ancient documents exception, but that abrogating an exception was a somewhat radical step.

One member preferred the proposal that would distinguish between paper documents and ESI. That member worried about the growing volume of ESI that is in fixed form, and noted that people don't stockpile paper the way they stockpile ESI. But other members noted that there might be a problem in distinguishing between ESI and paper. For example, why is a printout of a newspaper article on a website any different from the hardcopy of the newspaper? What rule would apply to a scan of an old hardcopy document?

One member suggested that the necessity-based alternative was preferable because abrogation seems extreme and it is appropriate to leave the matter of admissibility to the judge, with the instruction that the judge should be more careful in admitting old and potentially unreliable information. The necessity-based model is just telling the judge to be more careful.

Another member suggested yet another alternative, in the nature of burden-shifting. Under this alternative, hearsay could be admitted under the ancient documents exception unless the opponent could show that it was untrustworthy. The Reporter noted that this alternative could be effectuated by importing the untrustworthiness clause of the business records exception (Rule 803(6)) into the ancient documents exception. Another member argued, however, that this alternative would not be sufficiently protective, because with ancient documents, the very problem is that they are so old that it will be difficult to prove their untrustworthiness.

The Committee ultimately determined to revisit the proposed amendment to Rule 803(16) at the next meeting. The Reporter was directed to work up a formal proposal for each of the alternatives discussed. If the Committee decides to propose any amendments to other rules at that time, then any proposed change to Rule 803(16) might be part of a package.

This memo provides formal proposals, as directed by the Committee at its last meeting. It also provides a bit of further analysis and information on the timing question. The memo is divided into three parts. Part One of the memo provides background on the problem of ESI and the ancient documents exception --- this part is essentially condensed from previous memos and is intended for orientation purposes. Part Two discusses the timing question further. Part Three sets forth the formal proposals and provides some analysis on the costs and benefits of each proposal.

I. Background — The Ancient Documents Rule

Rule 803(16) provides as follows:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
>
> * * *
>
> **(16)** ***Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established.

The ancient documents "rule" is actually comprised of two separate types of rules. One type is the rules on authenticity, which provide standards for qualifying an old document as

genuine. The other is a hearsay exception for all statements contained in an authentic ancient document. These rules are derived from the common law, though one difference from the common law is that the relevant time period for being "ancient" has been reduced from 30 years to 20 years.[1]

As to authenticity: Rule 901(b)(8) provides as an example of evidence satisfying the standards of authenticity a document or "data compilation" that:

> "(A) is in a condition that creates no suspicion about its authenticity;
> (B) was in a place where, if authentic, it would likely be; and
> (C) is at least 20 years old when offered."

As the Advisory Committee puts it, the rationale for Rule 901(b)(8) is "the unlikeliness of a still viable fraud after the lapse of time." The standard for establishing authenticity to the court is low --- enough for a reasonable person to believe that the document is what the proponent says it is. Rule 901(a). Under that low standard, if a document looks old and not suspicious and is found where it ought to be, it makes sense to leave the question of authenticity to the jury.

Rule 901(b)(8) is not, however, the only avenue for authenticating an ancient document and thus triggering the ancient documents exception to the hearsay rule. Rule 803(16) says that the statements in a document that is at least 20 years old and whose "authenticity is established" are admissible for their truth. "Authenticity is established" means established in any way. Thus, as will be discussed in the previous memo, the tried and true methods for authenticating ESI in general are fully applicable to authenticating 20 year-old ESI.

As to hearsay: If a document satisfies the authenticity requirements of Rule 901(b)(8) --- or any other ground of authentication provided in Rules 901 or 902 and is over 20 years old --- then *every statement in that document can be admitted for its truth.* That is so because Rule 803(16) simply equates authenticity of the document with admissibility of the hearsay statements in that document. While the Advisory Committee Note states that "age affords assurance that the writing antedates the present controversy" there is no requirement in the rule that in fact the statements must predate the controversy. As the court put it in *Threadgill v. Armstrong World Industries, Inc.*:"Once a document qualifies as an ancient document, it is automatically excepted from the hearsay rule under Fed.R.Evid. 803(16)"[2] --- consequently the *Threadgill* court reversed a trial court's quite sensible ruling that excluded an ancient document because the content was untrustworthy.

[1] See Advisory Committee Note to Rule 803(16) (citing common law basis for the hearsay exception that stems from the rule on authenticity); Advisory Committee Note to Rule 901(b)(8) (adopting the "familiar ancient document rule of the common law"). The Committee Note to Rule 901(b)(8) attempts to explain the shortening of the time period from 30 to 20 years as a "shift of emphasis from the probable unavailability of witnesses to the unlikeliness of a still viable fraud after the lapse of time" and concedes that any time period "is bound to be arbitrary."

[2] 928 F.2d 1366, 1375 (3rd Cir. 1991).

The most complete articulation of the rationale for the ancient documents hearsay exception is set forth by Professors Mueller and Kirkpatrick:[3]

> Need is the main justification. The lapse of 20 years since the acts, events or conditions described almost guarantees a shortage of evidence. Witnesses will have died or disappeared. Written statements that might fit other exceptions (business records, past recollection) are typically thrown out or lost or destroyed. [4] * * *
>
> Naturally statements in ancient documents are affected by risks of misperception, faulty memory, ambiguity, and lack of candor (they are not intrinsically more reliable than oral statements), and a written statement unreliable when made is unreliable forever. Ancient documents do, however, bring fewer risks of misreporting (because the document is in writing), and they bring at least some assurance against negative influences. When authenticated, the document leaves little doubt the statement was made; there is little risk of errors in transmission; because of its age, the document is not likely to have suffered from the forces generating the suit, so there is less reason to fear distortion or lack of candor.

Rule 803(16) is the only rule of evidence that equates authenticity with admissibility of hearsay. [5] It is a fallacy to assume that just because an old document is authentic, the statements in it are automatically reliable enough to escape the rule excluding hearsay. Despite the Advisory Committee Note's assertion that "danger of mistake is minimized by authentication requirements," the fact is that none of the guarantees for authenticity set forth in Rule 901(b)(8) or any other authenticity rule do anything to assure that the *statements* in the authentic document are reliable. As the Seventh Circuit aptly put it in *United States v. Kairys*, 782 F.2d 1374, 1379 (7th Cir. 1986), the authentication rule's requirement that a proffered document be genuine "goes not to the content of the document, but rather to whether the document is what it purports to be."

It should follow from the Advisory Committee Note's assertion that *any* authentic document should be admissible for the truth of its assertions; the Note gives no indication why the danger of unreliable assertions is minimized by authentication requirements for ancient documents but not for any other documents or statements. But equating authenticity requirements and hearsay requirements is obviously misguided. The policy of the hearsay rule is to exclude unreliable out-of-court assertions, and that policy is not sufficiently furthered --- indeed it is ignored --- if the only standard for admissibility is that the document itself is genuine.

[3] Christopher Mueller & Laird Kirkpatrick, 4 Federal Evidence Sec. 8:100 at 901 (4th ed. 2013).

[4] Query whether that assertion of Professors Mueller and Kirkpatrick is applicable when the old material is ESI.

[5] *See* Fagiola v. National Gypsum Co. AC & S., Inc., 906 F.2d 53, 58 (2nd Cir. 1990) ("Because of the hearsay rule, authentication as a genuine ERCO document would not generally suffice to admit the contents of that document for its truth. An exception is when documents are authenticated as ancient documents under Rule 901(b)(8), in which case they automatically fall within the ancient document exception to the hearsay rule, Rule 803(16).").

A further anomaly with the ancient documents hearsay exception is inherent in its bright-line nature. For example, a copy of the National Enquirer that is 19 years and 364 days old could be authenticated,[6] but the assertions in that Enquirer would not be automatically admissible for the truth of any assertion. The equation of authenticity and hearsay admissibility occurs, however, the second that the periodical becomes 20 years old. An arbitrary time period is an inexact surrogate for the policies that underlie the ancient document rules.

In the end, Rule 803(16) is, as the Committee has recognized, a problematic hearsay exception --- an error of the common law that was adopted, and exacerbated, by the original Advisory Committee's reduction of the time period necessary to trigger it. But up to now, the rule has created few practical problems for courts and litigants. A Westlaw search indicates that ancient documents have been admitted in fewer than 100 reported cases since the Federal Rules of Evidence were enacted. Of course it is not possible to determine how often the exception has been used in unreported cases, but it is fair to state that the rule is, comparatively, a little-invoked exception.

So if the goal is to propose amendments only when necessary to remedy a real problem in practice, it is understandable that there has been, up to now, no serious consideration of Rule 803(16). But now it is the case that that terabytes and zettabytes of information are reaching or have already reached a twentieth birthday; and the specter of all that information being admissible for its truth regardless of its reliability might well lead to a real problem worth fixing.

As the previous memo indicated, the explosion of ESI does in fact raise the specter that the ancient documents exception to the hearsay rule will be used as a means of admitting large amounts of unreliable old ESI. As stated above, the primary justification for the ancient documents exception is necessity, which comes down to the premise that, given the 20-year time period, it is likely that all the reliable evidence (such as business records) has been destroyed so we have to make do with more dubious evidence. This necessity assumption appears to have been substantially undermined by the development of ESI. Because ESI is prevalent and is arguably easily preservable, whatever reliable evidence existed at the time of a 20 year-old event probably *still exists* — because it is likely to be ESI. Business records from the time, emails from the time, texts, chats — the chances of most or all of that being preserved are certainly higher than the chances of hardcopy and eyewitnesses still being around. There is no reason to admit *unreliable* ESI on necessity grounds if it is quite likely that there will be *reliable* ESI that is admissible under other hearsay exceptions.[7] Thus the "necessity" of proving claims based on older information of whatever provenance can be answered by the existence of bytes upon bytes of *reliable* electronic information — information that was not or could not have been preserved back in the day.

[6] See, e.g., Fed.R.Evid. 902(6) (material purporting to be a newspaper or periodical is self-authenticating).

[7] *See, e.g.,* Paramount Pictures Corp. v. International Media Films Inc*.,* 2013 WL 3215189 (C.D. Cal.) (records regarding a film, more than 20 years old, were admissible as business records).

If the ancient documents exception remains as is, there will be a situation in which parties can freely admit unreliable ESI, just because it is old, and all this will be done in the face of prevalent, reliable alternative evidence. Establishing admissibility under 803(16) is likely to be easier than, for example, using the business records exception to the hearsay rule, Rule 803(6). Rule 803(6) requires foundation testimony or an affidavit from a knowledgeable witness, as well as a showing that the record is one of regularly conducted activity.[8] Other exceptions, such as for excited utterances and present sense impressions, contain their own detailed admissibility requirements.[9] In contrast, all that needs to be shown for an ancient document is that it is old and meets the low standards for authenticity (a requirement that must be met for any document, whether a business record or an unreliable diary).[10] For ESI, age will be a snap to show, because the information will be dated if not explicitly than in the metadata.[11] Indeed, the metadata attendant to a file will make it easier to show that it has not (or has) been suspiciously altered --- thus making the authentication question that is the basis for the hearsay exception easier to solve than with hardcopy. In sum, while we once might have been able to tolerate the ancient documents exception due to its frequent use, the incentives to use it for unreliable ESI at least arguably warrant consideration of some limitation on the exception.

Does the Ancient Documents Exception Even Apply to ESI?

ESI that is stored for 20 years is not like a magazine or property deed that has been sitting in the attic for 20 years. Electronic data is dynamic. It is changed, at least in some ways, by the action of accessing it, viewing it, or moving it. There would be no worry about the ancient documents hearsay exception if old ESI could not be authenticated due to its dynamic nature ---

[8] *See, e.g.,* United States v. Duron-Caldera, 737 F.3d 988 (5th Cir. 2013) (old record not admissible as a business record because not prepared in the regular course of business activity; but admissible under Rule 803(16)).

[9] See Fed.R.Evid. 803(1) (to be admissible as a present sense impression, the statement must have been made at the time of the event to be proved, or immediately thereafter, and must describe the event); Fed.R.Evid. 803(2) (to be admissible as an excited utterance, the statement must have been made by the declarant while under the influence of a startling event, and it must relate to that event).

[10] See, e.g., United States v. Kalymon, 541 F.3d 624, 633 (6th Cir.2008) (factual accuracy of the content is not pertinent when considering whether the ancient document exception applies: "Suspicion does not go to the content of the document, but instead, "to whether the document is what it purports to be."); United States v. Firishchak, 468 F.3d 1015 (7th Cir. 2006) (ancient document admissible even though it would not satisfy any reliability-based hearsay exception).

[11] Metadata is information about data that is not readily apparent on the screen view of the file. "Metadata includes information about the document or file that is recorded by the computer to assist in storing and retrieving the document or file. . . . [Metadata] includes file designation, create and edit dates, authorship, comments, and edit history." Scheindlin, Capra and the Sedona Conference, Electronic Discovery and Digital Evidence: Cases and Materials 380 (2d ed. 2012).

because, as stated above, authenticity is the requirement for satisfying the hearsay rule under Rule 803(16).

But in fact the dynamic nature of stored ESI is unlikely to raise a substantial bar to the use of the ancient documents hearsay exception. This is so for a number of reasons. First, Rule 901(b)(8) specifically contemplates that the age of an *electronic* document will provide a ground of authenticity for ESI. That rule covers a "data compilation" in any form. If the mere fact that an electronic document was changed in some immaterial respect simply because it was stored was enough to disqualify that document from being found authentic under Rule 901(b)(8), then the drafters would never have covered data compilations in that rule. Thus, the specific inclusion of data compilations in Rule 901(b)(8) is an indication that the dynamic nature of ESI storage does not per se disqualify it from authentication under Rule 901(b)(8) --- and therefore does not disqualify the contents from automatic admissibility under Rule 803(16).

Moreover, a fair reading of the text of Rule 901(b)(8) covers old ESI even if it has been accessed, viewed, etc. over a 20 year period --- so long as it has not been suspiciously altered, as would be a problem with any document. If ESI is found on a server, hard drive, in the cloud, etc., it really is in a "place" where it would "likely be." Nothing in Rule 901(b)(8) requires a document to have been placed in a hermetically sealed and immovable container for 20 years; nothing in the Rule prohibits authenticating a document that has been viewed, accessed, or moved repeatedly over 20 years, so long as it is eventually found in a place where it would likely be. So if a frequently read or moved magazine can be authenticated as an ancient document, there is every reason to give the same basic treatment to frequently accessed or moved ESI.

But even if Rule 901(b)(8) were found inapplicable to authenticate ESI that had been accessed, viewed, or moved, that would not significantly impede the admissibility of old ESI under the ancient documents exception to the hearsay rule. Remember that Rule 803(16) operates as an exception for a more-than-20-year-old document whenever that document is found authentic on *any* ground. It does not require a finding of authenticity under Rule 901(b)(8). Thus, just like new ESI, old ESI can be authenticated in any number of ways, as indicated by the scores of cases involving challenges to the authenticity of ESI. To take one example (and many more were provided in the previous memo) websites can be authenticated through the presentation of information from the "wayback machine." [12]

Consequently, the risk that the ancient documents exception to the hearsay rule --- simply equating authenticity with admissibility of hearsay --- will become an open door to admitting unreliable hearsay in vast amounts of old ESI appears to be real.

II. Should an Amendment Be Proposed At This Point?

[12] *See, e.g.*, Telewizja Polska USA, Inc. v. Echostar Satellite Corp., 2004 WL 2367740 (N.D. Ill. Oct. 15, 2004) (use of the "wayback machine" (www.archive.org) to authenticate websites as they appeared at various dates relevant to the litigation).

At the last meeting, as stated above, some members of the Committee were wary of proposing an amendment to Rule 803(16) at this time, because there have to date been no reported cases in which ESI has been admitted under the ancient documents exception. One piece of intervening information might be relevant to the Committee's consideration of the timing question. When the Committee's consideration of the ancient documents exception was raised at the January, 2015 meeting of the Standing Committee, several members of that Committee expressed an interest in proposing an amendment now rather than later.[13] These Standing Committee members bemoaned the fact that the rulemaking process is constantly lagging behind emerging problems of advances in technology --- the process is obviously on such a timeline that the Rules Committees are continually playing catch-up, and often find it difficult to anticipate what new technological problems lie on the horizon. But with respect to the ancient documents exception and ESI, we know what the problem is and we know that this is a problem waiting to happen. These Standing Committee members thus saw an opportunity for the Rules Committee to "get out in front" of an emerging problem of technology for once.

It should also be noted that "getting out in front" of a forthcoming technological issue might send a useful signal to the public, i.e., that the Rules Committee is attuned to and proactively dealing with issues of emerging technology --- as opposed to adjusting on the fly to technological issues by rulemaking that may never catch up with continuing advances.

[13] One Standing Committee member made a public statement at the meeting advocating consideration of an amendment to Rule 803(16) at the next Standing Committee meeting. Three other members agreed with this position in conversations with the Reporter.

III. Drafting Alternatives

This section provides drafting alternatives for the four methods of amending Rule 803(16) that were discussed at the last meeting.

A. Deletion

One alternative---certainly the easiest drafting alternative --- is to delete Rule 803(16). As stated above, the basic problem with the exception is that it confuses authenticity of a document with reliability of its contents. It simply does not follow that because a document is genuine, the statements in the document are reliable. Simply basing a rule on necessity is questionable, because necessity alone should not justify the use of unreliable evidence. Any hearsay statement that is old and that *should* be admissible (because it is reliable) can be offered under the residual exception to the hearsay rule, Rule 807 — you don't need an ancient documents exception to admit old but reliable evidence. Indeed the only case cited by the Advisory Committee in support of Rule 803(16) was one in which the court found an old document admissible not because it was an ancient document, but rather because it carried the circumstantial guarantees of trustworthiness that would support admission today under the residual exception.[14] So the very underpinnings of the Rule are questionable.

How would deletion be implemented? The rulemaking formula in such a situation is to delete the text, keep the rule number open (so as not to upset electronic searches relying on existing rule numbers), and provide a committee note explaining the motivation for the deletion.

Thus, the deletion would look something like this:

~~**(16) *Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established.~~ **[Abrogated].**

Committee Note

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

The ancient documents exception could once have been thought tolerable out of necessity (unavailability of other proof for old disputes) and by the fact that the exception

[14] See Advisory Committee Note to Rule 803(16) (citing Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961)).

has been so rarely invoked. But given the development and growth of electronically stored information, the exception has become even less justifiable and more subject to abuse. The need for an ancient document that does not qualify under any other hearsay exception has been diminished by the fact that reliable electronic information is likely to be available and can be used as proof under a number of hearsay exceptions. And abuse of the ancient document exception is possible because unreliable electronic information could be easily accessible, and would be admissible under the exception simply because it has been preserved electronically for 20 years.

Reporter's Comment on Abrogation Alternative

As discussed in the previous memo to the Committee, a possible concern about abrogation is that could be seen as a radical remedy in the context of the rulemaking process. But on the other hand, if a rule is wrong, it is wrong and something should be done about it. And while it could have been tolerated because so rarely used, the increased risk of use caused by ESI could be thought a sufficient reason to make a clean slate of it. This would especially be the case if none of the other alternatives provide a satisfactory resolution to the risk of abuse of the poorly-found ancient documents exception. That is a concern addressed in discussion of the other drafting alternatives, below. [15]

A final thought on the "radical" act of abrogation: it's not as if the Committee would be abrogating a major rule --- 403, the hearsay rule, 702, none of the big stuff is being touched. The effect of abrogation on existing practice would be minor, while the effect on future practice could be major, and necessary. Again, this is especially true if none of the other alternatives will work as well as abrogation to stem the risk of abuse of the ancient documents exception, while at the same time avoiding difficult questions of interpretation or possible inconsistencies with other rules. One virtue of abrogation is that there is no question as to its meaning.

B. Limit the Exception to Hardcopy

One possible reason for limiting the exception to hardcopy, as discussed above, is that the ancient documents exception may be thought to continue to have some role in certain kinds of litigation in which critical hardcopy documents are very old and impossible to qualify under other exceptions.

[15] It should be noted that the members of the Standing Committee that expressed approval of an amendment to Rule 803(16) were also of the view that it should be abrogated.

An amendment preserving the exception for hardcopy:

(16) ***Statements in Ancient Documents.*** A statement in a document — but not including information that is electronically stored — that is at least 20 years old and whose authenticity is established.

Committee Note

The ancient documents exception to the rule against hearsay has been amended to specify that it is not applicable to information that is electronically stored. The ancient documents exception remains helpful for certain kinds of litigation in which information is located only in hardcopy documents that have withstood the test of time. But the exception is subject to abuse when applied to electronically stored information. The need for old electronically stored information that does not qualify under any other hearsay exception is diminished by the fact that *reliable* electronic information is likely to be preserved and could be used as proof under a hearsay exception that guarantees reliability — e.g., Rule 803(6), Rule 807. And abuse is possible because unreliable electronic information could be widespread and would be admissible under the exception simply because it has been preserved electronically for 20 years.

The amendment provides an exception to the general definition in Rule 101(b)(6), under which a reference to any kind of writing includes electronically stored information. Nothing in the amendment is intended to undermine any other use of electronically stored information under these Rules.

Reporter's Comment on Hardcopy-Only Drafting Alternative:

The major concern with an amendment that carves out electronic information is that the Federal Rules of Evidence have a rule that *equates* electronic evidence with hardcopy. Rule 101(b)(6), which became effective on December 1, 2011, provides that "a reference to any kind of written material or any other medium includes electronically stored information." Rule 101(b)(6) was added as part of the Restyling Project, one of the goals of which was to clarify that while the original Rules of Evidence were written largely with hardcopy in mind, the evidentiary concepts established in the Rules were and remain equally applicable to ESI; instead of specifying that equation in every single hardcopy-based rule, the decision was made to use an all-encompassing definitional approach.

Carving out ESI from 803(16) is arguably in tension with the basic approach to ESI so recently taken in the Restyling Project. It can be questioned whether a deviation from a unified approach is justified simply to allow old --- and often unreliable—hardcopy to be admitted in a handful of CERCLA and deportation cases. Moreover, there could be a random case in which the only available proof of an old matter is *ESI* that is not admissible under other exceptions. There

would seem to be no reason to treat that case of necessity differently from one where the only available proof is hardcopy.

Another problem with a rule distinguishing hardcopy from ESI is that the line between the two is not bright --- a point raised by members at the last meeting. A printout of a 20-year-old webpage is a product of ESI but it is in paper form. Indeed most ESI can be reduced to paper form, and so this drafting model would probably do little to limit the risk of overuse of the ancient documents hearsay exception. It might be argued that the way to limit the exception would be to exclude hardcopy that is derived from ESI, but that limitation would be hard to draft precisely and risks being overrun by technological advances. It would seem that the problems attendant to a hardcopy-only rule are not justified by the benefit of allowing hardcopy ancient documents in rarely-occurring cases.

If, however, ESI were to be carved out from the ancient documents exception, the Committee Note to such an amendment should explain the conflict between the carve-out and the general approach to the Evidence Rules in equating hardcopy and ESI. The above Committee Note attempts to do that.

C. Add a Necessity Requirement:

A third option is to apply the ancient documents exception to both ESI and hardcopy equally, but to limit the exception to situations in which the initial justification still obtains — i.e., where it is necessary to introduce the old evidence because there are no reasonably available alternatives.

An amendment adding a necessity requirement:

(16) ***Statements in Ancient Documents.*** A statement in a document that is at least 20 years old if:

(A) ~~and whose~~ the document's authenticity is established; and

(B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

Committee Note

Rule 803(16) has been amended to require a specific showing of necessity before hearsay may be admitted under the ancient document exception. *See* Rule 807 (imposing an identical necessity requirement). Unlike other hearsay exceptions, Rule 803(16)

imposes no requirement that the hearsay in a document must be reliable. The basic justification for the exception is necessity, but the text of the existing Rule does not in fact require the proponent to show that there is no other way to prove the point for which the hearsay is offered. The absence of a necessity requirement is particularly troubling given the development and widespread use of electronically stored information. Without a necessity requirement, a proponent might use the ancient documents exception to admit unreliable ESI or hardcopy, even though reliable ESI is readily available.

The language added to the Rule is intentionally chosen, so that guidance from case law under Rule 807 can be used to interpret the identical language in Rule 803(16).

Reporter's Comment on Necessity Alternative:

The language in new subdivision (B) is taken directly from the residual exception to the hearsay rule, Rule 807. That language was intended to limit the use of the residual hearsay exception to cases where it was truly necessary.[16] It can be argued that the same reasoning should apply to the ancient documents exception: if other evidence admissible under other reliability-based exceptions could be obtained through reasonable efforts, then the ancient documents exception should not be used either for hardcopy or ESI. Essentially the proposal ties the exception to its only real (albeit weak) reason for being.

Adding the "more probative" requirement to Rule 803(16) could have an ameliorative effect on the potential abuses raised by ESI. As discussed above, in any case in which there is old ESI available, there is likely to be reliable ESI that could be admitted to prove a point, and it is simply bad practice to allow a proponent to admit unreliable ESI just because it is old.

The added advantage of tracking the "more probative" language from the residual exception is that there is case law that can be borrowed from Rule 807 on what constitutes "reasonable efforts" to obtain information admissible under other exceptions. The case law under Rule 807 indicates that a proponent must try to find alternative evidence, but need not undertake Herculean efforts to do so.[17] "[L]imitations upon the financial resources available to the parties and the court are rightfully considered."[18] As one court put it, whether equally probative evidence is reasonably available depends upon "the importance of the evidence, the means at the

[16] See Saltzburg, Martin and Capra, Federal Rules of Evidence Manual §807.02[5] (10th ed.2012) (explaining that the rationale for the "more probative" requirement "is that the residual exception should be reserved for cases of clear necessity.").

[17] See the cases cited in Saltzburg, Martin and Capra, Federal Rules of Evidence Manual, supra at pages 807-17 through 807-21.

[18] Id. at 807-11.

command of the proponent, and the amount in controversy."[19] Thus, as applied to ESI and the ancient documents exception, old ESI might be admissible if alternative ESI can only be found by expensive forensic efforts, or could be read only by obtaining software that is not easily available or copyright-protected.

One might ask: If you are going to add a necessity requirement from Rule 807, then why would you not add the reliability requirement from Rule 807 as well? The answer is that you would then have another Rule 807 — you don't need two of them. What the additional necessity-based language would do is limit the exception to its original rationale and it would probably make it much less likely that the exception would become a broad avenue of admissibility for questionably reliable ESI — because in most cases there is likely to be reliable ESI that can be admitted under other exceptions.

Of course, the necessity-based solution suffers from the fundamental flaw from which the ancient documents exception has always suffered: the unsupportable equation of authenticity and reliability. Essentially the exception, as amended by the necessity language, would say that unreliable hearsay can be admitted when it is necessary to prove a point. That is logically problematic, but at least the addition of necessity-based language would likely help to put the exception back where it always was --- as a backwater in the hearsay rule. In that way it could limit the damage that would occur from what might otherwise be wholesale admission of unreliable ESI.

D. Add a Trustworthiness Burden-Shifting Provision

As stated above, a suggestion made at the last meeting was to deal directly with the problem that there is no reliability guarantee in the ancient documents exception. The proposal was to provide a burden-shifting device in the nature of that set forth in the newly amended Rule 803(6):

An amendment to implement trustworthiness burden-shifting:

> **(16)** ***Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established, unless the opponent shows that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.
> .

Committee Note

[19] Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1552 (9th Cir. 1990).

The rule has been amended to provide that documents offered under this exception may not be admitted for the truth of their contents if the opponent can show that the method or circumstances of preparation indicate a lack of trustworthiness. The rule incorporates language from Rule 803(6) to give judges discretion to exclude an untrustworthy record. The fact that a record can be authenticated as an ancient document (see, e.g., Rule 901(b)(8)) does not mean that any or every statement in that document should be admitted for its truth; an old document can contain as many untruths as a new one.

As with Rule 803(6), the opponent, in meeting its burden of showing untrustworthiness, is not necessarily required to introduce affirmative evidence that an assertion in an ancient document is untrustworthy. For example, the opponent might argue that a document was prepared with a specific motive to falsify without needing to produce evidence on the point. A determination of untrustworthiness is dependent on the circumstances.

Reporter's Comment on Trustworthiness Burden-Shifting Alternative:

The proposal is based on burden-shifting as to trustworthiness and reaches for an analogy with business records, and particularly the 2014 amendment to Rule 803(6) that specifically imposes the burden on the opponent to show untrustworthiness. But that analogy is not perfect. The burden is put on the opponent to a business record to show untrustworthiness because a business record is in fact presumptively untrustworthy. Because a business record must be regularly prepared in the course of regularly conducted activity, and must be recorded contemporaneously with the event, those requirements warrant a presumption that a business record will be accurate as a general matter. That is, the foundation requirements of the business records exception establish trustworthiness as a general matter, so that it is fair to shift the burden to the opponent to show untrustworthiness.

The same presumption does not apply to ancient documents --- thus the presumption of trustworthiness is unwarranted and shifting the burden to the opponent is not justified. Moreover, as pointed out at the last meeting, the age of the document will often make it difficult to establish untrustworthiness.

An alternative could be to shift the burden of proving trustworthiness to the *proponent* of the evidence. But if that is done, the exception comes very close to replicating the residual exception, and it would seem better to simply abrogate the exception and let the residual exception itself operate in the area left by that abrogation.

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Memorandum To: Advisory Committee on Evidence Rules

From: Daniel J. Capra, Reporter

Re: Possible Amendments to Rule 902 for Authenticating Machine-Generated Data and Other Electronic Information

Date: April 1, 2015

At its last meeting, the Evidence Rules Committee voted unanimously to proceed with a proposal to add two provisions to Rule 902, the rule on self-authentication. The first would allow self-authentication of machine-generated information, upon a submission of a certificate prepared by a qualified person --- analogous to the self-authentication provisions for business records in Rule 902(11) and (12). The second proposal would provide a similar self-authentication provision for a copy of an electronic device, media or file, again by way of certification of a qualified witness.

This memo sets forth the background of these two proposals, and then provides amendments and Committee Notes for the Committee to consider. The question at this meeting is whether to propose that the amendments and Committee Notes should be recommended to the Standing Committee for release for public comment.

I. Background to the Proposed Amendments to Rule 902.

As stated above, there are two proposed amendments. They have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. At the last meeting, Committee members determined that the types of electronic evidence covered by the two rules are rarely the subject of a legitimate authenticity dispute but that the proponent is nonetheless forced to produce an authentication witness, often at great expense and inconvenience --- and often, at the last minute, the opponent ends up stipulating to authenticity in any event. The goal of the amendments is to establish a pretrial certification process that will force the parties to come to grips with the authentication question in advance of trial and thus often avoid the unnecessary expense of lining up a witness for authentication testimony that becomes unnecessary when the witness is not challenged at trial or where a stipulation is made at the time of trial.

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

The minutes of the previous meeting summarize the Committee's determination:

> The Committee engaged in discussion on the certification proposals. Members uniformly agreed that it would be useful to promote rules that would make the process of proving authenticity for electronic evidence simpler, cheaper, and more efficient. Many Committee members remarked on the unnecessary expense, in the current practice, of having to call a witness to authenticate a web page or other machine-produced evidence, when it ordinarily ends up that the witness is not cross-examined or that authenticity is stipulated at the last minute.
>
> Discussion indicated three concerns about the proposal. First, in a criminal case, would admission of the certificates under the proposed rules violate the defendant's right to confrontation? As to this question, the Reporter commented that the Supreme Court has stated in *Melendez-Diaz v. Massachusetts* that admitting a certificate prepared for litigation does not violate the right to confrontation if the certificate does nothing more than authenticate another document or item of evidence. The Reporter also stated that the lower courts had uniformly held that certificates prepared under Rule 902(11) do not violate the right to confrontation, relying on the Supreme Court's statement in *Melendez-Diaz*. The problem with the affidavit found testimonial in *Melendez-Diaz* was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation. The certificates that would be prepared under proposed Rules 902(13) and (14) would not be certifying the accuracy of any contents or any factual assertions. They would only be certifying that the evidence to be introduced was generated by the machine (Rule 902(13)) or is a copy of the original (Rule 902(14)).

* * *

The second expressed concern about the proposed certification provisions was related to the first: any proposed Rule would have to clarify that all that the certification is doing is establishing that the proffered evidence is authentic. That is, there can be no certification about the accuracy of the underlying information in the proffered item. Thus, when Rule 902(13) provides for certification of authenticity for records generated "by a process or system that produces an accurate result" the certification would not mean that the specific results were indisputably reliable, only that the system described in the certificate produced the item that is authenticated. Similarly, a certificate offered as proof of authenticity of a web page does not dispose of a hearsay exception with respect to the content of the webpage. And a certification that the proffered item is a copy of the hard drive from the defendant's computer does not alleviate the government from having to prove that the defendant is the one who downloaded the information onto the original harddrive. Committee members resolved that the necessary clarification about the limits of the certification proposals should be set forth in the Committee Notes to the proposed rules.

The final expressed concern was about proposed Rule 902(14) specifically. That proposal would permit authentication of a copy of an electronic device or storage medium by way of certification where the copy is shown to be authentic by its "hash value or a similar process of digital identification." Committee members concluded that the use of the term "hash value" was problematic because that term would be unknown to many people, and more importantly it could become outmoded by technological advances. The Committee unanimously agreed that the proposal should be changed to allow certification of authenticity of a copy that is found to be authentic by a "process of digital identification."

The Committee unanimously determined to proceed with drafting a formal amendment and Committee Note for proposed Rules 902(13) and (14), for consideration at the Spring 2015 meeting. The Reporter was directed to prepare language to the Committee Note that would specifically address any concern that certification of a copy of on electronic device or storage medium might be misused as certification of content, or as proof of any underlying connection between the defendant and the item in a criminal case.

II. Possible Amendments

A. Proposed Rule 902(13) on Machine-Generated Evidence

Rule 902. Evidence That Is Self-Authenticating

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

* * *

(13) Certified Records Generated by an Electronic Process or System. The original or a copy of a record if the record was generated by an electronic process or system that produces an accurate result, as shown by a certification by a qualified person that meets the certification requirements of Rule 902(11), Rule 902(12), a federal statute, or a rule proscribed by the Supreme Court. [Before the trial or hearing], the proponent must give an adverse party reasonable [written] notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.[1]

COMMITTEE NOTE

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

[1] The notice sentence intentionally tracks Rule 902(11) --- which currently requires "written" notice "[b]efore the trial or hearing." Another memo in this agenda book proposes that the notice provisions of the Federal Rules of Evidence should be made more uniform. One of the specific proposals is to delete the language requiring of "written" notice "before the trial or hearing" from Rule 902(11). If that proposed amendment goes forth, then those terms should be deleted from proposed 902(13). But if the notice amendment does not proceed, the better drafting approach would be to have Rule 902(13) track Rule 902(11) --- because they are based on the same premise --- and so the terms "written" and "before the trial or hearing" should be included.

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

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

A certification under this Rule can only establish that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the item on other grounds. For example, if a webpage is authenticated by a certificate under this rule, that authentication does not mean that the assertions on the webpage are admissible for their truth. It means only that the item is what the proponent says it is, i.e., a particular web page that was posted at a particular time. Likewise, the certification of a process or system of testing would not mean that the underlying test results were accurate, only that the system described in the certification produced the item that is authenticated.

Drafting Points:

1. I thought it important to make the point that the certification must be as to information that would be sufficient to establish authenticity if the certifier testified. It can't just be a certification of any kind.

2. The original draft did not specifically refer to "electronic" information but as that is the heart of the proposal it made sense to clarify that the intent of the rule is to cover electronic evidence. The fact that the authentication must be about a process or system that produces accurate results is probably enough to limit it to electronic information but it would seem helpful to clarify the limitation.

3. The Committee Note says nothing about the confrontation issues that were addressed at the last meeting. History indicates that since *Crawford*, rule drafters are probably better off not opining in Committee Notes about the constitutionality of the proposed rule. The amendments to Criminal Rule 15 and Evidence Rule 804(b)(3) both raised the hackles of the Supreme Court when opinions on constitutionality were set forth in the respective Committee Notes. It is true that the 2013 amendment to Rule 803(10) cited *Melendez-Diaz* but that was because the whole point of the amendment was to *correct* a constitutional infirmity in the rule that was highlighted in that case. Moreover, the amendment to Rule 803(10) simply transported from *Melendez-Diaz* a notice-and-demand procedure that the *Melendez-Diaz* Court specifically stated would solve the constitutional problem. It seems better in this instance to just leave the constitutional questions lie for now; it might end up to be necessary to address them if there is a lot of public comment raising the confrontation issues.

4. If there is pushback on the confrontation question, then the proposal can eventually be altered to add a notice-and-demand provision along the lines of Rule 803(10). The language could look like this:

> **(13) Certified Records Generated by an Electronic Process or System.** The original or a copy of a record if the record was generated by an electronic process or system that produces an accurate result, as shown by a certification by a qualified person that meets the certification requirements of Rule 902(11), Rule 902(12), a federal statute, or a rule proscribed by the Supreme Court. [Before the trial or hearing], the proponent must give an adverse party reasonable [written] notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them. In a criminal case, a prosecutor who intends to offer a certification must provide notice of that intent at least 14 days before trial, and the certificate is admissible only if the defendant does not object within 7 days of receiving the notice --- unless the court sets a different time for the notice or objection.

And the Committee Note could add a sentence indicating that a notice and demand provision was added for criminal cases to address the same concerns that were treated in the amendment to Rule 803(10). But as discussed in the memo for the last meeting, a notice and demand provision is unnecessary for Rule 902(13), as the certificate does no more than authenticate another document. Thus it should not be added to the rule in the first instance, but only in response to a groundswell of (unmerited) concern over the right to confrontation.

B. Proposed Rule 902(14) on Self-Authentication of a Copy of an Electronic Device, Storage Media or Electronic File

Rule 902. Evidence That Is Self-Authenticating

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

* * *

(14) ***Certified Copy of Electronic Device, Storage Media or File.*** A copy of an electronic device, storage media, or electronic file, if:

(A) the copy is shown to be authentic by a process of digital identification;

(B) the showing is made by a certification by a qualified person that meets the certification requirements of Rule 902(11), Rule 902(12), a federal statute, or a rule proscribed by the Supreme Court; and

(C) the proponent meets the notice requirements of Rule 902(13).

Committee Note

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

Today, copies of electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a unique alpha-numeric sequence of approximately 30 characters that an algorithm determines based upon the digital contents of a drive, media, or file. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to

allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

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

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

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

Drafting Point:

1. The same point about a notice and demand provision can be made as above. If there is significant pushback, a notice and demand provision can be added.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Disuniformity in FRE Notice Provisions
Date: March 15, 2015

The Federal Rules of Evidence contain notice provisions in eight separate rules: 404, 412, 413, 414, 415, 609(b), 807, and 902(11).[1] These notice provisions differ substantially in their details. At first glance there does not appear to be a reason for such disparity. When the Rules were restyled, the restyling consultant undertook an effort to try to make the notice provisions uniform. But it was determined that any move toward uniformity would constitute a substantive change to most of the notice provisions (e.g., changing a term of days to a "reasonable" time period, adding or deleting good cause requirements, etc.). The Committee did resolve, however, to revisit the possibility of amendments that would provide for more uniformity in the notice provision at a later date. Perhaps that time has come.

This memo is divided into four parts. Part One sets forth and provides comments on the various notice provisions. Part Two discusses the costs and benefits of trying to provide uniformity in the notice provisions. Part Three discusses substantive matters that must be resolved to provide uniformity for the notice provisions. Part Four provides drafting examples.

[1] Rule 902(12) also contains a reference to notice but it simply incorporates the notice provision of Rule 902(11) : "The proponent must also meet the notice requirements of Rule 902(11)." So no direct change need be made to Rule 902(12) --- any change to Rule 902(11) will affect Rule 902(12) in equal measure.

The 2013 amendment to Rule 803(10) add a notice and *demand* procedure for certificates of absence of public record offered against a criminal defendant. This procedure is intended to comport with constitutional requirements, and to establish a ground for waiver, and is not a notice requirement in the traditional sense. It is not further treated in this memo.

I. The Notice Provisions of the Federal Rules of Evidence

A. Rule 404(b):

Rule 404. Character Evidence; Crimes or Other Acts

* * *

(b) Crimes, Wrongs, or Other Acts.

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

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

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

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

Reporter's Note:

This provision was added to the Rules in 1991. The Committee Note states that the amendment is "intended to reduce surprise and promote early resolution on the issue of admissibility." Here are the notable aspects of the Rule 404(b) notice requirement:

1. It applies only in criminal cases, and the notice obligation is on the government only. The limitation to criminal cases appears to be a recognition that in civil cases, the discovery process would itself provide notice of possible Rule 404(b) evidence. And the notice obligation on the prosecutor only was apparently a recognition that it is almost always the government, and hardly ever the defendant, that seeks to offer Rule 404(b) evidence in criminal cases.

It is possible, of course, to extend the notice requirement to defendants in criminal cases. It could be done as follows:

On request by a<u>n</u> ~~defendant~~ <u>opponent</u> in a criminal case, the ~~prosecutor~~ <u>proponent</u> must:

(A) provide reasonable notice of the general nature of any such evidence that the ~~prosecutor~~ <u>proponent</u> intends to offer at trial; and

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

That change would seem equitable, because if the defendant needs notice on Rule 404(b) evidence, it would seem that the prosecutor has an equal need for advance notice of "reverse" 404(b) evidence. Given the infrequency of use of reverse 404(b) evidence, however, there is definitely no need to propose an amendment solely for the purpose of imposing a notice

requirement on the criminal defendant. But it might be worth consideration as part of a broader project that would make the notice provisions more uniform.

2. It does not require a specific form of notice. The Committee Note states that the Committee specifically considered and rejected particularity requirements in favor of a "generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts." There is no explanation, though, of the rationale for rejecting a more particularized requirement.

3. It requires pretrial notice but does not impose specific time limits. The Committee Note states that "no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case."

4. It contains a good cause exception. This allows for the possibility of notice to be made at the trial.

5. It contains a triggering mechanism. Notice is dependent on the defendant asking for it. This is a unique provision in the Federal Rules of Evidence. Nothing in the Committee Note explains this requirement.

B. Rule 412

Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition

*** * ***

(c) Procedure to Determine Admissibility.

(1) *Motion.* If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

*** * ***

Reporter's Note:

Rule 412 was directly enacted by Congress in 1978. It was amended by Congress in 1994. Congress in 1994 adopted the Advisory Committee's proposed amendment that had been rejected by the Supreme Court, and made the Advisory Committee Note the legislative history to

the amendment. Here are the notable aspects of the Rule 412 notice requirement, as amended in 1994:

1. It requires a motion to be made. This is unique in the notice provisions. Notes of the Advisory Committee discussions indicate that members thought a motion should be necessary because "a motion is more formal, delivers more political muscle, and is easier to put under seal." (Minutes of Committee meeting, May 1993).

The uniqueness of a motion requirement can be explained by the fact that Rule 412 is the only one of the notice provisions that is concerned with sensitive matters that would impact a victim. As the Advisory Committee recognized during restyling, "the notice provision in Rule 412 is designed to protect different interests than those protected by other notice provisions." (Minutes of Committee meeting, April 2009). The notice requirement protects "both the victim and the prosecution against surprise and prejudice due to late disclosure of evidence." *United States v. Ramone*, 218 F.3d 1229, 1232 (10th Cir. 2000).

2. It requires specifics about the evidence. The evidence must be specifically described and the proponent must state the proper purpose for which it is offered. This is in contrast to the Rule 404(b) provision which requires only disclosure of the "general nature" of the evidence. The requirement of specifics surely makes sense as applied to Rule 412 evidence --- getting specifics means that the victim's interest will be more protected --- but there is nothing I could find in the history to explain the choice that was made.

3. It has a) a specified time period, b) of 14 days before trial. There is nothing that I could find in the history to indicate why a specific time period was employed, or why it was 14 days. But presumably a specific time period was required in order to make the defendant turn square corners before such private and sensitive information could be raised and used at the trial.

4. It contains a good cause exception. A good cause exception is surely required if the time limit is set forth in a period of days. As discussed below, however, a good cause exception would not seem necessary if the notice requirement itself is made more flexible.

5. It specifies service of the motion and notice to the victim or victim's representative. This is a unique provision in the notice provisions but that uniqueness is explained by the fact that Rule 412 is the only evidence rule that is designed to protect victims and is the only rule with a notice provision in which a victim has a stated interest.

C. Rules 413-415

The notice provisions in these rules are identical in substance. The rules were directly enacted by Congress and there is nothing I could find in the legislative history about the choices made for notice. The addition of a notice requirement in the first instance may have been spurred by the fact that the notice requirement for bad acts had been added to Rule 404(b) only a few years earlier.

Rule 413. Similar Crimes in Sexual-Assault Cases

*** * ***

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

Rule 414. Similar Crimes in Child-Molestation Cases

*** * ***

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

Rule 415. Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation

*** * ***

(b) Disclosure to the Opponent. If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.

Reporter's Note:

Here are the notable factors of the Rule 413-415 notice requirement:

1. It contains a) a specified time period, b) of 15 days before trial. Nothing I could find indicates why Congress chose a specified time period or why it was 15 days.

2. It contains a good cause exception. A good cause loophole is surely required *if* the notice is stated in terms of a specific time period. Not so if the notice is stated in terms of "enough time to give the opponent a fair opportunity to respond."

3. It provides specifics for the notice. The proponent must provide witness statements or a summary of the expected testimony. This differs from the specifics in Rule 412, which includes a requirement that the proponent disclose the purpose for which the evidence is offered. That discrepancy can be explained by the fact that Rule 412 is very concerned about proper purposes, while under Rules 413-415 the evidence can be admitted for any purpose for which it is relevant --- the required analysis for admissibility is nowhere near as precise.

There is a question about whether disclosure of witness statements by the prosecution under Rules 413-414 fits within the general rule that prosecutors are not required to disclose witness statements in advance of their testimony. The Jencks Act, 18 U.S.C.A. §3500, requires disclosure of witness statements, but not in advance of their trial testimony. See also Fed.R.Crim.P. 26.2 (requiring disclosure of witness statements by both sides but only after the witness testifies). Essentially, Congress provided an exception to the Jencks Act for prior crimes proven by witness statements under Rules 413 and 414. It is unclear why witness statements must be provided in advance under Rules 413 and 414 but not under Rule 404(b) --- because all these rules deal with the admissibility of a criminal defendant's prior bad acts. In light of the general rule about witness statement disclosure, and the ill fit with Rule 404(b), the Committee may wish to consider whether to delete the reference to witnesses' statements in both Rule 413 and 414. And if that is going to be done, Rule 415 should also be changed accordingly, because it would seem simply odd and unnecessary to require advance disclosure of witness statements in that Rule and in no other – especially as Rule 415 covers civil cases and so broader discovery will probably end up in production of witness statements in any event.

4. Rules 413-14 impose the notice obligation on the prosecutor. The same is true with Rule 404(b). As noted in the discussion of that Rule above, a case can be made for extending the notice requirement to defendants who offer reverse 404(b) evidence. But no such provision need be made for Rules 413-14. There appears to be no such thing as "reverse" Rule 413-14 evidence. Those rules are limited to evidence of the defendant's sexual assaults and it is impossible to believe that the defendant would want to admit evidence of a "good" sexual assault.

D. Rule 609(b)

Rule 609. Impeachment by Evidence of a Criminal Conviction

* * *

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

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

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

Reporter's Note:

This notice provision was added by Congress to the Advisory Committee proposal. The House proposal was to bar impeachment with old convictions. The Senate proposal was to allow

such convictions if their probative value substantially outweighed their prejudicial effect. The Conference Report states as follows:

> The Conference adopts the Senate amendment [but] with an amendment requiring notice by a party that he intends to request that the court allow him to use a conviction older than ten years. The Conferees anticipate that a written notice, in order to give the adversary a fair opportunity to contest the use of this evidence, will ordinarily include such information as the date of the conviction, the jurisdiction, and the offense or statute involved. In order to eliminate the possibility that the flexibility of this provision may impair the ability of a party-opponent to prepare for trial, the Conferees intend that the notice provision operate to avoid surprise.

Here are the notable factors of the Rule 609(b) notice requirement:

1. It requires "written" notice. This is rare in the notice provisions, and it raises some tension with advances in cm/ecf.

2. It requires no particulars. The Conference Report indicates an intent to require notice of the date of conviction, the jurisdiction, and the nature of the offense. But none of that is required to be disclosed under the text of the Rule.

3. It specifies no specific time period. Just enough to give the opponent a fair opportunity to contest the evidence.

4. It contains no good cause exception. The absence of a good cause exception is explained by the flexibility of the notice provision itself. That phrasing --- enough time to allow the opponent a fair opportunity to contest its use --- incorporates a good cause standard, because it would encourage the court to use such devices as a continuance if notice is provided late, and those devices would ordinarily not be used (i.e., the evidence would be excluded) if the party had no good reason for delay.

E. Rule 807

Rule 807. Residual Exception

* * *

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

Reporter's Note:

This notice provision was added by the Conference as part of a compromise of a disagreement between the House and the Senate over whether a residual exception should be

established. The House deleted the proposal for residual exceptions "as injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to prepare for trial." The Senate was in favor of a residual exception but also concerned about overuse of it; it added safeguards such as the necessity requirement, but not a notice requirement. It appears that the Conference added a notice requirement to respond to criticism that the residual exception could be used to the disadvantage of an unprepared litigant --- with something as unusual as residual hearsay, the opponent needs advance notice to prepare a particularized argument.

One of the important (and probably intended) consequences of the notice requirements in Rule 807 is that a party cannot argue that hearsay incorrectly admitted at trial court have been admitted under Rule 807. *See, e.g., United States Pelullo,* 964 F.2d 193 (3rd Cir. 1992) (records found improperly admitted as business records; government's argument on appeal that the records could have been admitted as residual hearsay was rejected because no notice was provided before trial). Thus careful consideration of the use of the residual exception must be given at the trial level.

Here are the notable factors of the Rule 807 notice exception:

1. It requires pretrial notice but not a specific period of days. So it is similar to Rule 404(b) in this respect.

2. It does not contain a good cause exception. That is unlike Rule 404(b). And that creates a problem. While flexible, the rule (unlike Rule 609(b)) specifically requires that the notice be given before trial. Without good cause language, there is difficulty for courts and litigants where notice is given at trial but the proponent has a good excuse for being late. This has led to dispute in the courts over whether a good cause exception can be employed by courts under Rule 807. *See, e.g., United States v. Lyon,* 567 F.2d 777 (8th Cir. 1977) (yes); *United States v. Ruffin,* 575 F.2d 346 (2nd Cir. 1978) (no).

The moral seems to be that if the notice has a trigger date (before trial or a number of days before trial) then a good cause exception should be set forth in the rule to account for the inevitable situation in which the proponent is late but has a good reason for being so. On the other hand, if the notice requirement is completely flexible, as in Rule 609(b), a good cause requirement is unnecessary (indeed nonsensical) because timeliness is determined by all the circumstances, including the fact that there is an excuse for not giving notice until the trial.

3. It requires notification of particulars, including the declarant's name and address. That is much more particularized than, say, the Rule 404(b) notice requirement. This is the only rule that specifically requires disclosure of a name and address.

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

F. Rule 902(11)

Rule 902. Evidence That Is Self-Authenticating

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

* * *

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

Reporter's Note:

The Advisory Committee recommended adoption of Rule 902(11) because it determined that foundation testimony regarding business records was usually pro forma and an unnecessary expense for the proponent. The Committee was, however, concerned that without a foundation witness to testify, there was some possibility that records might be admitted even though they were questionable as to trustworthiness. The Committee concluded that it was unfair to shift the burden of going forward to the opponent unless the proponent provided advance notice that a foundation witness would not testify.

Here are the notable factors of the Rule 902(11) notice requirement:

1. It requires pretrial notice but does not contain a specific time period. So it is like Rule 807 in this respect, and arguably raises the same issues of requiring a good cause provision. Though perhaps it is less likely to raise a problem because the proponent is probably going to know whether they want to use the certification before the trial starts. A statement that might qualify as residual hearsay could be found late in the game, but that seems less likely with business records that are being certified.

2. It requires "written" notice. As with the written notice requirement of Rule 609(b), this requirement raises tensions with cm/ecf. It has also raised issues that courts have had to deal with when notice is provided other than in "written" form. For example, in *United States v. Komasa*, 767 F.3d 151 (2d Cir. 2014), business records were entered into evidence by way of certificates. The defendant complained that he was given only oral notice. The certificates had been provided to the defendant during discovery. The court held that the trial court did not abuse discretion in admitting the records based on a finding that the defendants had *actual* notice and a full opportunity to challenge the authenticating certificates. The court noted, however, "that parties fail to comply with the Rule 902(11)'s written notice requirements at their own risk" and observed that "a single sentence added to the cover letter forwarding the certifications and documents [to the defendants] would have complied with the rule."

One could argue that something that could be fixed by a single sentence in a cover letter is more a detail than anything else, especially when the defendant has received actual notice --- as would be required by any notice provision. The contrary argument is that a requirement of

"written" notice makes it easier to determine whether notice has been given at all. But in the typical case, it would not seem difficult to determine whether notice was actually given --- meaning that the requirement of "written" notice is not much more than something for a proponent to trip over and for a trial court to excuse when actual notice is found. *See also United States v. Petroff-Kline*, 557 F.3d 285 (6th Cir. 2009) (written notice contained a typographical error; trial court properly held that this error was excused by a corrected notice).

3. It does not contain a good cause exception. As stated above, this can be a problem given the pretrial requirement, but probably less so than with the residual exception.

4. It contains some particulars regarding the notice requirement. The proponent must make the record and certification available for inspection.

II. Costs and Benefits of Providing Greater Uniformity in the Notice Provisions

A review of the notice provisions above indicates that there are a number of differences among the provisions, without substantial reasons for those differences. For example, there appears to be no reason why the Rule 404(b) notice provision contains a triggering mechanism (the defendant must ask for notice) while other provisions attendant to the same concerns of surprise and need for preparation (e.g., Rules 413-15, Rule 807) do not.[2] And it is hard to find rhyme or reason for having specific time periods for some rules (such as Rules 413-415) and more flexible "enough to give a fair opportunity to challenge the evidence" for others.

On the other hand, it also seems apparent that it will be impossible for all the notice requirements to read exactly the same. For example, requiring a motion under Rule 412 --- which is designed to protect a victim from public disclosure of sexual activity --- can be seen to be important in the rape shield context, but a proponent should not have to make a motion before seeking to admit evidence of, say, a bad act under Rule 404(b) or an old conviction under Rule 609(b). Moreover, the particulars of any notice --- if that is to be addressed --- will likely have to vary somewhat simply because the evidence presented in the various rules is not uniform. For example, the particulars under Rule 807 (declarant's name) will necessarily differ from any particulars pertinent to information that is not hearsay (like Rule 404(b)).

So the first process question is whether the benefit of a uniformity project outweighs the cost. The benefit of having uniform provisions on notice would appear to be self-evident. Lawyers and litigants would know how to operate regardless of the applicable rule. Uniformity lowers transaction costs. Uniformity also makes it look like the rule-drafters know what they are doing and are not asleep at the rulemaking process wheel --- thus it helps to assure public confidence in the rules.[3] Currently, looking at the notice provisions as a whole indicates a slapdash approach with no attempt to make the rules user-friendly and consistent to the extent possible.

It must be acknowledged that the benefits of uniformity are tempered because the notice provisions cannot be made completely uniform in every respect. But on the other hand, uniformity for its own sake, without regard to necessary differences, is not the point. The point of effective rulemaking is to provide a uniform approach to common questions but to appropriately recognize the considerations that justify differences in language. To take an example: the Rules Committee established a subcommittee to promulgate a uniform approach that would abrogate the "three-day rule" for electronic service --- that uniformity was to extend to changes to the Appellate, Bankruptcy, Civil, and Criminal Rules. The subcommittee developed a template of textual change and Committee Note that all of the Committees used. But differences in note and text were implemented to address special considerations presented in the Appellate Rules. So it can be said that an attempt to provide uniformity to the notice provisions, but to recognize differences where necessary, can provide substantial benefits and is in accord with the Standing Committee's approach to rulemaking.

The costs of uniformity are likely to be the dislocation and transaction costs attendant to a change in law and practice as to some of the notice provisions. For example, if the decision is

[2] It could be argued that the requirement of a defendant request was added to Rule 404(b) in an attempt to make the mechanism operate like civil discovery, which is triggered by a demand from the opponent. Assuming that is a plausible reason, it would equally apply to most of the other notice requirements in criminal cases --- particularly Rules 413-14, 609(b) and 807.

[3] Similar interests arose in the Restyling. The Committee thought it important to provide language that recognized the phenomenon of electronic evidence. Courts were not having trouble accommodating electronic evidence under the original rules, but the Committee believed that the rules --- and the rulemaking process --- would have more credibility if the rules specifically recognized and accommodated electronic evidence. See Rule 101(b)(6).

made to have a notice provision flexible as to time, then the practice will change under those provisions with specific time periods. But these costs could be seen to be limited for a number of reasons:

● The Committee Note can specify that the case law under an existing unchanged rule can be used as precedent for rules that are changed. For example, and hypothetically, the case law under a "reasonable opportunity to respond" rule such as Rule 807 could be used by a court to apply that language to an amended Rule 413. And, on the other hand, if specific time periods and a good cause exception are made uniformly applicable, the case law from the rules currently using such provisions could be used for authority.

● While there is some case law providing for exclusion of evidence because notice requirements were not met, it is usually not because of some nuance in the particular notice provision, but rather because of a complete failure to provide any kind of notice until the evidence is proffered at trial. *See, e.g., United States v. Ramirez-Lopez*, 315 F.3d 1143 (9th Cir. 2003) (Rule 404(b) notice requirement violated when evidence was first made known when the witness testified to it); *United States v. Carrasco*, 381 F.3d 1237 (11th Cir. 2004) (no notice given before Rule 404(b) evidence was admitted in rebuttal). Thus a minor miss on a new notice provision is unlikely to have substantial consequences.

● It could be argued that where parties have had problems with nuance, the solution might be to do away with the nuance, as with the requirement of "written" notice in Rule 902(11) in *Komasa*, above.

Of course it is for the Committee to determine whether the benefits of amending the rules to provide uniform notice requirements (to the extent possible) outweigh the costs.

III. Choices to be Made Regarding Uniformity

This section discusses the choices that the Committee would have to make if it wished to pursue uniformity in the notice rules in the Federal Rules of Evidence.

A. Motion Practice

Rule 412 is unique in the notice rules in tying notice to a motion to be made. As set forth above, Rule 412 requires the defendant (civil or criminal)[4] to file a motion specifically describing the evidence and the purpose for which it is offered, at least 14 days before trial. This motion requirement makes sense in Rule 412 because it is tied into a further requirement, found in Rule 412(c)(2) --- that the motion, related materials and the record of the hearing must be and remain sealed. *See S.M. v. J.K.*, 262 F.3d 914 (9th Cir. 2001) (evidence excluded as a sanction when the defendant failed to file his motion to introduce evidence of the victim's sexual behavior under seal). Requiring a motion surely makes it easier to assure that the information subject to the request can be placed, and remain, under seal.

The motion requirement of Rule 412 supports the underlying rationale of Rule 412, which is to protect the privacy interest of alleged rape victims. No such intensely protected privacy interest is at work in any of the other rules in which notice is required. Accordingly, there would appear to be no need to add --- and indeed it would be counterproductive to add --- a motion practice requirement in the other rules merely for uniformity.

The question then is whether the motion requirement in Rule 412 should be deleted in pursuit of uniformity. Because the motion requirement promotes the policy of Rule 412, the answer should probably be no. This seems to be one of those situations in which an exception to uniformity should be found because the rule deals with different questions and policy interests than the other rules --- there is a valid reason for disuniformity here.

Should Rule 412 Be Exempted From a Uniformity Project?

That conclusion raises the broader question of whether the notice requirement of Rule 412 should even be made part of a uniformity project. There are at least two reasons for taking a hands-off approach to Rule 412: 1) the Rule simply has a different objective, and promotes different policy interests, than the other rules that have notice requirements; 2) the Rule obviously deals with sensitive and volatile policy matters, and amending even just its procedural requirements can open up controversy. It should be noted that eight years ago, the Committee considered whether to amend Rule 412 to provide that false claims of rape were either covered, or not covered, by the Rule's protection. The Committee found that any attempt to amend the rule could lead to conflict and pushback (perhaps in Congress) that could be so significant as to far outweigh the benefit of clarification on a single point.

In this instance, amending the notice provisions of Rule 412 would not have the benefit of clarifying anything. The words seem crystal clear and I could find no reported cases involving a dispute over the meaning of the Rule 412 notice provision. The only benefit would be to provide uniformity, but that would not be much of a benefit because many of the provisions in Rule 412 should not be changed solely for uniformity purposes. The motion requirement is one example, but the requirement that a non-party (the victim) receive notice is also unique --- and equally important to the underlying policy. Even the requirement of 14 days' advance notice

[4] The Rule refers to a "party" and technically it would be possible for a prosecutor or civil plaintiff to seek to offer evidence of a victim's sexual behavior. But at least the published cases in which such an effort is made are hen's teeth rare. *See United States v. Blue Bird*, 372 F.3d 989 (8th Cir. 2004) (evidence of the victim's chastity barred by Rule 412). In any case, if a plaintiff or prosecutor were to seek to admit evidence of the victim's sexual behavior, the motion requirement would obviously apply.

might be justified as against other rules with a more flexible "reasonableness" time period --- because of the policy of protecting victims, it can be argued that it is especially important for a proponent to follow precise procedures before this sensitive evidence can be omitted.

In sum, there is much to be said for leaving Rule 412 out of a uniformity project. Part Four will provide a drafting alternative for Rule 412 which promotes some uniformity, but the other (probably better) alternative would be to do nothing.

B. Triggering Mechanism --- Request By the Opponent

As stated above, Rule 404(b) is unique is that the notice requirement is conditioned on a request from the defendant. As discussed earlier, the genesis of this triggering requirement is murky, but it is possible that it was done to replicate the civil discovery system. The bottom line is that the request requirement is an outlier, and the question for uniformity purposes is whether it should be 1) extended to every other rule; 2) deleted from Rule 404(b); or 3) retained only in Rule 404(b) due to some unique issue raised in that rule.

It is pretty clear that a proponent-request requirement should not be added *across the board*. At least with Rule 404(b) evidence, it can be said that the defendant might have a legitimate reason to think that the government might have information of bad acts and a consequent intent to offer the bad acts at trial --- that is, the defendant might at least know they have an interest in making a request. But the same cannot be said for old convictions of government witnesses under Rule 609(b), or residual hearsay under Rule 807, or certifications under Rule 902(11). A party in these instances would ordinarily have no idea about whether the opponent has such evidence. So the end result would be a boilerplate request for no real purpose.

As to retaining or deleting the request requirement in Rule 404(b): there is a strong argument that it should be deleted on the merits because the interest in uniformity outweighs any benefit from the requirement. Courts have recognized that the request is little more than a "reference to Rule 404(b) in the boilerplate request for discovery under Fed.R.Crim.P. 16." *United States v. Barnes*, 49 F.3d 1144, 1149 (6th Cir. 1995). And yet it is a technical hurdle that if not met can deprive the defendant of advance notice of critical evidence. *See, e.g., United States v. Tuesta–Toro,* 29 F.3d 771 (1st Cir.1994) (omnibus defense motion requesting "confessions, admissions and statements ... that in any way exculpate, inculpate or refer to the defendant" was insufficient to constitute a request for Rule 404(b) evidence). Ultimately of course it is for the Committee to determine whether the request requirement should be retained in Rule 404(b).

But if the Committee does decide to retain the request requirement, it would need to consider the fact that whatever rationale supports that requirement would also support an extension of the requirement to Rules 413 and 414. Those rules deal with the same kind of evidence as Rule 404(b) --- prior bad acts of the defendant. If the government needs a request for providing notice of intent to use bad acts under Rule 404(b) it is hard to see why it wouldn't need a similar request for Rules 413 and 414.

C. Time Periods – Specific or Flexible

As stated above, some time periods are set forth in specific day requirements (e.g., 15 days before trial in Rules 413-15), or before trial (Rule 404(b), while others are flexible

(reasonable written notice so that the opponent has a fair opportunity to contest the evidence in Rules 609(b)).

There is certainly something to be said for a uniform approach --- with the probable exception of Rule 412, for reasons discussed above. The uniformity in result is probably more important than the actual approach to be taken. That said, the more flexible "fair opportunity to meet" test has an advantage because it tells the parties that in determining the timeliness of notice, the court will take account of all the relevant factors. The certainty of a specific days approach is often likely to be undermined anyway because a court might well excuse (or ameliorate) an untimely notice. *See, e.g., United States v. Guidry*, 456 F.3d 493 (5th Cir. 2006) (time period excused where the prosecution did not become aware of the evidence until just before trial); *Doe v. Smith*, 470 F.3d 331 (7th Cir. 2006) (error to exclude evidence for failure to provide timely notice, where any prejudice could have been cured by continuance). Thus a term-of-days requirement --- coupled with the necessary good cause exception --- is likely to devolve into a more flexible enquiry anyway. Moreover, there is a fair amount of case law on rules with flexible notice provisions that can be used as guidelines for parties --- so that it is not just a free-for-all. *See, e.g., United States v. Williams*, 792 F.Supp. 1120 (S.D. Ind. 1992) (holding that there is a presumptive rule that reasonable notice under 404(b) requires at least ten days prior to the start of trial, unless the government can show a reason to deviate from that rule). *See also United States v. Perez-Tosta*, 36 F.3d 1552 (11th Cir. 1994) (stating there are three factors to consider whether notice was reasonable: 1) when the Government could reasonably have learned of the evidence; 2) the extent of prejudice to the defendant from a lack of time to prepare; and 3) how significant the evidence is to the prosecution's case).

Another problem with a specific-days requirement is how to count the days. The other sets of rules have a specific method for counting days. See, e.g., Civil Rule 6. But these time-counting rules do not explicitly apply to the Evidence Rules. So there might be questions of what happens when a 15-day period ends on a weekend or holiday. The time-counting rules clearly say that you automatically add another day to the period. But, again, those rules do not apply to the Evidence Rules. It should be acknowledged that I could find no reported case law in which the parties had a time-counting argument for the day-based notice periods in the Evidence Rules. But the best way to avoid any such argument is to have a more flexible provision. Barring that, if the Committee does choose to go with a period of days, it should be a multiple of 7 --- because the time should be counted from the day of trial, so counting multiples of 7 backward can never land on a weekend (though it might end on a holiday).

As to whether the provisions should require notice before trial, without a specific discussion of days, that question is bound up with the question of whether to include a good cause requirement--- which is discussed immediately below.

D. Good Cause Exception

The notice provisions containing a good cause exception are those that are based on a specific time period, e.g., before trial (Rule 404 (b)) or 15 days before trial (Rules 413-415). There is rhyme and reason to this. If the time period runs from a specific point, a good cause exception is necessary to avoid exclusion of evidence where the proponent had a good reason for not making the time period. In contrast, if the notice provision is flexible --- i.e., enough time to give the opponent a fair opportunity to challenge the evidence --- then a good cause exception would be an unnecessary complication.

Adding a good cause exception to a flexible notice requirement would mean that if a proponent has good cause, it can introduce evidence even though the opponent doesn't have a fair opportunity to meet it. So it is no surprise that a good cause exception cannot be found in a rule with a flexible time provision, like Rule 609(b). Good cause is not an irrelevancy in a "fair opportunity to challenge" notice provision, however. The "fair opportunity" language is properly read to incorporate a good cause component in its general standard. If a party gives late notice

but has a good cause excuse, the flexible "fair opportunity to meet" language should be construed to require the court to use some option other than exclusion, such as delay of the trial.

If the Committee does decide to take a uniform approach in setting the notice requirements in "fair opportunity to meet" language, one option would be to forego any textual reference to "good cause" but to explain in the note that good cause is a factor that may support a continuance in order to give the opponent a fair opportunity to meet the evidence in light of late notice. It should also mention that even under a flexible provision, it is the norm that notice will be given before trial. That option is illustrated in Part IV, below.

The major drafting point is that there are two possible tracks to take: 1) a flexible "enough to give the opponent a reasonable opportunity to meet" with no specific day and no 'before trial" language ---and with no good cause provision; or 2) a specific date (preferably "before trial" rather than specific days) and a good cause provision. A problem found in some of the notice provisions is that they mix and match from these two tracks. Specifically, Rules 807 and 902(11) both contain specific dates --- before trial --- but don't contain good cause exceptions. So a project to renovate the notice provisions could be thought to be beneficial not only for uniformity purposes but also to make these two notice provisions more coherent.

E. "Written" Notice

Rules 609(b) and 902(11) require "written" notice, but as is seen above, in the only reported case on the subject, the court excused the written notice requirement when it was clear that the opponent was actually notified. It is also noted above that the term "written" is somewhat problematic in light of electronic case filing, service, etc. --- although the problem is not insurmountable because Rule 101(b)(6) provides that any reference to written material includes electronically stored information.

A strong argument can be made that these references to written notice should be deleted in favor of uniformity. First, there is no particular reason why written notice should be required under these two rules and not any others. That is, the writing requirement should be applied either uniformly or not at all. And "not at all" sounds appropriate in light of the fact that the failure to provide written notice is likely to be excused so long as the opponent has a fair opportunity to meet the evidence. So adding the requirement just becomes another thing for the parties to argue about, usually for no real effect. Of course it is for the Committee to determine, as a policy matter, whether a writing requirement is important enough to be included in a rule. But if it is found important enough, it should be included in all the notice rules.

F. Particulars

As discussed above, some of the notice provisions require disclosure of some kind of particulars about the notice, and the description of the particulars varies. Rule 404(b) requires disclosure of the "general nature" of the evidence; Rules 413-415 require disclosure of "witnesses statements or a summary of the expected testimony"; Rule 807 requires "particulars, including the declarant's name or address"; while Rules 412, 609(b) and 902(11) make no reference to particulars.

Whether to refer to particulars, and then to describe the particulars to be included in the notice, raises difficult questions. But some points seem inarguable:

First, the substantive requirement of particulars of disclosure should not be rejected just to make the rules uniform on this point. Providing some particulars may certainly be necessary to allow the opponent to meet certain evidence.

Second, a particulars requirement does not work --- or is unnecessary --- in certain notice provisions. For example, under Rule 412, a particulars requirement seems unnecessary when the question of admissibility is going to be vetted through an in camera hearing after a motion is filed – the opponent will surely have sufficient opportunity to learn the particulars through that process. And under Rule 609(b), the opponent by definition will get the date and nature of the conviction, and also, because the proponent must provide the court sufficient facts and circumstances in supporting its probative value, a "reasonable" notice would seemingly require articulation of those facts and circumstances --- otherwise it would not be sufficient to allow the opponent to meet the evidence. Thus, in these rules, adding a particularity requirement would be counterproductive.

Third, there is a good reason for some differentiation in the particulars requirement in certain rules, because of the different kinds of evidence involved. For example, residual hearsay and prior bad acts by their nature contain different kinds of particulars.

Fourth, as discussed above, the Committee may wish to consider deleting the Rule 413-415 requirement to produce witness statements, as well as the Rule 807 requirement to produce the address of the declarant. Both of these requirements are in tension with disclosure provisions both within and outside the Evidence Rules.

Fifth and finally, there does not appear to be any good reason for differentiating particulars in Rule 404(b) as compared to Rules 413 - 415. As stated above, this is the same kind of evidence, and if the defendant needs to be prepared for one kind of bad act, it would appear that he needs to be equally prepared for another kind of bad act. Thus, there is an argument that the particularity requirements of Rule 404(b) *should* be made uniform with those of Rules 413-415. Whether that means loosening the requirements of Rules 413 -415, or tightening the requirements of Rule 404(b), is a question for the Committee.

G. "Intent to Offer"

Every one of the notice provisions is couched in terms of evidence that the proponent intends to offer. For example, Rule 404(b) states that the government must provide notice "of any such evidence that the prosecution intends to offer at trial." It could be argued that "intent to offer" language could be dropped because there is no reason to provide notice of anything unless there is an intent to offer the evidence at trial. That is, the intent to offer is implicit in the notice itself.

But there is something to be said for retaining the "intent to offer" language in the notice provisions. First, that language is in every one of the notice provisions, so deleting it would not be within the goals of a uniformity project --- it's already uniform. Second, "intent to offer" is probably good language to use for setting the stage for providing notice --- general references to "the evidence" seem somewhat bare in comparison to a reference to "the evidence that the proponent tends to offer." Third, there is some case law indicating that the "intent to offer" language is supposed to have some teeth. For example, in *Kirk v. Raymark Indus.*, 61 F.3d 147 (3rd Cir. 1995), the court held that a hearsay statement was improperly admitted under the residual exception. The plaintiff gave notice of the evidence (through civil discovery), but never gave specific notice of the intent to offer it under the residual exception. The court stated that Rule 807 requires not just notice of the hearsay statement "but also notice of the proponent's intention to specifically rely on the rule as a grounds for admissibility of the hearsay statement."

The *Kirk* court's reading of the notice provision in Rule 807 is not obvious, because the rule simply states that the proponent must give "reasonable notice of the intent to offer the statement and its particulars." It doesn't specifically require notice of an intent to offer the statement as residual hearsay. Nonetheless, removing the language of "intent to offer" – at least removing it from Rule 807 --- could result in disruption that would not be justified by any corresponding benefit. Therefore it appears that the "intent to offer" language should be retained in the notice provisions.

IV. Drafting Examples

A. A Template for Uniformity: Track One

Professor Joe Kimble, the Committee style consultant, prepared at my request a template for a uniform approach to notice requirements that he suggests can be used for all the notice provisions except for Rule 412.[5]

> "X must give Y reasonable notice of [particulars] so that Y has a fair opportunity to challenge the evidence."

That's pretty sketchy, Joe admits. But it actually advances the ball insofar as a number of substantive decisions have been made. Specifically: 1) good cause is encapsulated in fair opportunity; 2) fair opportunity substitutes for specific time periods; 3) particulars need to vary somewhat depending on the rule; 4) there is no demand requirement in any rule; and 5) there is no requirement of written notice.

Most of the options chosen are geared toward flexibility in the notice provisions (a requirement of particulars is the exception). It can be argued that the more specific the notice provision, the more likely that the proponent will trip over it, and practically speaking the court is likely to excuse the error anyway --- so long as the opponent has a fair opportunity meet the evidence. If "fair opportunity" is going to be the operative standard it might as well be the standard that is in the text of the rule.

What follows below is the notice provisions as they would be amended under the template. Obviously there are other ways to go about making the notice rules uniform. Particulars can be deleted; specific time periods and good cause provisions can replace the "fair opportunity" language; a demand requirement can be reinstated in Rule 404(b) (and then, for consistency, added to Rules 413 and 414). If the Committee decided to make different substantive choices, the template can be modified to accommodate them. The most likely possibility for a different version is what might be called Track Two. That is, a requirement of notice before trial with a good cause exception included. A template for Track Two will be discussed below.

[5] Rule 412 won't work in this template because of its motion and sealing requirements. As discussed above, the issues and policies involving Rule 412 are so unique that it is probably best to consider it sui generis and to drop it from any uniformity project.

B. Applying the Track One Template to the Notice Provisions (Other Than Rule 412)

Note that there are two versions provided for Rule 404(b) and Rules 413-415. That is because Rule 404(b) requires disclosure of the "general nature" of the evidence while Rules 413-15 require disclosure of "witnesses' statements or a summary of the expected testimony." As these rules cover the same kind of evidence, there is no reason for them to have a difference in the kind of information that should be provided in the notice. It is up to the Committee, if it decides to proceed in this project, to determine whether to require only "general nature" or more specific information. It could go further and provide that the Rule 404(b) "general nature" language should be applied to all the notice rules. If so, the drafts below can change accordingly.

Note also that the drafts delete the reference to witness statements in Rules 413-15 and to the declarant's address in Rule 807. As discussed above, these current requirements are problematic --- and one benefit of the project can be to clean up these substantive problems.

Rule 404(b) (tracking the particulars of current Rule 404(b)

(b) Crimes, Wrongs, or Other Acts.

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

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

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

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

(3) Notice in a Criminal Case. In a criminal case, this evidence is admissible only if the prosecutor [proponent] gives the defendant [opponent] reasonable notice of the general nature of the evidence that the prosecutor intends to offer, so that the defendant has a fair opportunity to challenge it.

Rule 404(b) (tracking the particulars of Rules 413-415

(b) Crimes, Wrongs, or Other Acts.

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

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

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

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

(3) Notice in a Criminal Case. In a criminal case, this evidence is admissible only if the prosecutor [proponent] gives the defendant [opponent] reasonable notice of the intent to offer the evidence and its particulars, including a summary of the expected testimony, so that the defendant [opponent] has a fair opportunity to challenge it.

Rules 413 and 414 (with "particulars" language from those rules):

~~(b) Disclosure to the Defendant.~~ **Notice.** ~~If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant,~~ This evidence is admissible only if the prosecutor gives the defendant reasonable notice of the intent to offer the evidence and its particulars, including ~~witnesses' statements or~~ a summary of the expected testimony, so that the defendant has a fair opportunity to challenge it. ~~The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.~~

Rules 413 and 414 (with "particulars" language from Rule 404(b)):

(b) ~~Disclosure to the Opponent.~~ **Notice.** ~~If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.~~ This evidence is admissible only if the prosecutor gives the defendant reasonable notice of the general nature of the evidence that the prosecutor intends to offer, so that the defendant has a fair opportunity to challenge it.

Rule 415 (with "particulars" language from rules 413-415).[6]

(b) ~~Disclosure to the Opponent.~~ Notice. ~~If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered~~, This evidence is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the evidence and its particulars, including ~~witnesses' statements or~~ a summary of the expected testimony, so that the adverse party has a fair opportunity to challenge it. ~~The party must do so at least 15 days before trial or at a later time that the court allows for good cause.~~

Rule 413-415 (with particulars language from Rule 404(b).

(b) ~~Disclosure to the Opponent.~~ Notice. ~~If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.~~ This evidence is admissible only if the proponent gives an adverse party reasonable notice of the general nature of the evidence that the proponent intends to offer, so that the adverse party has a fair opportunity to challenge it.

Rule 609(b)

Rule 609. Impeachment by Evidence of a Criminal Conviction

* * *

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

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

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

[6] Rule 415 is currently different from Rules 413 and 414 because it (correctly) refers to a "party" rather than "the prosecutor" offering the evidence. The change in text makes it more uniform because it refers to the proponent --- a term equally applicable to all three rules. That seems to be an improvement. But there is still some difference because Rule 415 refers to notice on "an adverse party" while Rules 413 and 414 refer to notice on "the defendant." This difference is necessary because, you never know, in a civil case an adverse party may or may not be the defendant.

Rule 807

Rule 807. Residual Exception

* * *

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

Rule 902(11)

Rule 902. Evidence That Is Self-Authenticating

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

* * *

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

C. The Basic Committee Note for Track One

Here is a possible uniform Committee Note, with extra material as designated for Rules 404(b) and 413-415:

The notice provisions in the Federal Rules of Evidence have been made uniform to the extent reasonably possible --- though no change has been made to Rule 412 because of the unique policies protecting privacy interests under that Rule.

The notice provisions opt for flexible standards as opposed to specific and rigid criteria. The basic requirement of providing notice so that the opponent has a fair opportunity to challenge the evidence is adaptable to any situation, and can be applied by courts to assure that the opponent is not unfairly surprised under the circumstances. The Committee saw no need to add "good cause" language to the uniform notice provisions. The flexible standard of "fair opportunity to challenge" can be used --- when a proponent provides late notice but has a good cause excuse for doing so --- to grant a continuance of or other remedy to allow the opponent time to prepare. *See United States v. Calkins,* 906

F.2d 1240 (8th Cir. 1990) (notice provided one day before trial was sufficient where there was good cause for the late notice and a continuance was granted to give the defendant a fair opportunity to challenge the evidence); *United States v. Parker*, 749 F.2d 628 (11th Cir. 1984) (notice requirement satisfied where the evidence was the subject of a pretrial hearing and the defendant did not ask for a continuance).

References to pretrial notice have been deleted as part of establishing flexibility under the circumstances. But it is expected in the usual case that notice will have to be given before trial in order for the opponent to have a fair opportunity to challenge the evidence.

Add to Rule 404(b)

The requirement of a request before notice must be provided has been dropped. That requirement is not found in any other notice provision in the Federal Rules of Evidence, and the result of the requirement has ended up to be a boilerplate demand on one hand, and a trap for the unwary on the other.

Add to Rule 404(b) if it follows the current provisions of Rules 413-415:

The notice provision has been amended specifically to track the "particularity" provisions of Rules 413-415. Those Rules also cover admission of crimes, wrongs or other acts and the Committee saw no reason for the notice requirements to differ. The burden of providing some particulars about the evidence the prosecutor seeks to admit is not an onerous one, and providing such particulars can guard against the unfair surprise that is the basis of the notice requirement.

Add to Rules 413-415, if the 404(b) "general nature" language is used:

The notice provision has been amended specifically to track the "general nature" language of Rule 404(b). Like this Rule, Rule 404(b) also covers admission of crimes, wrongs or other acts and the Committee saw no reason for the notice requirements to differ. The Committee determined that disclosure of the "general nature" of the evidence was sufficient to alert the opponent and was more in line with a flexible approach to notice.

Add to Rules 413-415 if the particulars are retained but the reference to witness statements is deleted:

The requirement that the proponent provide disclosure of witness statements has been deleted, as it is inconsistent with other disclosure provisions that do not require advance disclosure of witness statements. See, e.g., Fed.R.Crim. P. 26.2(a).

Add to Rule 807 if the requirement of disclosing a declarant's address is deleted:

The requirement of disclosing a declarant's address is deleted because in most cases of proffered residual hearsay, the declarant must be unavailable in order for the "more probative" requirement of the rule to be met. Disclosing the address of an unavailable declarant would seem to be an unnecessary requirement; and it is also inconsistent with the other notice provisions, which do not impose such a requirement.

D. Applying the Track Two Template to the Notice Provisions (Other Than Rule 412)

Track Two means requiring pretrial notice but adding a necessary good cause exception.

Rule 404(b) (tracking the particulars of current Rule 404(b)

(b) Crimes, Wrongs, or Other Acts.

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

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

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

(B) do so before trial~~—or during trial if the court, for good cause, excuses lack of pretrial notice.~~ or at a later time that the court allows for good cause~~, excuses lack of pretrial notice~~.

Rule 404(b) (tracking the particulars of Rules 413-415

(b) Crimes, Wrongs, or Other Acts.

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

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

(A) provide reasonable notice of the general nature of the intent to offer the evidence and its particulars, including a summary of the expected testimony ~~any such evidence that the prosecutor intends to offer at trial~~; and

(B) do so before trial ~~or during trial if the court,~~ or at a later time that the court allows for good cause~~, excuses lack of pretrial notice~~.

Rules 413 and 414 (with "particulars" language from those rules):

~~**(b) Disclosure to the Defendant.**~~ **Notice.** ~~If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant,~~ This evidence is admissible only if the prosecutor gives the defendant reasonable notice of the intent to offer the evidence and its particulars, including ~~witnesses' statements or~~ a summary of the expected testimony, so that the defendant has a fair opportunity to challenge it. The prosecutor must do so ~~at least 15 days~~ before trial or at a later time that the court allows for good cause.

Rules 413 and 414 (with "particulars" language from Rule 404(b)):

(b) ~~**Disclosure to the Opponent.**~~ **Notice.** ~~If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony..~~ This evidence is admissible only if the prosecutor gives the defendant reasonable notice of the general nature of the evidence that the prosecutor intends to offer. so that the defendant has a fair opportunity to challenge it. The party must do so ~~at least 15 days~~ before trial or at a later time that the court allows for good cause

Rule 415 (with "particulars" language from rules 413-415).[7]

(b) ~~Disclosure to the Opponent.~~ Notice. ~~If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered~~, This evidence is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the evidence and its particulars, including ~~witnesses' statements or~~ a summary of the expected testimony, so that the adverse party has a fair opportunity to challenge it. The party must do so ~~at least 15 days~~ before trial or at a later time that the court allows for good cause.

Rule 413-415 (with particulars language from Rule 404(b).

(b) ~~Disclosure to the Opponent.~~ Notice. ~~If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony.~~ This evidence is admissible only if the proponent gives an adverse party reasonable notice of the general nature of the evidence that the proponent intends to offer, so that the adverse party has a fair opportunity to challenge it. The party must do so ~~at least 15 days~~ before trial or at a later time that the court allows for good cause.

Rule 609(b)

Rule 609. Impeachment by Evidence of a Criminal Conviction

* * *

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

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

(2) the proponent gives an adverse party reasonable ~~written~~ notice of the intent to ~~use~~ offer the evidence ~~it so that the party has a fair opportunity to contest its use.~~ The proponent must do so before trial or at a later time that the court allows for good cause.

[7] Rule 415 is currently different from Rules 413 and 414 because it (correctly) refers to a "party" rather than "the prosecutor" offering the evidence. The change in text makes it more uniform because it refers to the proponent --- a term equally applicable to all three rules. That seems to be an improvement. But there is still some difference because Rule 415 refers to notice on "an adverse party" while Rules 413 and 414 refer to notice on "the defendant." This difference is necessary because, you never know, in a civil case an adverse party may or may not be the defendant.

Rule 807

Rule 807. Residual Exception

* * *

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

Rule 902(11)

Rule 902. Evidence That Is Self-Authenticating

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

* * *

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

E. The Basic Committee Note for Track Two

Here is a possible uniform Committee Note, with extra material as designated for Rules 404(b) and 413-415:

The notice provisions in the Federal Rules of Evidence have been made uniform to the extent reasonably possible --- though no change has been made to Rule 412 because of the unique policies protecting privacy interests under that Rule.

The notice provisions opt for a basic requirement that reasonable notice be provided before trial, unless the court provides for a later time upon a finding of good cause.

Add to Rule 404(b)

The requirement of a request before notice must be provided has been dropped. That requirement is not found in any other notice provision in the Federal Rules of Evidence, and the result of the requirement has ended up to be a boilerplate demand on one hand, and a trap for the unwary on the other.

Add to Rule 404(b) if it follows the current provisions of Rules 413-415:

The notice provision has been amended specifically to track the "particularity" provisions of Rules 413-415. Those Rules also cover admission of crimes, wrongs or other acts and the Committee saw no reason for the notice requirements to differ. The burden of providing some particulars about the evidence the prosecutor seeks to admit is not an onerous one, and providing such particulars can guard against the unfair surprise that is the basis of the notice requirement.

Add to Rules 413-415, if the 404(b) "general nature" language is used:

The notice provision has been amended specifically to track the "general nature" language of Rule 404(b). Like this Rule, Rule 404(b) also covers admission of crimes, wrongs or other acts and the Committee saw no reason for the notice requirements to differ. The Committee determined that disclosure of the "general nature" of the evidence was sufficient to alert the opponent and was more in line with a flexible approach to notice.

Add to Rules 413-415 if the particulars are retained but the reference to witness statements is deleted:

The requirement that the proponent provide disclosure of witness statements has been deleted, as it is inconsistent with other disclosure provisions that do not require advance disclosure of witness statements. See, e.g., Fed.R.Crim. P. 26.2(a).

Add to Rule 807 if the requirement of disclosing a declarant's address is deleted:

The requirement of disclosing a declarant's address is deleted because in most cases of proffered residual hearsay, the declarant must be unavailable in order for the "more probative" requirement of the rule to be met. Disclosing the address of an unavailable declarant would seem to be an unnecessary requirement; and it is also inconsistent with the other notice provisions, which do not impose such a requirement.

F. An Attempt to Instill Some Uniformity in Rule 412

As discussed above, any benefit in trying to make Rule 412 uniform in its notice requirement is probably outweighed by the cost. The benefit is minimal because the start of the notice process --- a motion --- is unique to that rule, and justifiably so, thus it should not be changed. Also service on the victim is obviously unique to Rule 412. So "uniformity" is really at the margins and probably doesn't justify tinkering with this sensitive rule. But if the Committee does wish to try partial uniformity, it might be effectuated this way:

Track One

Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition

*** * ***

(c) Procedure to Determine Admissibility.

(1) *Motion.* If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so ~~at least 14 days before trial unless the court, for good cause, sets a different time~~ in time to allow the opponent a fair opportunity to challenge the evidence;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

*** * ***

Track Two

Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition

*** * ***

(c) Procedure to Determine Admissibility.

(1) *Motion.* If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so ~~at least 14 days~~ before trial ~~unless the court, for good cause, sets a different time~~ or at a later time that the court allows for good cause

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

TAB 5

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FORDHAM

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

To this classic argument, two other points can be made in support of exempting prior statements of witnesses from the hearsay rule. First, the prior statement is by definition closer in time to the event described, and so is less likely to be impaired by faulty memory or a litigation motive.[2] Second, treating all statements of testifying witnesses as outside the hearsay rule would dispense with the need to give confusing limiting instructions as to those statements that would be admissible anyway for credibility purposes.[3] Indeed the interest in avoiding difficult-to-follow instructions was the animating reason behind the 2014 amendment to Rule 801(d)(1)(B), discussed infra.

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

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

> The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of

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

[3] *See*, Morgan, *supra*, at 194: "Furthermore, it must be remembered that the trier of fact is often permitted to hear these prior statements to impeach or rehabilitate the declarant-witness. In such event, of course, the trier will be told that he must not treat the statement as evidence of the truth of the matter stated. But to what practical effect? * * * Do the judges deceive themselves or do they realize that they are indulging in a pious fraud?"

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

> truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth.

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

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

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

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

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

There are several counter-arguments responding to the concern about manufactured consistent statements. First, you don't need an overbroad hearsay rule to regulate that problem, because litigation-generated extrinsic

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

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

statements can be excluded under Rule 403 as cumulative and unduly prejudicial.[6] Second, the witness can be cross-examined about the context and generation of the consistent statements.[7] Third, this concern about overuse of consistent statements, even if valid, should not lead to a rule that *all* prior statements are hearsay; there is no risk of witnesses manufacturing *inconsistent* statements, for example, and so the concern about generating evidence is localized and should be addressed to prior consistent statements only.

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

C. State Variations

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

> **60-460. Hearsay evidence excluded; exceptions**
>
> Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible except:
>
> (a) *Previous statements of persons present.* A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness. * * *

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

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

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

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

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

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

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

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

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

II. Prior Inconsistent Statements

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

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

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

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

There are problems with the rationales for Congress's tightening of the hearsay exception for prior inconsistent statements. The first Congressional concern --- as to whether the statement was ever made --- is not a hearsay concern. Whether the statement was made (as distinguished from whether it is true) is a question ordinarily

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

addressed by in-court regulators--the in-court witness to the statement testifies and is cross-examined, or other admissible evidence is presented that the statement was or was not made, and this becomes a jury question.[10] Second, the requirements of oath and formality surely do add reliable circumstances, and thus these requirements do respond to a hearsay concern. But as the Advisory Committee noted, the oath "receives much less emphasis than cross-examination as a truth-telling device."

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

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

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

3) raising the possibility that parties will seek to evade the rule by calling witnesses to "impeach" them with prior inconsistent statements, with the hope that the jury will use the statements as proof of the matter asserted --- and thereby raising a problem for the courts in having to determine the motivation of the proponent for calling the witness (motivation that would be irrelevant if the prior statement were substantively admissible);[11] and

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

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

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

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

B. State Variations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> **(1) Prior Inconsistent Statement of Declarant-Witness.** A prior statement by a declarant-witness that is inconsistent with the declarant-witness's testimony and:
>
> (A) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition;
>
> (B) is a writing signed and adopted by the declarant; or
>
> (C) is a verbatim contemporaneous electronic, audiotaped, or videotaped recording of an oral statement.

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

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
>
> (1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
>
> (A) is inconsistent with the declarant's testimony or the declarant denies having made the statement or has forgotten, or * * *

Wyoming applies the Congressional limitation only in criminal cases.

III. Prior Consistent Statements

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

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

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

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

> Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.
>
> * * * The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness — such as the charges of inconsistency or faulty memory.
>
> The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

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

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
* * *
(B) is consistent with the declarant's testimony and is offered:

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

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

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

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

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

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

B. State Variations

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

There are a couple of notable state versions however:

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

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

IV. Prior Statements of Identification

A. History and Current Practice

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

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

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

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

Insofar as prior statements of identification are concerned, the only possibility of amendment that would appear to be on the table would be the broad approach, discussed above, of making *all* prior statements of testifying

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

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

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

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

witnesses substantively admissible. Short of that, it would appear that the existing Rule 801(d)(1)(C) is working well and should be retained.

B. State Variations

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

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

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

V. A Preliminary Attempt at Drafting Alternatives

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

A. Lifting the Hearsay Ban on Prior Statements of Witnesses

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

1. Changing the Hearsay Definition

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Reporter's Notes:

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

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

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

2. A Hearsay Exception for All Prior Witness Statements

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

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

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

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

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

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

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

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

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

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

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

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

* * *

Reporter's Notes:

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

2. Some might object that amending Rule 801(d)(1) would be unsatisfactory because it would continue the pernicious category of "not hearsay" hearsay. That is, if you are going to make it an exception, it is better conceptually to call it an exception to the hearsay rule rather than to call something "not hearsay" when it actually fits the definition of hearsay. In 2010, the Advisory Committee considered a proposal from a law professor to move the Rule 801(d) "not hearsay" categories into real hearsay exceptions. The Advisory Committee rejected the proposal, on the grounds that lawyers and courts have become familiar with "not hearsay" hearsay; that it was a

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

B. Lifting the Congressional Limitation on Prior Inconsistent Statements:

That would be easy rulemaking:

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

* * *

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

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

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

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

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

* * *

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

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

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

* * *

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

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

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

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

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

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

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

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

Reporter's Note

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

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TAB 6A

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FORDHAM

University School of Law

Lincoln Center, 150 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 J. Capra, Reporter
Re: Best Practices Manual for Authentication on Electronic Evidence
Date: March 15, 2015

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

But while the Committee decided not to propose amendments, it unanimously supported a project that would end with the publication of a "best practices" manual on authenticating electronic evidence. The minutes of the meeting describe the Committee's determination as follows:

> Committee members unanimously determined that the Committee could provide significant assistance to courts and litigants in negotiating the difficulties of authenticating electronic evidence, by preparing and publishing a best practices manual ─along the lines of the work done by Greg Joseph in footnoting the support for his draft amendments. A best practices manual could be amended as necessary, avoiding the problem of having to amend rules to keep up with technological changes. It could include copious citations, which a rule could not. And it could be set forth in any number of formats, such as draft rules with comments, or all text with no rule.
>
> The Committee directed the Reporter to prepare a memorandum on how a best practices manual on authentication of electronic evidence might be developed and prepared. The Reporter will provide a sample format on one or more types of electronic evidence. Once the best practices manual is prepared and approved, the Committee will

determine (after consultation with the Standing Committee) on the best way to have it published, whether under the auspices of the Committee or with some other designation.

Since the Fall meeting, we have found out that the FJC has already commissioned a project to publish a "best practices" manual for authenticating electronic evidence. Greg Joseph and Judge Paul Grimm agreed to prepare the manual. I contacted Greg, Judge Grimm, and the FJC and it was unanimously agreed that it would be best for us to join forces. So the goal is to prepare the best practices manual for review by the Evidence Rules Committee and publication by the FJC. How the Evidence Rules Committee's involvement is stated publicly (e.g., authorization, co-authorship, etc.) remains subject to discussion and to ultimate determination by the Standing Committee.

This is a long-term project. The goal is to finish one or two best practices provisions for each Evidence Rules Committee meeting. Each chapter will cover a particular type of electronic communication. There will also be a separate chapter on judicial notice, and an Introduction that will set forth the general standards provided by Evidence Rules 104(a) and (b).[1]

At this meeting, we provide for the Committee's review a draft of the best practices for authenticating email, as well as the freestanding chapter on judicial notice. We invite the Committee's comments and suggestions, particularly its views on whether the format we use is helpful and user-friendly, or whether some other format should be adopted.

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

[1] Judge Grimm has written extensively on the relationship between Rules 104(a) and 104(b) as applied to authentication of electronic evidence. It is anticipated that his existing writing on the subject will provide the backbone for this introduction. Similarly, Greg Joseph has written extensively on authentication and judicial notice of electronic evidence, and we have and will borrow heavily from these writings. There is no need to reinvent the wheel here.

TAB 6B

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EMAIL AUTHENTICATION

I. Relevant Rules

Rule 901(b)(1) – *Testimony of a Witness with Knowledge*
Testimony that an item is what it is claimed to be.

Rule 901(b)(3) – *Comparison by an Expert Witness or the Trier of Fact*
A comparison with an authenticated specimen by an expert witness or the trier of fact.

Rule 901(b)(4) – *Distinctive Characteristics and the Like*
The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

Rule 902(7) – *Trade Inscriptions and the Like*
An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

Rule 902(11) – *Certified Domestic Records of a Regularly Conducted Activity*
The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record – and must make the record and certification available for inspection – so that the party has a fair opportunity to challenge them.

Rule 902(12) – *Certified Foreign Records of a Regularly Conducted Activity*
In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Rule 104(a)-(b) – *Preliminary Questions*
(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

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

Rule 201. Judicial Notice of Adjudicative Facts

* * *

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

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

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

(c) Taking Notice. The court:

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

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

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

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

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

II. Illustrations

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

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

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

Defendant-witness acknowledged that the documents in question contained emails he sent to an undercover agent, the emails were sent from his email address, and the document contained the entirety of his email exchange with the undercover agent. "Because [Defendant-witness] *authenticated the emails* and testified they were complete, he cannot show deficient performance or prejudice based on counsel's failure to object based on *authenticity* and completeness." Id. at 13 (emphasis added).

State v. Womack, 2014 Wash. App. LEXIS 2566 (Wash. Ct. App. Oct. 21, 2014) (interpreting Wash. ER 901[2]).

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

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

Witness's personal knowledge of email contents and her affidavit authenticating emails as the ones she sent sufficient for admissibility. Id. at 12.

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

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

The court, in outlining the variety of manners in which an email could be authenticated, stated that testimony from a witness who purports to have seen the declarant create the email in question was sufficient for authenticity under Rule 901(b)(1). Id. at 999. Because such a witness was unavailable, the court turned to circumstantial evidence under Rule 901(b)(4).

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

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

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

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

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

"Those emails that are not clearly identifiable on their own can be authenticated under Rule 901(b)(3), which states that evidence may be authenticated by the trier of fact with 'specimens which have been authenticated' – in this case those emails that have been independently authenticated . . ." Id. at 40 (internal citations omitted).

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

Applying Rule 901(b)(4) requires consideration of the "totality of circumstantial evidence."[3] While any one factor *may* be insufficient to determine admissibility, when weighed together, authenticity may be established. "This rule is one of the most frequently used to authenticate e-mail and other electronic records."[4] Outlined are factors that can, alone or in conjunction (depending on the case), establish authenticity.

Circumstantial Evidence Authenticating An Email Purportedly Sent by a Particular Person

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

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

An email identified as originating from the defendant's email address and that automatically included the defendant's address when the reply function was selected was considered sufficiently authenticated. Id. at 1322.

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

A chat room log entered into evidence identified one of the participants by the screen name "Cessna." The identification by co-conspirators of the defendant as "Cessna" and the defendant's presence at a meeting arranged with "Cessna" was considered sufficient foundation to admit the chat logs into evidence. Id. at 630-31.

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

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

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

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

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

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

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

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

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

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

Where the email in question included the phrase "Trust me on this one" and emails independently authenticated as from the defendant included the phrase "Trust me on this one," the court found sufficient circumstantial evidence for admissibility[6]. Id. at 18.

Womack, 2014 Wash. App. LEXIS 2566.

A witness called by the state identified the contents of an email as "consistent with [the defendant's] writing style. . . ." The court found the foundational requirements for the email were successfully met. Id. at 50.

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

Pavlovich v. State, 6 N.E.3d 969 (Ind. Ct. App. 2014) (interpreting Ind. R. Evid. 901).[7]

The court held that emails were sufficiently authenticated as written by the defendant where they included detailed knowledge of previous in- person conversations with the victim about family, age, and her escorting business only discussed between the two. Id. at 979.

In the Interest of F.P., 2005 PA Super 220, ¶ 6, 878 A.2d 91.

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

[6] The court determined admissibility under California's authenticity standards.

[7] See also Siddiqui, 235 F.3d 1318, 1322 (messages that referred to facts only the Defendant was familiar with were ruled admissible).

evidence that the he had sent the messages. Id. at 95.

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

Commonwealth v. Amaral, 78 Mass. App. Ct. 671, 674-75, 941 N.E.2d 1143, 1147 (2011) ("In other e-mails, Jeremy provided his telephone number and photograph. When the trooper called that number, the defendant immediately answered his telephone, and the photograph was a picture of the defendant. These actions served to confirm that the author of the e-mails and the defendant were one and the same") (citing Mass. G. Evid. § 901(b)(6))

Cf. United States v. Benford, 2015 U.S. Dist. LEXIS 17046 (W.D. Okla. Feb. 12, 2015) (text message: identifying information in other texts, contact information for brother and girlfriend, together with texts addressed to the alleged owner of phone suffice to tie texts to that person)

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

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

People v. Harris, 2014 Cal. App. Unpub. LEXIS 7086 (Cal. Ct. App. Oct. 1, 2014)[8].

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

State v. Ruiz, 2014 Mich. App. LEXIS 855 (Mich. Ct. App. May 15, 2014) (interpreting MRE 901).

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

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

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

[8] Interpreting the same California authenticity standard as in Randell, 2014 Cal. App. Unpub. LEXIS 4767.

used as a digital equivalent of the Bates stamp used in paper document production."[9]

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

The court explained that "[h]ash values can be inserted into original electronic documents when they are created to provide them with distinctive characteristics that will permit their authentication under Rule 901(b)(4)." Id. at 547.

5) A forensic witness testifies that an email issued from a particular device at a particular time. "Metadata, commonly described as data about data is defined as information describing the history, tracking, or management of an electronic document."[10]

Lorraine, 241 F.R.D. 534:

Since an electronic message's metadata (including an email's metadata) can reveal when, where, and by whom the message was authored, the court found it could be used to successfully authenticate a document under 901(b)(4). Id. at 547-48.

Donati v. State, 215 Md. App. 686, 688 (Md. Ct. Spec. App. 2014), *cert denied*, 438 Md. 143 (2014) ("Circumstantial evidence that has been used to authenticate e-mail messages includes forensic evidence connecting a computer to an internet address for the computer from which the e-mails were sent")

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

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

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

Donati v. State, , supra at 689 (author elsewhere uses same email address, repeats the content, or discusses the contents of the email with a third party)

Meyer v. Callery Conway Mars HV, Inc., 2015 U.S. Dist. LEXIS 937 (W.D. Pa. Jan. 5, 2015) (author discusses the contents of the email with a third party)

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

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

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

AT Engine Controls Ltd. v. Goodrich Pump & Engine Control Sys., Inc., 2014 U.S. Dist. LEXIS 174535 (D. Conn. Dec. 18, 2014) (collecting cases).

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

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

Nola Fine Art, Inc. v. Ducks Unlimited, Inc., 2015 U.S. Dist. LEXIS 17450 (E.D. La. Feb. 12, 2015) ("[Defendant] produced the email to plaintiffs in discovery and therefore cannot seriously dispute the email's authenticity").

Wells v. Xpedx, 2007 U.S. Dist. LEXIS 67000 (M.D. Fla. Sept. 11, 2007) ("Documents produced during discovery are deemed authentic when offered by a party opponent"); Sklar v. Clough, 2007 U.S. Dist. LEXIS 49248 (N.D. Ga. July 6, 2007) ("The e-mails in question were produced by Defendants during the discovery process. Such documents are deemed authentic when offered by a party opponent").

10) An adversary produces in discovery a third party's email received by the producing party in the ordinary course of business and the email is offered against the adversary:
Broadspring, Inc. v. Congoo, LLC, 2014 U.S. Dist. LEXIS 177838 (S.D.N.Y. Dec. 29, 2014)) (third party emails sent to a party in the ordinary course of business and produced by the party in litigation are sufficiently authenticated by the act of production when offered by an opponent, but hearsay and other admissibility objections as to the third parties' statements must separately be satisfied).

Circumstantial Evidence Authenticating An Email Purportedly Received by a Particular Person

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

Womack, 2014 Wash. App. LEXIS 2566.
To determine whether the Defendant received a series of emails the court considered the author's testimony that she had sent the emails in question to the Defendant's email address. Id. at 49-50.

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

Commonwealth v. Amaral, 78 Mass. App. Ct. 671, 674-75, 941 N.E.2d 1143, 1147 (2011) ("The actions of the defendant himself served to authenticate the e-mails. One e-mail indicated that Jeremy would be at a certain place at a certain time and the defendant appeared at that place and time.") (citing Mass. G. Evid. § 901(b)(6))

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

Womack, 2014 Wash. App. LEXIS 2566.
In determining the Defendant's reception of the emails, the court considered, in addition to the author's testimony that she had sent the Defendant the emails, his replies (authenticated using evidence described *supra*) referencing the contents of the received emails. Id. at 49-50.

4) The email was received and accessed on a device in the possession and control of the alleged recipient.

People v. Allen, 2014 Cal. App. Unpub. LEXIS 7776 (Cal. Ct. App. Oct. 29, 2014)[11].

The court found text messages sufficiently authenticated when it was undisputed the phone searched by the police belonged to the Defendant and the text messages in question were received on his cell-phone. Id. at 17-18. The court also considered additional evidence supporting authenticity, including the fact that the Defendant attempted to explain away the contents of the text messages when questioned by officers. Id.

Rule 902(7) – Authentication by Trade Inscriptions

1) The name of a server from which a business email originates, if included in the address, can constitute a self-authenticating trade inscription.

5-901 Weinstein's Federal Evidence § 901.08

"If the computer system uses a trade inscription to identify itself in the place of 'employername' in the e-mail address, the entire message may be self-authenticating under Rule 902(7). Indeed, the 'employername' portion of the e-mail address is usually a trade inscription for purposes of Rule 902(7)." Id. (with regard to emails taking the form *employeename@employername.com*).

Donati v. State, 2014 Md. App. 215 Md. App. 686, 690 (2014) (interpreting Md. Rule 5-902).

When outlining the general practices of authenticating emails, the court stated: "Under Rule 902(7), labels or tags affixed in the course of business require no authentication. Business e-mails often contain information showing the origin of the transmission and identifying the employer-company. The identification marker alone may be sufficient to authenticate an e-mail under Rule 902(7)." Id. at 710 (internal citation omitted).

Rule 902(11) – Certified Documents; Domestic

1) An email meeting the foundational requirements to qualify as a business record under Fed. R. Evid. 803(6) may be self-authenticating under 902(11).

Safavian, 435 F. Supp. 2d 36.[12]

The court in Safavian recognized that emails could be authenticated if they met the foundational requirements of Rule 803(6). The court added, however, that 902(11) could *only* be used as a means to authenticate if the emails in question are being offered under the business records hearsay exception. The government argued at trial

[11] Interpreting the same California authenticity standard as in Randell, 2014 Cal. App. Unpub. LEXIS 4767.

[12] See also Rambus, Inc. v. Infineon Techs. AG, 348 F. Supp. 2d 698, 701 (E.D. Va. 2004) (emails that qualify as business records may be self-authenticating under 902(11)), *rev'd on other grounds*, 523 F.3d 1374; Lorraine, 241 F.R.D. 534 (citing Rambus for the proposition that emails may self-authenticate).

that the emails were admissible under separate hearsay exceptions or, alternatively, for non-hearsay purposes. Id. at 39.

Rule 902(12) – Certified Documents; Foreign

1) Analogous to self-authenticating evidence under 902(11), an email can be admitted if it meets the foundational elements of 902(12).

Indiaweekly.com, LLC v. Nehaflix.com, Inc., 2011 U.S. Dist. LEXIS 60457, (D. Conn. June 6, 2011).

In outlining when an email could be entered into evidence under the business records exception, the court stated the Defendant must establish the foundational predicates "by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11) [or] Rule 902(12) . . . ." Id. at 5 (quoting Fed. R. Evid. 803(6)).

Rule 201 – Judicial Notice of Authenticity[13]

Although unlike the taking of judicial notice with regard to websites in many respects, several courts, both state and federal, have found that judicial notice may be appropriate for certain electronic information found in emails. Included are several considerations a court may make in determining whether to take judicial notice of the creation or content of emails.

1) The nature of the evidence extracted from the email:

a) Where emails include unique time or location stamps, the court may take judicial notice of authenticity.[14]

Ceglia v. Zuckerberg, 2013 U.S. Dist. LEXIS 45500 (W.D.N.Y. Mar. 26, 2013).

The court found emails originating from Zuckerberg's Harvard email address authentic after evidence revealed the email bore a "UTC Time Zone Stamp" consistent with his known residence at the time of the sending. Id. at 142-44. The court was unwilling to take judicial notice of a separate set of emails the Plaintiff proffered as purportedly from the defendant specifically because they had UTC Time Zone Stamps consistent with Daylights Savings Time before Daylights Savings Time began, raising suspicion with regard to authenticity. Id.

b) Where the proponent of an email can establish that the email was one automatically generated by a website, the court can take judicial notice that the purported recipient's email address received the email.

Berry v. Webloyalty.com, Inc., 2011 U.S. Dist. LEXIS 39581 (S.D. Cal. Apr. 11, 2011).

[13] See generally Gregory P. Joseph, *Judicial Notice of Internet Evidence*, U.S. LAW WEEK, Vol. 82, No. 34, 4 (March 11, 2014).

[14] See United States v. Diaz, 2014 U.S. Dist. LEXIS 56572 (D. Nev. April 23, 2014) (finding that the court had the authority to take judicial notice with regards to a website's timestamp or time-zone data).

After the defendant offered signed affidavits explaining that whenever a customer enrolls on the site they are automatically sent a "join email," the court accepted as authentic the email purportedly received by the Plaintiff. Id. at 37-38.

c) The court can take judicial notice of authenticity with regard to the email used for comparison under Fed. R. Evid. 901(b)(3).

Lorraine, 241 F.R.D. 534.

When describing authentication under Fed. R. Evid. 901(b)(3), the court stated that the "specimen used for comparison" by the trier of fact could be "admitted into evidence by judicial notice under 201." Id. at 546.

d) The court can take judicial notice of an email's authenticity if the email is attached or pertains to the contents of the pleadings and there is no party dispute to the email's authenticity.

Rupert v. Bond, 2014 U.S. Dist. LEXIS 134083 (N.D. Cal. Sept. 22, 2014).

The court grantedthe plaintiff's request for judicial notice of an email where the email was referenced in the pleadings and the Defendant's raised no objections to the email's authenticity. Id. at 19.

Moreland v. Ad Optimizers, LLC, 2013 U.S. Dist. LEXIS 50509 (N.D. Cal. Apr. 8, 2013).

The court granted a party's request for judicial notice of an "exemplar email representative of the emails at issue in [the] case" because the email was "referenced generally in the complaint" and there was no dispute to its authenticity. Id. at 5.

2) Whether any party has contested to the taking of judicial notice

a) The right to object to the court's taking of judicial notice in Fed. R. Evid. 201(e) "is of enormous practical importance for three reasons." [15] First, "given that the Internet contains an unlimited supply of information with varying degrees of reliability, permanence, and accessibility, it is especially important for parties to have the opportunity to be heard prior to the taking of judicial notice of websites." Second, absent an objection, the court does not abuse its discretion in taking judicial notice and the issue is not preserved for appellate review. Third, the parties' right to be heard militates against the pre-Rule 201(e) tradition of exercising "extreme caution" before taking judicial notice."[16]

Perkins v. LinkedIn Corp., 2014 U.S. Dist. LEXIS 160381 (N.D. Cal. Nov. 13, 2014).

The court authenticated by judicial notice screenshots of three emails offered by the Plaintiff because the Defendant raised no objections to its authenticity or relevancy. Id. at 29.

[15] Joseph, *supra* at 4.

[16] Joseph, *supra*.

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JUDICIAL NOTICE OF ELECTRONIC EVIDENCE

I. Relevant Rules

Rule 201 – *Judicial Notice of Adjudicative Facts*

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

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

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

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

(c) Taking Notice. The court:

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

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

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

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

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

II. Considerations in Taking Judicial Notice of Electronic Evidence[1]

Nature of the Website

Federal and State Government Websites

1) Because Government websites are self-authenticating under Fed. R. Evid. 902,[2] courts have taken judicial notice of their contents both for the truth and for the fact that the contents were readily available on the website at a certain date or time. Courts' authority includes taking judicial notice of the websites and content of other court's websites.

United States v. Newsome, 2014 U.S. Dist. LEXIS 150659 (S.D. Ohio Oct. 23, 2014).

The defendant objected to a report's reference to a different court's websites. The court overruled the objection, saying "[a] federal district court is permitted to take judicial notice of another court's website." Id. at 3.

United States v. Head, 2013 BL 292022, 2013 U.S. Dist. LEXIS 151805 (E.D. Cal. Oct. 22, 2013).

In a footnote, the court stated "[t]he court may take judicial notice of information posted on government websites as it can be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Id. at 7 n.2 (quoting Fed. R. Evid. 201(b)(2)).

Privately Owned Websites

1) Courts have been hesitant to take judicial notice of privately owned (especially party-owned) websites for their truth "because, in general, the Internet 'contains an unlimited supply of information with varying degrees of reliability, permanence, and accessibility' and 'is an open source' permitting anyone to 'purchas[e] an Internet address and create a website.'"[3]. This general rule has been subject to exceptions given the nature of the website's contents or the purpose for which the information is offered.[4]

Victaulic Co. v. Tieman, 499 F.3d 227 (3d Cir. 2007).

The court outlined two reasons that district courts should hesitate to take judicial notice of facts appearing on a privately owned website. First, the court argued that given the nature of the internet and the fact that anyone could purchase and create a convincing website, without a means of authentication it would be "premature to assume a webpage is owned by a company merely because its trade name appears." Second, " a company's website is a marketing tool. Often, marketing material is full of imprecise puffery that no one should take at face value. . . . Thus courts should be wary of finding judicially noticeable facts amongst all the fluff." Id. at 236.

[1] See generally, Gregory P. Joseph, *Judicial Notice of Internet Evidence*, U.S. LAW WEEK, Vol. 82, No. 34 (March 11, 2014).

[2] Newton v. Holland, 2014 BL 24020, 2014 U.S. Dist. LEXIS 10625, at *2-3 (E.D. Ky. Jan. 29, 2014).

[3] Joseph, *supra* at 7 (internal cites omitted).

[4] See, *infra*, "Nature of the Content" and "Purpose for Which the Content is Offered," respectively.

Judicially Trusted Privately Owned Websites

1) There are some categories of privately owned websites exempted from the general rule described *supra*. These websites, having an indicia or reliability, are the kind "courts turn to repeatedly to take judicial notice."[5] Outlined are examples of categories of websites subject to judicial notice.

   a) Websites providing time, date, location, and weather services

      i) Geography (Google Maps, MapQuest, etc.)

         United States v. Schultz, 537 F. App'x 702 (9th Cir. 2013).
            Using Google Maps, the court took judicial notice of the fact that the two locations in issue were more than five miles apart. Id. at 704 n.1.

         McCormack v. Hiedeman, 694 F.3d 1004 (9th Cir. 2012).
            In determining that the distance between Bannock County, Idaho and Salt Lake City, Utah was approximately 138 miles, the court held that Google Maps was a website whose accuracy could not reasonably be questioned under Fed. R. Evid. 201(b)(2). Id. at 1008 n.1.

      ii) Time and Date

         United States v. Diaz, 2014 U.S. Dist. LEXIS 56572 (D. Nev. April 23, 2014).[6]
            The court approved the government's request to take judicial notice that Las Vegas is in the "PST time-zone" as well as the dates on which Daylight Savings Time began as verified by www.timeanddate.com. The court stated that "the accuracy of the information contained at the www.timeanddate.com website, from which comparisons between UTC and PST can be drawn, is capable of ready verification and its accuracy cannot reasonably be questioned. Judicial notice of [the] requests is appropriate under Rule 201(b)(2)." Id. at 13-14.

      iii) Weather Services

         Diaz, 2014 U.S. Dist. LEXIS 56572.
            Online screenshots from the National Weather Service's National Hurricane Center were judicially noticed. Id. at 12-13.

[5] Joseph, *supra* at 9.

[6] See also Ceglia v. Zuckerberg, 2013 U.S. Dist. LEXIS 45500, 2013 WL 1208558, at 49 (W.D.N.Y. Mar. 26, 2013) (taking judicial notice of time stamp information found on an email and verified by website); Cline v. City of Mansfield, 745 F. Supp. 2d 773, 800 n.23 (N.D. Ohio 2010) (the court took judicial notice that the sun set at 7:47pm on a particular date according to www.timeanddate.com).

b) Websites providing financial data

The same inference of trustworthiness and reliability inherent in Fed. R. Evid. 803(17) (Market Reports and Similar Commercial Publications) leads courts to take judicial notice published on websites.[7]

Freeland v. Iridium World Communs., Ltd., 233 F.R.D. 40 (D.D.C. 2006).

In assessing fraud-on-the-market, the court determined the closing prices of the Defendant's stock on relevant dates. The court cited to http://bigcharts.marketwatch.com, stating that the court could take judicial notice of closing stock prices. Id. at 43 n.3.

c) Internet Archive's Wayback Machine

The Wayback Machine allows users to access archived screenshots of websites as they existed on particular dates and time in an a process described below.[8]

> First, a person logs onto Internet Archive's website located at *www.archive.org*, where the user will see a box in the middle of the homepage bearing the title "Wayback Machine." In the box there is a small input field. The user enters the web address of the desired site into the input field, following the *http://* prompt, and hits the "Take Me Back" button found directly below to initiate a search of the Internet Archive's database. If screenshots matching the user's web address request are available, a list of the dates on which images were taken is displayed on the user's computer screen in vertical columns grouped by year. Clicking on a particular date retrieves the screenshots of the website archived for that specific date. The image appears in the user's web browser just like a live website would appear, however, the user is not viewing a live website. Instead, the user sees the static version of the website that is stored in Internet Archive's database. The Wayback Machine only provides a window into the past where users can see what a website looked like on a specific date.Healthcare Advocates, Inc., 497 F. Supp. 2d at 631. With regards to the Wayback Machine and judicial notice, courts have fallen into two categories: finding no basis for reasonable dispute on accuracy or requiring additional foundation of authenticity.

Wayback Machine – No Additional Foundation Necessary

Tompkins v. 23andMe, Inc., 2014 U.S. Dist. LEXIS 88068 (N.D. Cal. June 25, 2014).

In a class action lawsuit brought against the 23andMe, Inc., the court took judicial notice of the Internet Archive screenshot of the defendant's Nov. 2013 website. Id. at 7-8 n.1.

Martins v. 3PD, Inc., 2013 U.S. Dist. LEXIS 45753 (D. Mass. Mar. 28, 2013).

When taking judicial notice of several previous versions of the defendant's website, the court stated that screenshots available on the Internet Archive's Wayback Machine were "facts readily determinable by resort to a source whose accuracy cannot reasonably be questioned." Id. at 47 n.8.

[7] Joseph, *supra* at 10.

[8] Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey, 497 F. Supp. 2d 627, 631 (E.D. Pa. 2007).

Wayback Machine – Additional Foundation for Authenticity Required

Open Text S.A. v. Box, Inc., 2015 U.S. Dist. LEXIS 11312 (N.D. Cal. Jan. 30, 2015).

The court was unwilling to accept a screenshot from the Wayback Machine into evidence without a declaration from a representative of the Internet Archive confirming its authenticity.

Specht v. Google, Inc., 747 F.3d 929 (7th Cir. 2014).

The court affirmed the district court's exclusion of screenshots from the Wayback Machine. The court agreed with the district judge's conclusion that without an affidavit describing the reliability of the Internet Archive and its Wayback Machine, the screenshots were not properly authenticated. Id. at 932.

Nature of the Content

Regulated Content

1) Websites with content subject to regulations contain information susceptible to judicial notice, even if the website belongs to a private party. This information may include licensing information or prescription and food product usage, instructions, and directions.

Snyder v. Cindy Law, P.A., 2010 U.S. Dist. LEXIS 139539 (N.D.N.Y Dec. 21, 2010).

Because uses and directions for prescription medication listed on manufacturers' websites are subject to FDA regulation, the court took judicial notice of facts describing Clozaril® as a medication for the treatment of schizophrenia.

Reputation

1) Courts have been comfortable taking judicial notice of facts appearing on websites when the owner of the website has a strong motivation to provide accurate information.

Joseph, *supra*.

"[A] retail or other commercial entity will be highly motivated to ensure the accuracy of information about its retail locations or web payment processing (which may be relevant to jurisdictional, venue or other issues)" Id. at 8.

Elec. Arts, Inc. v. Textron Inc., 2012 BL 187763, 2012 U.S. Dist. LEXIS 103914 (N.D. Cal. July 25, 2012).

The court took judicial notice of the packaging displayed on the Plaintiff's website because, it reasoned, the Plaintiff had a strong motivation to display the actual packaging of its game on its website to ensure sales. Id. at 6-7.

Purpose for Which the Content is Offered

Demonstrating the Capabilities of a Website

1) "[T]he capability of a party's website itself may have legal significance" in determining its contacts for personal jurisdiction in states where the level of contacts is difficult to determine or otherwise non-existent.[9]

W. Marine, Inc. v. Watercraft Superstore, Inc., 2012 U.S. Dist. LEXIS 18973 (N.D. Cal. Feb. 14, 2012).

The court took judicial notice of the characteristics of the defendant's website including how customers shop, ensure deliveries, and input payment information in determining whether there were sufficient purposeful contacts for personal jurisdiction over the defendant. Id. at 28.

Proving the Existence of Statements, Images, or Brands

1) While courts have hesitated to take judicial notice of statements and websites for the truth (because of the hearsay rule), courts have been willing to judicially notice the existence of statements, images, and brands to establish notice, knowledge, or when bearing independent legal significance.[10]

Flexiteek Ams., Inc. v. Plasteak, Inc., 2013 U.S. Dist. LEXIS 169591 (S.D. Fla. Dec. 2, 2013).

The court took judicial notice of the contents of the defendant's website not for its truth, but rather because it *incorrectly* displayed patent information significant to the unfair trade practices claims alleged. Id. at 2.

JTH Tax, Inc. v. Grabert, 2013 U.S. Dist. LEXIS 181800 (E.D. Va. Dec. 30, 2013).

In a suit for defamation, the court took judicial notice of the *existence* of the purportedly defamatory statements made by the Defendant on several websites. Id. at 20.

Objections to Judicial Notice

1) The right to object to the court's taking of judicial notice in Fed. R. Evid. 201(e) "is of enormous practical importance for three reasons."[11] First, "given that the Internet contains an unlimited supply of information with varying degrees of reliability, permanence, and accessibility, it is especially important for parties to have the opportunity to be heard prior to the taking of judicial notice of websites." Second, absent an objection, the court does not abuse its discretion in taking judicial notice and the issue is not preserved for appellate review. Third, the parties' right to be heard militates against the pre-Rule 201(e) tradition of exercising "extreme caution" before taking judicial notice."[12]

Pickett v. Sheridan Health Care Ctr., 664 F.3d 632 (7th Cir. 2011).

[9] Joseph, *supra* at 9.

[10] Joseph, *supra* at 9-10.

[11] Joseph, *supra* at 4.

[12] Joseph, *supra*.

Reviewing the grant for judicial notice of a website at the district court level, the reviewing court cautioned "given that the Internet contains an unlimited supply of information with varying degrees of reliability, permanence, and accessibility, it is especially important for parties to have the opportunity to be heard prior to the taking of judicial notice of websites." Id. at 637.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Research Regarding the Recent Perception (e-Hearsay) Exception
Date: March 25, 2015

At its last meeting, the Evidence Rules Committee decided not to proceed with an amendment that would add a "recent perceptions" exception to Rule 804. The genesis of the proposal was an article by Professor Jeffery Bellin, who argued that such an exception was necessary to allow admission of reliable electronic communications --- particularly texts and tweets – that would not be admissible under the traditional hearsay exceptions. The Committee was concerned that the exception would be too broad, allowing admission of texts and tweets based more on crowd-sourcing than personal knowledge. And it also concluded that there was no indication that any problem existed that needed to be addressed --- any showing that reliable texts and tweets are being excluded had not yet been sufficiently made.

The Committee did, however, resolve to monitor developments of case law on hearsay objections to texts, tweets, and other social media communication. The minutes of the last meeting describe the Committee's determination:

> Ultimately, the Committee decided not to proceed on Professor Bellin's proposal to add a recent perceptions exception to Rule 804. It did not reject a possible reconsideration of a recent perceptions exception, however. The Committee asked the Reporter and Professor Broun to monitor both federal and state case law to see how personal electronic communications are being treated in the courts. Are there reliable statements being excluded? Are such statements being admitted but only through misinterpretation of existing exceptions, or overuse of the residual exception?

This memo responds to the Committee's direction in two ways. First, attached to this memo is a report from Professor Dan Blinka of Marquette Law School on the Wisconsin exception for recent perception. Wisconsin is one of the few states that has adopted the recent perceptions exception. At the Reporter's request, Professor Blinka has conducted significant legal and empirical research into the operation of the recent perceptions exception in Wisconsin. Hopefully this can give the Committee some perspective on how the exception would operate if it were added to the Federal Rules of Evidence. I am extremely grateful to Professor Blinka for the excellent work he has done for the benefit of the Committee.

Second, attached after Professor Blinka's memo is an outline describing recent cases in which texts and tweets have been offered for truth in federal courts. The goal of the memo is to determine two things: 1) whether electronic communications that appear to be reliable are being excluded because they don't fit into existing exceptions; and 2) whether such communications are being admitted as reliable, but only by misapplying existing exceptions (e.g., finding the declarant excited when she was not, overusing the residual exception, etc.).

19 March 2015

To: Professor Daniel J. Capra, Reporter to the Judicial Conference Advisory Committee on the Federal Rules of Evidence

From: Professor Daniel D. Blinka[1]

Re: **Wisconsin's Experience with the Hearsay Exception for Statements of Recent Perception**

Introduction

This memorandum focuses, as requested, on Wisconsin's experience using the statement of recent perception exception (the "SRP"), Wis. Stat. § 908.045(2), especially as relates to eHearsay.[2] It is informed by the scholarship of Professor Daniel J. Capra and Professor Jeffrey Bellin,[3] but its goal is explicating how Wisconsin courts have applied the SRP since its inception in the mid-1970s. Thus it refrains from speculating how Wisconsin case law relates to other proposed rules.

The memorandum is primarily shaped by the dozen or so Wisconsin appellate cases construing the SRP[4], yet it is also influenced by numerous conversation with judges and an informal survey of over a hundred judges in November 2014 (see below). Where appropriate, I have suggested how current doctrine might be applied to eHearsay. As requested, however, the focus is on the SRP; no attempt has been made to systematically assess eHearsay across the evidentiary spectrum.

Wisconsin presents an ideal Petri dish for evaluating the SRP's effectiveness generally and with respect to eHearsay. The SRP has been applied to all manner of statements, oral, written, and even electronic. Nor is there any reason to think that Wisconsin's experience is somehow unique or does not reflect broader national currents.

In sum, the SRP rule appears to work reasonably well, regardless of the form taken by the hearsay. There is no impediment that unduly limits, much less blocks, its use for eHearsay. As suggested below, it may be that eHearsay presents fewer hearsay risks than oral statements in some circumstances. Specifically, eHearsay may (should) provoke the rethinking of Wisconsin case law that bars the use of the SRP to prove what someone else said (or as the courts put it, the "aural perception of an oral statement privately told to a person"[5]). Although the current version of the SRP is prolix, somewhat over-engineered, and in need of revision, the rule works tolerably

[1] Professor of Law, Marquette University Law School. J.D., PhD, University of Wisconsin.
[2] For consistency, this memorandum adopts the broad definition of "eHearsay" as "social networking, texts, and other forms of instantaneously transmitted electronic communication." Daniel J. Capra, *Memorandum: Hearsay Exception for Electronic Communications of Recent Perception,* 83 FORDHAM L. REV. 1337, 1338 n. 5 (2014).
[3] See Capra, *Recent Perception, supra*. *See also* Jeffrey Bellin, *eHearsay*, 98 MINN. L. REV. 7 (2013); *The Case for eHearsay*, 83 FORDHAM L. REV. 1317 (2014).
[4] I considered the unpublished cases as well as published cases to assure a more accurate picture of how the courts are construing the SRP.
[5] *See* Element 2, below, discussing *State v. Stevens*, infra.

well. The larger hurdle is educating and persuading trial lawyers how to use the current hearsay rules, including the SRP, when proffering eHearsay.

Background: The SRP and the Surging Use of eHearsay Generally

Wisconsin adopted the SRP, § 908.045(2), along with nearly all of the then proposed Federal Rules of Evidence in 1974. The SRP represented a "major change" in Wisconsin law, according to an analysis by the Wisconsin Judicial Council.[6] Wisconsin was one of a small group of states that adopted the proposed Federal Rules of Evidence before Congress completed its review.[7] Thus, no consideration was given to Congress's eventual rejection of the SRP or its reasons for doing so. Nonetheless, the courts have been reasonably vigilant in policing the rule and mindful that its broad language may be readily abused.[8] There has been no call to revisit or repeal the SRP since its adoption.

The SRP has not suffered from overuse, but neither has it been ignored. Since 1974 there have been only about a dozen opinions by the Wisconsin Court of Appeals and the Wisconsin Supreme Court addressing the rule. Only one case (unpublished) concerned eHearsay (a text).

Appellate opinions, however, are a poor measure of what occurs at trials generally. To get a better sense of how the SRP has fared in the trial courts, I conducted a crude, informal survey of Wisconsin judges at a November 2014 judicial conference.[9] There was no time to prepare a rigorous formal survey that yielded quantitative data; the questions (below) are broadly phrased, designed to get more at trends regarding not just the SRP but also eHearsay generally. Most of the judges kindly participated.[10] Below are the questions asked and a tally of the written responses provided. Again, there was no pretense of conducting a rigorous survey yielding statistically significant outcomes. The questions were as follows:

> 1. Do you recall this hearsay exception [the SRP] being raised at trial, civil or criminal, for any kind of evidence? If so, about how many times?
>
> > 23 judges: e.g., "frequently"; "dozen-plus"; over 4
> > 61 judges: e.g., a "few times"; "not many"; “3 or 4”; "rare"
> > 59 judges: no recollection or not at all
> > 2 judges: N/A (no answer)

[6] Wis. Stat. § 908.045(2), Judicial Council Committee’s Note (1974). 59 Wis.2d at R314 (1974).
[7] Wisconsin has not adopted the 2011 stylistic revisions to the Federal Rules of Evidence, nor has it shown much of any effort to ensure that its state evidence rules reflect the current federal rules generally. For example, Wisconsin chose not to adopt FED. R. EVID. 413 to 415.
[8] *See State v. Weed*, 2003 WI 85, 263 Wis.2d 434, 666 N.W.2d 485 (affirming a homicide conviction). Pointing to Congress’s criticism of the proposed federal rule, Justice Bradley concurred but criticized the majority for “unwisely broaden[ing] the exception” in a way that “essentially blows it wide open.” *Id*. at ¶¶66-67, citing Daniel D. Blinka, *Wisconsin Evidence 2d*, § 8045.2 at 711. *Weed* involved the “recent perception” element and is discussed *infra*.
[9] The audience was mostly trial judges, but appellate judges were also present and participated. Although crude, the survey provided more information than anecdotes, yet it captures only the memories of current and some recently retired judges.
[10] Regrettably, my presentation concerned other evidentiary issues so I could not devote much time to the survey other than to introduce it, explain its purpose, and implore judges to participate. Nearly all judges participated and many offered comments as well.

2. If invoked by counsel, was the [SRP] rule raised in relation to electronic communications (e.g., texts, emails, Facebook, Twitter)?

17 judges: yes, especially email but also Facebook and texts
72 judges: no
54 N/A (based on question 1)

3. In general, have you noticed an increased use of electronic communications (emails, etc.) at trials, civil or criminal?

125 judges: yes, especially email and Facebook ("prevalent")
11 judges: no
5 judges: N/A

4. Do you think that the SRP rule should be revised or parts eliminated, especially in relation to electronic communications? In what way?

7 judges: yes
33 judges: unsure or open to revision
71 judges: no changes needed
1 judge: "eliminate" the SRP
12 judges: N/A

The results are revealing. First, while the SRP may not be invoked with the frequency of the party admissions rules or prior inconsistent statements, it was used more often than suggested by the dozen or so appellate cases over forty years (or, for that matter, my own solitary musings).

Second, a heaping handful of judges (17) reported its use for eHearsay. And while we do not know whether the evidence was excluded or admitted, it confirms that the SRP is used for eHearsay. A significant number of judges (5) offered that authentication was more a problem with eHearsay than the hearsay rules themselves. A more refined, statistically valid survey might reveal more about the problems and potential of SRP and other rules in dealing with eHearsay.

Third, an overwhelming majority of judges report an increased use of eHearsay in all manner of cases. Comments by judges mentioned commercial litigation (emails especially) but also family law cases and domestic violence actions where texts and Facebook postings are commonly encountered. Only two judges suggested that special rules are needed for texts and emails. Other suggestions by judges are mentioned below relative to pertinent elements of the SRP.

Fourth, the judges confirmed their general satisfaction with the SRP. They saw no reason to eliminate the rule or to substantively revise it.

The Statement of Recent Perception in Wisconsin Law: Element-by-Element

The Wisconsin SRP provides as follows:

908.045 Hearsay exceptions; declarant unavailable. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

(2) STATEMENT OF RECENT PERCEPTION. A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear.

The discussion below assesses each element of the SRP as construed by Wisconsin law. It slightly shuffles the order of elements (e.g., no. 6 below) in the interest of clarity. Comments about eHearsay are incorporated where helpful.

The declarant's unavailability; the forgetful witness/declarant

The SRP, like all other exceptions under § 908.045, requires a showing that the declarant is unavailable to testify. In several cases, the proponent failed to meet this standard, although nothing in the case law suggests that the SRP creates any unique problems in establishing the declarant's unavailability.[11]

The cases illustrate the variety of unavailability. In some cases the declarant was dead.[12] In others the declarant asserted a privilege, such as the privilege against self-incrimination, rendering his testimony unavailable.[13]

More interesting are cases involving "forgetful" declarants. In one the declarant suffered a head injury triggering serious neurological and cognitive impairment. During a lucid moment, he (allegedly) told his wife and daughter about his fall from a ladder; this statement formed the bases for the eventual lawsuit. The daughter later testified that she immediately asked him about the statement but he no longer recalled it. By the time of trial, he had slid into a persistent vegetative state which rendered him physically as well as cognitively unavailable to testify. The wife and daughter testified about his statement, which the court admitted as a SRP.[14]

And most intriguing is case law applying the SRP where the declarant appears in court and testifies that he does not remember the statement. In an early case (late 1970s) the declarant testified at trial that he observed a certain license plate, wrote it down on a newspaper, and communicated it to his friend during a telephone call the next day. At trial, however, he no longer recalled the number and had long ago discarded the newspaper. The court held that the declarant was unavailable based on his lack of recollection and admitted his oral statement to his friend as a SRP.[15]

When a forgetful declarant testifies at trial other evidence rules are implicated. First, in criminal cases the declarant's availability for cross-examination satisfies the confrontation right regardless of the unavailability of the declarant's memory. Second, other hearsay rules are

[11] *State v. Akins*, 2014 WI App 83 (unpublished), 355 Wis.2d 578, 851 N.W.2d 471 (declarant available; hence, the SRP was inapplicable).
[12] *E.g.*, *State v. Weed*, 2003 WI 85, 263 Wis.2d 434, 666 N.W.2d 485 (homicide victim).
[13] *E.g.*, *State v. Manuel*, 2005 WI 75, ¶13, 281 Wis.2d 554, 697 N.W.2d 811 (declarant asserted the Fifth Amendment right); *State v. Potts*, 2013 WI App 73 (unpublished), n. 3, 348 Wis.2d 263, 831 N.W.2d 824 (stipulated that a declarant was not available because he would have claimed his right against self-incrimination).
[14] *Kluever v. Evang. Reformed Immanuels Cong.*, 143 Wis.2d 806, 422 N.W.2d 874 (Ct. App. 1988).
[15] *State v. Kreuser*, 91 Wis.2d 242, 280 N.W.2d 270 (1979).

implicated. Anecdotally, some judges have had instances where the proponent successfully offers a forgetful witness's eHearsay as a prior inconsistent statement under Wis. Stat. § 908.01. Note also that the Wisconsin rule follows the "original recipe" of the Federal Rules of Evidence here too, meaning that the prior (inconsistent) statement is admissible not only for testing credibility but also to prove the truth of the matter asserted. Trial judges reported no special problems using the prior statement for its truth, especially as the witness/declarant is subject to cross-examination and impeachment. Offering such statements as prior inconsistent statements avoids altogether the complexities of the SRP foundation, as described below.[16]

Element 1. *"A Statement"*

The term "statement" in the SRP has not been an issue in the cases. Nearly all involve oral statements by a declarant to others ("communications"), but nothing restricts the reach of statements to oral expressions. In one older case the declarant saw a suspicious license plate that he wrote down on a newspaper. The next day he called his friend, the owner of the stolen car, and related the plate number.[17] Here we have two statements, one written on a newspaper and the other orally communicated during the call.

One case addressed the SRP with respect to a species of eHearsay, namely, a text message that purportedly identified the shooter in a murder case.[18] The court held that the text message was properly excluded: (1) the proponent (the defendant) offered the text message not for its truth but for another purpose ("poor police work") that the court found irrelevant and (2) the declarant was available to testify.[19] There was no indication that text messages as such are not "statements" falling within the SRP.

In the informal survey, most judges (71) saw no need to revise the SRP rule to embrace electronic statements. A number (14) explicitly commented that "statement" included electronic communications. Yet some thought it might be useful to clarify that eHearsay is included. One judge suggested revising the SRP rule to read in part:

> A statement, oral or written, conveyed personally or in any other form, including electronically, . . .

In sum, neither the survey nor my discussions with judges suggests a reluctance to apply the SRP, or other hearsay exceptions, to eHearsay, provided the proper foundation was provided. That said, it might assist counsel and the courts if the rules were revised to embrace explicitly electronic communications in much the same way that records of regularly conducted activities

[16] Since this memorandum focuses on the SRP, I (mostly) resisted the temptation to launch into a more extended discussion of forgetful witnesses, prior inconsistent statements, and the many virtues of the Wisconsin approach that allows any inconsistent statement to be used to prove its truth, regardless of whether it was made under oath, etc., as required by FED. R. EVID. 801(d)(1)(A). The Wisconsin rule adopted the original draft of the federal rule; its use has created no significant problems and obviates the need for a decidedly unhelpful limiting instruction that distinguishes a permissible use (credibility) from an impermissible one ("substantive" use).

[17] *State v. Kreuser*, 91 Wis.2d 242, 280 N.W.2d 270 (1979).

[18] *State v. Akins*, 2014 WI App 83 (unpublished), 355 Wis.2d 578, 851 N.W.2d 471.

[19] *Akins*, at ¶¶23-24. The text message named the defendant's cousin as the shooter; the defendant explicitly disavowed using the text to show that his cousin was the killer.

broadly include records "in any form."[20] This may be as simple as adding “electronic” language to the definition of “statement” in Rule 801(a).

Element 2. *"which narrates, describes, or explains an event or condition"*

The SRP requires that statements, in whatever form, must narrate, describe, or explain an event or condition. In hearsay doctrine, this element addresses concerns about the declarant's narrative accuracy. The cases have struggled to explain the terms “event” and “condition.” Most important, especially as relates to eHearsay, is case law holding that the SRP does not extend to “the aural perception of an oral statement privately told to a person” (e.g., Witness A testifies she heard B say that C said . . .), as explained below.

The "narrate, describe, or explain" language has engendered no problems.[21] In *State v. Kreuser*, to repeat, the declarant called his friend and read the license plate number he had observed and written on a newspaper the day before. At trial he could no longer recall the number, but others testified to what he had said.[22] In other cases declarants have described falls from ladders, unloading firearms, an arson in progress, and an abusive husband’s conduct.[23]

More uneven has been the construction of the terms "event" or "condition." In *Kreuser* there were arguably two qualifying events: (1) the observation of a license plate on the stolen vehicle, which the declarant then wrote on the newspapers; and (2) the declarant's act of calling his friend and relating the plate number the next day – since the caller read it from the newspaper, this was a separate hearsay layer. The *Kreuser* court did not distinguish between the two.

In today’s world, the declarant spotting the stolen vehicle would have likely texted his friend at the first opportunity (after pulling safely to the side of the road, of course). This eHearsay would have been more compelling proof than *Kreuser*’s convoluted trail – (1) friend sees stolen vehicle and writes down the license plate; (2) the next day he calls the owner and reads his note; (3) the owner calls the police and relates the number; (4) the police officer records that number in his report and later testifies to it a trial (neither the friend nor the owner could recall the stolen license number at trial).[24]

In other cases, however, the courts have more closely scrutinized the “event” or “condition,” although the result is not always enlightening. In *Tim Torres Enterprises v. Linscott*,[25] a commercial defamation case, a witness testified that a business associate, Gilles,

[20] Wis. Stat. § 908.03(6).
[21] *E.g., State v. Weed*, 2003 WI 85, 263 Wis.2d 434, 666 N.W.2d 485 (statement by murder victim about having unloaded a .357 handgun because of his concerns about the defendant's mental and emotional stability; she killed him with the gun three days later).
[22] *State v. Kreuser*, 91 Wis.2d 242, 280 N.W.2d 270 (1979) (the car’s owner testified that after receiving the call, he related the license number to police, who recorded it in their report; the same plate was found on the stolen car; the caller had discarded the newspaper).
[23] In order of description, the cases are *Kluever v. Evang. Reformed Immanuels Cong*., 143 Wis.2d 806, 422 N.W.2d 874 (Ct. App. 1988); *State v. Weed*, supra,; *State v. Ballos*, 230 Wis.2d 495, 602 N.W.2d 117 (1999); and *State v. Kutz*, 2003 WI App 205, 267 Wis.2d 531, 671 N.W.2d 660.
[24] While relying on the SRP rule, the *Kreuser* court also cited case law addressing multi-declarant past recollection recorded.
[25] *Tim Torres Enterprises v. Linscott*, 142 Wis.2d 56, 416 N.W.2d 670 (Ct. App. 1987).

told him that "Bob Linscott was very unhappy . . . and I could expect something to happen."[26] The court held that it was error to have admitted Gilles' statement (about Linscott's unhappiness) under the SRP. The statement concerned Linscott's "state of mind" regarding the contractual dispute. Without explication, the court essentially held that this was not a "condition" under the SRP. Unclear is what constitutes a permissible condition, especially as the court "perhaps conced[ed]" that "how a person is 'upset' or 'unhappy' is the equivalent to explaining a condition[.]"[27] Later cases have not clarified this point. As suggested in the next section, the real problem may have been the uncertainty over why Gilles thought Linscott was unhappy – was it something Linscott said? His conduct?

The term "event" is narrowly construed to eliminate oral statements from its reach, which effectively precludes the SRP from conveying hearsay-within-hearsay. *State v. Stevens* [28] concerned a conversation between two young teenaged girls as they walked to school. Melissa told her friend that the night before Stevens, her stepfather, had admitted to a burglary and theft of stereo equipment. (Melissa was found dead several months later.) The trial court excluded Melissa's statement under the SRP because an event is "'something that happens'" and that "'someone making a statement to another person' [the stepfather confessing to his stepdaughter] would not qualify."[29] In short, the friend could not relate what the deceased Melissa had said about the defendant's admission. The court of appeals agreed. Without citation to authority, the court held:

> We concluded that *this exception [the SRP] does not apply to the aural perception of an oral statement privately told to a person.* Corroboration is the key to reliability of a statement coming under this exception. . . . [T]his is not like the present sense impression rule in § 908.03(1), Stats., or the excited utterance rule in § 908.03(2). There, the guarantees of reliability is immediacy. For a statement of recent perception, the declarant is not available. *Reliability depends on the possibility of corroborating the declarant's statement*.[30]

The SRP rule on its face, however, carries no corroboration requirement. Nor did the *Stevens* court flesh out the distinction between corroboration and the "possibility of corroborating" the statement. Later cases, however, have pulled back on any corroboration requirement without explicitly overruling *Stevens*. Essentially, the "possibility of corroboration" refers to whether a "private statement" was "recently perceived."[31]

Whatever the vagaries surrounding corroboration, the cases have consistently held that an event cannot be the "aural perception of an oral statement privately made to a person."[32] Yet the rationale is underdeveloped. The trial judge in *Stevens* said that an event is "something that happens," yet an oral statement overheard by a witness is surely "something" too. Moreover, the

[26] *Tim Torres*, supra, 416 N.W. 2d at 678.
[27] *Id*.
[28] *State v. Stevens*, 171 Wis.2d 106, 490 N.W.2d 753 (Ct. App. 1992).
[29] *State v. Stevens*, 490 N.W.2d at 759. *See State v. Weed*, supra, at ¶ 18 (the event was "taking the bullets out of the .357" handgun).
[30] *State v. Stevens*, supra, 490 N.W.2d at 759-60 (emphasis added).
[31] *State v. Kutz*, 2003 WI App 205, ¶54, 267 Wis.2d 531, 671 N.W.2d 660.
[32] *Kutz*, at ¶63 (*Stevens* precluded the victim's statements about the defendant's prior threats under the SRP).

Stevens gloss emphasizes oral statements that are "privately made to a person"[33]; does this mean that the gloss is inapplicable where there are multiple witnesses to an oral statement?

Although the case law has not offered a refined rationale, it would seem that the *Stevens* gloss is best justified by hearsay policy and limited confidence in the SRP, especially when both hearsay layers are oral statements. Assume a witness (A) testifies that "B told me that C said . . . "; the proponent's prime objective is to prove the facts related by C.[34] Here, B's role is that of a hearsay conduit for C's statement. Our concern is whether the *witness* is accurately relating what B said that C said. The possibility of mistransmission along the line is obvious; oral statements are famously difficult to recall with complete accuracy, let alone an oral statement relating yet another oral statement. Did the witness misperceive or misremember B's statement? And did B misperceive or misremember (or lie about) what C said? In sum, where the witness is relating two layers of oral statements, the cases refuse to use the SRP to prove the first layer (B's statement) even where the second layer is admissible under another hearsay exception (e.g., statements by a party opponent).[35]

eHearsay, however, has clear advantages over two layers of oral statements. For example, assume Melissa had texted her young friend, "OMG, my stepdad told me he burglarized a house on my paper route; the stuff he stole is in our house right now!" Applying *Stevens*, Melissa's text is a "privately made" communication but one that is recorded and not subject to the vagaries of memory. In short, once Melissa's text is authenticated, the court can read for itself what Melissa wrote about Stevens' confession. Melissa's eHearsay is not subject to the distortions and ambiguities of her (actual) oral statement. Indeed, it is better than having four other witnesses to Melissa's *oral* statement. Thus, Melissa's text should be admitted under the SRP and her stepfather's confession as a party admission. There is tenuous support in the case law for limiting the *Stevens*' gloss to multiple oral statements.[36]

Element 3. *"recently perceived by the declarant"*

The SRP requires a showing that the event or condition was one "recently perceived by the declarant." This element guarantees the declarant's personal knowledge of the event while also imposing a hazy, flexible time limit between the event and the statement that turns on the circumstances. Thus, it helps to assure the accuracy of the declarant's perceptions and memory when making the statement. A key feature of the SRP cases is that they explicitly permit "more time" than allowed by other exceptions, yet the courts also heed the SRP's other limitations (e.g., clear recollection, good faith, not in response to pending investigations). The declarant's unavailability to testify both fuels the need for the hearsay and confines the court to circumstantial evidence in evaluating the SRP's elements.

[33] In *Stevens* only the declarant's young friend heard the statement as they walked to school.
[34] This is the *Stevens* case. The witness testified that Melissa said that her father had told Melissa that he had committed the burglary.
[35] In *Stevens*, the deceased declarant related her father's confession to burglary. The father's statement constituted an admission by a party opponent. Longstanding doctrine also holds that admissions are not subject to any requirement that the declarant have personal knowledge. See 2 MCCORMICK ON EVIDENCE § 255 (Kenneth S. Broun ed., 7th ed. 2013).
[36] In *Kreuser*, the first declarant read the license number from the newspaper on which he wrote it a day earlier. *Kreuser*, however, antedates *Stevens* and the point was not discussed by the *Kreuser* court or argued by the parties.

"More time," though, does not mean carte blanche. An inability to provide any clues about the duration between the statement and the event is fatal.[37] Even in a case involving only a one-day gap between the observed event and the statement, the court discussed the valid reason for the "delay."[38]

Underscoring the SRP's flexibility, Wisconsin courts have insisted that the "mere passage of time, while important in a determination of whether the event was recently perceived, is not controlling here."[39] In *Kluever v. Evangelical Reform Immanuels Cong.*,[40] a volunteer painter at a church was found unconscious on the floor near a stepladder owned by the church. He was hospitalized with serious brain injuries, suffering from "deficits in orientation, attention span and memory" as well as aphasia, dysphasia and an inability to interpret verbal communications. Expert testimony, however, also established that the man experienced "islets of memory." Eight to ten weeks later, while in the hospital, the man spontaneously told his wife and daughter the he had fallen from the ladder. When "immediately questioned" by his daughter, the man said he had no memory of the statement.[41]

The *Kluever* court upheld the admissibility of the statement as a SRP despite the eight to ten week lapse and the declarant's cognitive "deficits." In contrast with the present sense impression and excited utterance exceptions, the SRP "was intended to allow *more time* between the observation of the event and the statement."[42] Moreover, the SRP's purpose is to provide some evidence of a claim where other proof is lacking:

> The exception's purpose . . . is to admit probative evidence which in most cases could not be admitted under other exceptions due to the passage of time . . . on the ground that no evidence might otherwise be available. As such, the exception deals with the problem: "how can a litigant establish his claim or defense if the only witness with knowledge of what occurred is unavailable?"
>
> That is exactly the situation we have here. Absent Kluever's statement, there would be no witness with first-hand knowledge of how the fall occurred. The trial court, after applying the trustworthiness tests embodied in sec. 908.045(2), Stats., determined that Kluever's statement was probative evidence admissible as a recent perception.[43]

Need for the proof, however, does not trump the "recently perceived" element. Expert testimony showed that the man experienced "islets of memory" as well as an "amorphous" concept of time; thus, "the fall was 'recently perceived' in Kluever's [the injured man] mind."[44] Yet what are the limits of this holding? Nearly any articulated memory or belief is "recently perceived" in the

[37] *Tim Torres*, 416 N.W.2d at 678-79 (a witness admitted that he had no idea when the declarant, Gilles, spoke with Linscott, whose "unhappiness" was the subject of Gilles' statement).
[38] *State v. Kreuser*, 91 Wis.2d 242, 280 N.W.2d 270, 273 (1979) (in an age before cellphones and Internet, the declarant had to get his friend's phone number from work before he could make the call the next day).
[39] *Kluever v. Evang. Reformed Immanuels Cong.*, 143 Wis.2d 806, 422 N.W.2d 874, 877 (Ct. App. 1988).
[40] *Id.*
[41] *Kluever*, supra, 422 N.W.2d at 876.
[42] *Kluever*, supra, 422 N.W.2d at 877 (the court elsewhere observed that the SRP's "intention" was to "expand the allowable amount of time between perception and the making of the statement.") (emphasis added).
[43] *Kluever*, supra, 422 N.W.2d at 877 (citations omitted).
[44] *Id.*

declarant's mind. Surely, the SRP would not permit any statement prefaced with the phrase, "I remember it like it was just yesterday . . ."

Despite its shortcomings, the "more time" holding is baked into state law. *Kluever* has not been narrowly read as an extraordinary case involving a brain-damaged declarant who experienced "islets of memory" as supported by expert testimony. In a later case, *State v. Weed*, the Wisconsin Supreme Court, relying on *Kluever*'s "more time" latitude, upheld the admissibility of a statement made "within, at most, eight days" of the event described. Yet the court also underscored that the declarant's recollection was clear and the statement was not prompted by a pending investigation or litigation.[45]

There is no reason to think that eHearsay would present proof issues more complex than those involving oral statements. Indeed the great virtue of a recorded statement is that we do not have to rely on the witness's elusive memory of what someone else said. It is no difficult thing to reimagine many of these cases as involving a text message, Facebook posting, or email rather than an oral statement.

In sum, the SRP cases contemplate delays of days, weeks, or even a month or more between the event and statement. The case law suggests no inordinate problems with this "fuzzy" limitation and the trial judges report no real abuses. At bottom it seems no more problematic than determining the declarant's "stress of excitement" under Rule 803(2) or the much tighter time limits imposed by the present sense impression, Rule 803(1). Put differently, the phrase "more time" has not become a talisman that guarantees admissibility. Nor should this element be viewed in isolation. In eschewing a hearsay shot clock, the courts closely assess the rule's other foundational elements.[46]

Element 4. *"and while the declarant's recollection was clear"*

The "clear recollection" element complements the "recently perceived" element, especially as relates to the declarant's memory. Absent solid proof of a statement's recency, the courts next look to whether the declarant's recollection was clear. Here too the courts look at the totality of the circumstances, including the time elapsed between the statement and the event, the statement's spontaneity, and whether it was prompted by an investigator or otherwise made in anticipation of litigation.[47] The inquiry is necessarily circumstantial as the declarant is by definition unavailable to testify to the facts asserted in the statement.

Sometimes the declarant himself can assist the court in evaluating his clear memory. In *State v. Kreuser*, discussed earlier (and often), the declarant testified at trial that he could no longer recall the license number he had relayed to his friend over the phone (his forgetfulness

[45] *State v. Weed*, 2003 WI 85, 263 Wis.2d 434, 666 N.W.2d 485, 492. The concurring opinion castigated the majority opinion for its cavalier treatment of recent perception element (it "unwisely broadens the exception" and "essentially blows it wide open"). *Id* at ¶66. Professor Capra has also warned of this shortcoming. Capra, *supra*, *Memorandum*, at 1344. Troubling in *Weed* is that there was no way to further pin down when the statement was made.

[46] *But see State v. Knapp*, 2003 WI 121, ¶184, 265 Wis.2d 278, 666 N.W.2d 881(where the defense sought to introduce exculpatory evidence through a witness who could not recall when the deceased declarant made the statements; held that the SRP applied despite uncertainty over the statement's recency – since the events occurred 12 years earlier, the "lack of clarity as to timing is almost certainly due to the failure to prosecute this case earlier"). Dissenting, Chief Justice Abrahamson found "no evidence that the statements meet the foundational requirement of recent perception." *Id*. at ¶ 202.

[47] *State v. Ballos*, 230 Wis.2d 495, 602 N.W.2d 117, ¶¶16-17 (Ct. App. 1999).

satisfied the unavailability predicate). Most salient, he testified that he wrote down the license number on a newspaper, which he read the next day to his friend during the telephone call. His testimony to the effect that he accurately recorded the license plate number and accurately read it to his friend the next day showed he had a clear memory when making these statements.[48]

In other cases witnesses to the statement can provide information about the clearness of the declarant's memory. In *State v. Weed* several witnesses testified that although the declarant, a murder victim, had "drank a few beers," he then "switched to soda" and there was no indication that his memory was impaired.[49]

In the *Kluever* case the court looked to both expert and lay testimony. Expert medical testimony established that the declarant enjoyed "islets of memory" despite his severe brain damage (see above). Also significant, the court assessed testimony by the declarant's daughter "concerning the circumstances under which the state was made[.][50] She testified that the declarant was lucid when he spontaneously described his fall from the ladder:

> Prost [the daughter] stated that, just before the statement was made, Kluever recognized her, her mother, and her daughter, and asked where his other two grandchildren were. Prost also stated that Kluever's speech was good that day, and that she could understand him when he said something.[51]

Doubts about the accuracy of the declarant's memory went to the statement's weight, not its admissibility.[52]

Although not discussed in the cases, it would also seem that courts are influenced by the content of the statement itself in determining if the declarant's recollection was sufficiently clear. The judge, of course, can rely on the hearsay in question when deciding if it falls with the SRP exception.[53] A straightforward declarative sentence asserting a fact – for example, "that's the reason I took the bullets out of the .357" – without qualifications, hedging, or uncertainty supports a finding that the declarant's memory was clear about having unloaded the gun.

Most forms of eHearsay foreclose the possibility of other witnesses to the clarity of the declarant's memory. By default the clarity of the statement itself will have to establish the clearness of the declarant's memory. Issues involving the declarant's motives are best addressed through the elements (Nos. 5 and 6) below.

Element 5. *"made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested"*

In addressing concerns about the declarant's sincerity, the SRP clusters together three distinct yet related considerations: the declarant's (1) good faith, (2) awareness of pending or possible litigation, and (3) interest in such litigation. The last two considerations – the declarant's interest in, and awareness of, pending/possible litigation – are usually determinative. The cases

[48] *State v. Kreuser*, 91 Wis.2d 242, 280 N.W.2d 270, 273 (1979).
[49] *State v. Weed*, 2003 WI 85, ¶20, 263 Wis.2d 434, 666 N.W.2d 485.
[50] *Kluever v. Evang. Reformed Immanuels Cong.*, 143 Wis.2d 806, 422 N.W.2d 874, 878 (Ct. App. 1988).
[51] *Kluever*, supra, 422 N.W.2d at 876.
[52] *Kluever*, supra, 422 N.W.2d 878.
[53] Wis. Stat. § 901.04(1). It is substantively identical to FED. R. EVID. 104(a).

feature no extended discussions of this element, which is unsurprising. All three considerations are subjective, involving the declarant's mental state when making the statement. And since the declarant must be unavailable, courts are compelled to look instead at the surrounding circumstances. This is akin to doing brain surgery with a blunt instrument.

Good faith. The declarant's good faith is largely a function of an absence of bad faith. Good faith "depends on 'the declarant's incentive to accurately relate the event or condition.'"[54] Most often this becomes an issue of what motivated the declarant to make the statement.[55] In the informal survey, one seasoned trial judge said that the good faith element largely ensures the statement's reliability.

Appearances count; the cases readily assume good faith absent proof to the contrary.[56] For example, 911 calls "are presumably 'made in good faith.'"[57] Nor is it fatal that the declarant may have had an array of motives, some bad and some good, provided the judge is convinced that the good motives prevailed. Put differently, the circumstantial nature of the analysis permits proponents to play off a bad motive against other factors pointing toward sincerity.[58] The proponent, however, has the burden of proof on good faith. No case has excluded a statement because it was made in "bad faith," perhaps because a finding that there was insufficient proof of "good faith" serves the same purpose while making a cleaner record.[59]

Not in contemplation of pending or anticipated litigation. Whether the declarant contemplated litigation is but another way of asking whether he or she spoke in good faith. Here too sweeping generalizations are necessarily based on circumstantial evidence in light of the declarant's unavailability.

"Contemplation" connotes awareness or knowledge.[60] In *State v. Manuel* the court explained:

[54] *State v. Manuel*, 2005 WI 75, ¶32, 281 Wis.2d 554, 697 N.W.2d 811, quoting Daniel D. Blinka, *Wisconsin Evidence* 2d, at 710-711 (2001).
[55] *Manuel*, supra, 697 N.W.2d at ¶33 (where the declarant was involved in an attempted murder and told his girlfriend that the defendant shot the victim, held that the trial court properly found that his motive was to convince his girlfriend to hide with him at a motel; while the declarant may have had other (bad) motives for making the statement, the trial court "essentially" rejected them).
[56] *State v. Weed*, 2003 WI 85, ¶17, 263 Wis.2d 434, 666 N.W.2d 485 (the statements "appeared to be made in good faith"); *Kluever v. Evang. Reformed Immanuels Cong.*, 143 Wis.2d 806, 422 N.W.2d 874, 877 (Ct. App. 1988) ("there is no reason to conclude that Kluever was acting in bad faith"). *See also State v. Kreuser*, 91 Wis.2d 242, 280 N.W.2d 270, 273 (1979) (asserting that the "statement was made in good faith").
[57] *State v. Ballos*, 230 Wis.2d 495, 602 N.W.2d 117 (Ct. App. 1999) at ¶17 (in an arson for profit prosecution, 911 callers observed a building on fire, a man in flames, and another man getting into a car bearing the license plate related by the caller).
[58] *Manuel*, supra, 697 N.W.2d at ¶33; *State v. Kutz*, 2003 WI App 205, ¶¶53-54, 267 Wis.2d 531, 671 N.W.2d 660 (defendant convicted of murdering his estranged wife; held that victim's multiple statements about the defendant's following her around were properly admitted under the SRP; although the victim had a motive to "disparage" the defendant – the marriage was falling apart, she was involved with another man --, the trial court appropriately put this aside because the statements were made to close confidants (e.g., her mother) and were not "instigated" by anyone).
[59] *See West v. State*, 74 Wis.2d 390, 246 N.W.2d 675 (1976) (a declarant's motive to "help a friend" who was the getaway driver in a robbery supported a finding that good faith was "lacking").
[60] *See Kluever*, supra, 422 N.W.2d at 878.

> [T]he "'not in contemplation of pending or anticipated litigation' requirement 'may be inferred circumstantially from a consideration of whether a lawsuit has been filed, lawyers have been contacted, and the manner in which the subject matter came up during the conversation in which the statement was made."[61]

As with good faith, the cases readily assume no contemplation/awareness absent evidence to the contrary. Pending litigation is simple: Was a lawsuit or criminal charge filed? In *Kluever* the court observed that the injured plaintiff's statement was made nearly eleven months before the lawsuit was filed.[62] In short, no pleadings, no pending litigation.

Contemplating "anticipated litigation" is trickier. Since the SRP requires an actual awareness (contemplation), the case law manifests no traces of an objective, "reasonable anticipation" standard. Nor is it simply an awareness that litigation is likely. For example, where the declarant describes a shooting,[63] a witness sees his friend's stolen car,[64] or 911 callers report figures fleeing a burning building,[65] criminal litigation is readily anticipated, yet the courts insist on something more. The key is whether the statement is calculated to influence the investigation or likely litigation.[66] In *Kluever*, the declarant fell from a church's ladder and sustained horrific injuries, yet the court found no contemplation of pending litigation when he told his wife and daughter how he got hurt. The court stressed that his statement was "spontaneous" and not one showing "studied reflection."[67]

The declarant's interest in any pending or anticipated litigation. Even where litigation is pending or may be readily contemplated, the statement is nonetheless admissible unless it is shown that the declarant had an interest in such litigation. The cases have not addressed what constitutes an "interest." Mercifully, they have shown no disposition to inject into it any of the abstruseness found in the dead man's statutes.

It appears that here too the concern is the declarant's motive to skew the litigation (see above). This is seen most readily in *Kluever*, where the declarant was later named the plaintiff in the lawsuit made possible by his statement describing how he injured himself, one made in the hospital with only his wife and daughter present. Although the wife and daughter "stood to benefit" from the litigation later filed, there was no showing that the declarant's motive was to influence any eventual litigation.[68] Problems with their credibility (Had they just made it up? Had he misremembered how he got hurt?) went to weight and were better left to cross-examination. Similarly, in *Weed* the declarant was integrally involved in the shooting in question, and by all indications an aider and abettor, yet the motive behind his statement (that

[61] *Manual*, supra, at ¶ 32, quoting Blinka, *Wisconsin Evidence 2d* at 711.
[62] *Kluever*, supra, 422 N.W.2d at 878.
[63] *Manuel*, supra.
[64] *Kreuser*, supra.
[65] *Ballos*, supra.
[66] *E.g.*, *Manuel* at ¶33 (attempted murder prosecution where the declarant told his girlfriend that the defendant shot another man; although the declarant was likely an aider and abettor, the trial court properly found no bad faith or contemplation of pending litigation based largely on the motive behind the statement, namely, to convince the girlfriend to hide with him at a motel).
[67] *Kluever*, supra, 422 N.W.2d at 878.
[68] *Id.*

defendant shot the victim) was not to exculpate himself or inculpate the defendant, but rather to persuade his girlfriend to leave with him.[69]

Element 6. *"[and] not in response to the instigation of a person engaged in investigating, litigating, or settling a claim"*

Although the "instigation/engaged investigator" language appears as the first element of the SRP, it is more meaningfully paired with the good faith/anticipation of litigation elements, which cover much of the same ground. This sixth element is straightforward and poses no problem in the cases. The word "claim" denotes civil litigation, yet the courts unflinchingly apply it in the criminal cases as well, likely because it raises so few obstacles.

First, was the statement made to a person engaged in investigating, litigating, or settling a claim? The element connotes an interrogator (the "instigator" behind the statement) who is a professional of some sort (a police officer or claims adjustor), engaged or employed to investigate. The case law reflects very different sets of relationships between declarants and witnesses. They include statements to a wife and daughter,[70] to a young friend as the two walked to school,[71] to a girlfriend,[72] to a close friend and his son,[73] and to a co-worker and friend whose car had been stolen.[74]

Second, spontaneous statements are by definition not "instigated" within the meaning of the rule. Thus, 911 calls reporting a burning building (and a man on fire!) are not only spontaneous but not instigated by police.[75] Similarly, a statement describing how the declarant hurt himself was spontaneous, unprompted by any questions from his wife and daughter, who were clearly interested in the outcome of a later lawsuit that hinged on the statement.[76]

In short, the SRP would not apply to statements prompted by questions from insurance investigators and the like. The rule's language also seems limited to civil cases (a "claim"), yet the case law has reflexively applied it to criminal cases and police investigations as well.

In many ways this element seems unnecessary regardless of the type of hearsay involved. If questions are asked by such an investigator, it surely follows that litigation is pending or readily anticipated. In eHearsay terms, it is difficult to imagine a scenario where a statement would be "instigated" through electronic means.

Conclusions

The Wisconsin experience with the SRP rule reveals no insuperable difficulties or problems. Hedged as it is with multiple foundational elements and predicated upon the

[69] *Manual*, supra, 697 N.W.2d at ¶32 and ¶34.
[70] *Kluever v. Evang. Reformed Immanuels Cong.*, 143 Wis.2d 806, 422 N.W.2d 874, 877 (Ct. App. 1988).
[71] *State v. Stevens*, 171 Wis.2d 106, 490 N.W.2d 753 (Ct. App. 1992).
[72] *State v. Manuel*, 2005 WI 75, ¶32, 281 Wis.2d 554, 697 N.W.2d 811.
[73] *State v. Weed*, 2003 WI 85, ¶17, 263 Wis.2d 434, 666 N.W.2d 485.
[74] *State v. Kreuser*, 91 Wis.2d 242, 280 N.W.2d 270, 273 (1979).
[75] *State v. Ballos*, 230 Wis.2d 495, 602 N.W.2d 117 (Ct. App. 1999) at ¶17. Left unaddressed is the status of follow-up questions by a 911 dispatcher, a problem rife in the criminal cases applying *Crawford*. Under the SRP it is clear that 911 dispatchers are not involved in investigating, litigating, or settling a claim.
[76] *Kluever*, supra.

declarant's unavailability to testify, it is not used excessively. For the most part, the courts have been cautious in applying it, particularly to oral statements that describe still other oral statements ("the aural perception of an oral statement"). Yet courts have not been reluctant to allow "more time" between an event and the statement describing it, especially when there is need for the evidence, largely because the SRP's other elements (e.g., clear memory, good faith, not in anticipation of litigation) promote reliability. Moreover, the SRP seems well suited to deal with eHearsay.

The version of the rule adopted by Wisconsin would profit from revision. The SRP's "not in anticipation of litigation" language coupled with the "good faith" element obviate the need for an additional element precluding any statement "instigat[ed]" by "a person engaged" in investigating or litigating the claim. That said, this element has posed no problem in the case law. Redundancy has its values. Thought should also be given to whether a proposed federal rule should address the problem of a statement describing another statement, especially where both are oral. Last, it may assist counsel and courts if the SRP explicitly includes electronic (eHearsay) statements within its compass.

Outline on Recent Cases Involving Admissibility of Electronic Communications Under the Federal Hearsay Rule and Its Exceptions.

The question is whether a recent perceptions exception is needed for admission of reliable electronic communications. So what we are looking for is: 1) reliable electronic communications that were excluded; or 2) reliable electronic communications that are admitted only by improperly stretching existing exceptions.

I. Electronic Communications Properly Found to be Not Hearsay

Effect on the Listener: ***Meyer v. Callery Conway Mars HV, Inc.***, 2015 U.S. Dist. LEXIS 937 (W.D. Pa. Jan. 5, 2015): In an employment discrimination action, the defendant offered an email about a dangerous condition that the plaintiff was alleged to have created at the plant. That email was admissible over a hearsay objection, because it was not offered to prove that the plaintiff created the condition, but only the state of mind of the supervisor in deciding whether to fire the plaintiff. ***See also United States v. Gonzalez,*** 560 Fed. Appx. 554 (6th Cir. 2014): in a prosecution involving fraud and credit card theft, text messages to the defendant were properly admitted as non-hearsay because they provided him information that made him aware of the fraud.

Verbal Acts: ***Turner v. Am. Building Condo. Corp.***, 2014 U.S. Dist. LEXIS 15804 (S.D. Ohio Feb. 7, 2014): Emails found not hearsay because they were "verbal acts, offered to show what was said when and by whom. The statements themselves are the evidence, not the truthfulness or lack thereof of what the statements purport to express."

Circumstantial Evidence of Connection: ***United States v. Edelen*****,** 561 Fed.Appx. 225 (4th Cir. 2014): Appellants were charged and found guilty of conspiracy to kidnap. They argued it was error to admit a text that was sent to Edelen's phone the day before the attack, by a contact named "Puffy." The text informed Edelen of the victim's location. The court found that the text was properly admitted as not hearsay: it formed a link between Edelen and "Puffy" by the fact that it was made, and it supported the inference that Edelen had access to, and likely received, certain information about the victim prior to the commission of the offense.

II. Hearsay found admissible — correctly — under existing exceptions:

Party-opponent statement: ***United States v. Brinson,*** 772 F.3d 1314 (10th Cir. 2014): A text message from the defendant to a prostitute was properly admitted as the defendant's own statement under Rule 801(d)(2)(A). The prosecution showed by a preponderance of the evidence that the text was sent by the defendant: the account was registered to an email address registered to the defendant; the defendant's first name was used in the text; a witness testified that the defendant had identified himself by a nickname that was in the text; and two witnesses testified that the defendant's Facebook name was that nickname. ***See also Greco v. Velvet Cactus, LLC,*** 2014 U.S. Dist. LEXIS 87778 (E.D. La.) (text messages admitted as party-opponent statements).

Party-opponent agent's statement: ***United States v. McDonnell,*** 2014 WL 6772480, at *1 (E.D. Va.): Admitting an e-mail by the defendant's employee against the defendant pursuant to Rule 801(d)(2)(D) because the email was about a matter within within the scope of the employment relationship.

Co-conspirator Exemption: ***United States v. Thompson***, 568 Fed. Appx. 812 (8th Cir. 2014): Appellants were found guilty of conspiring to possess and possessing oxycodone with intent to distribute. The government's case against the Thompson twins included text messages between Wadley and the twins discussing a trip from New York to Florida, the specific amount of pills to be purchased from the undercover agent, and elaborate negotiations of the purchase price. One defendant contended that the text messages constituted impermissible hearsay, but the court found them properly admitted as statements between co-conspirators during the course and in furtherance of the conspiracy.

III. Use—or Possible Overuse? --- of the Residual Exception

Facebook Post: ***Ministers and Missionaries Ben. Bd. v. Estate of Flesher,*** 2014 WL 1116846 (S.D.N.Y.): In a weird case involving a dispute about an estate, a major fact question was whether Flesher was domiciled in Colorado at the time of his death. The defendant offered a printout of a post from Flesher's Facebook page, in which Flesher stated that he was in Colorado and intended to stay there. The court found these statements admissible under Rule 807, in light of authentication by a close friend and "corroboration by other documentary evidence." It is difficult to assess whether the court stretched the residual exception and would not have had to do so if a recent perceptions exception had been available. The analysis is terse. But even if the analysis were wrong, a recent perception exception would not have been needed to admit the Facebook post. The assertions in the post, about intent to stay in Colorado, were surely admissible under the state of mind exception and the *Hillmon* doctrine. If the *Hillmon* doctrine allows hearsay to prove an intent to *go* to Colorado, it clearly allows hearsay to prove an intent to *stay* there.

IV. Hearsay Properly Found Inadmissible --- Would Not Have Been Admissible Under a Recent Perceptions Exception:

Email Chain: ***Ira Green, Inc. v. Military Sales & Serv. Co.*****,** 775 F.3d 12 (1st Cir. 2014): the trial court admitted a chain of emails between business people under the business records exception. The court found that this was error because the emails were exchanged in 2012 and described what purportedly occurred in 2011. The court stated that "[t]his lack of contemporaneity puts the exhibit outside the compass of the business records exception." Nor would that time period be "recent" enough to be within any fair conception of the recent perceptions exception.

Emails in Business: ***Am. Home Assur. Co. v. Greater Omaha Packing Co.,*** 2014 U.S. Dist. LEXIS 51287 (D. Neb.) (emails not admissible as business records because no showing of regularly conducted activity; no indication that these emails could have been considered statements of recent perception).

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Federal Case Law Development After *Crawford v. Washington*
Date: April 1, 2015

The Committee has directed the Reporter to keep it apprised of case law developments after *Crawford v. Washington*. This memo is intended to fulfill that function. The memo describes the Supreme Court and federal circuit case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. The outline begins with a short discussion of the Court's latest case on confrontation, *Williams v. Illinois*, and then summarizes all the post-*Crawford* cases by subject matter heading.

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 — the expert relied in part on a Cellmark DNA report to conclude that the DNA found at the crime scene belonged to Williams. The splintered opinions in *Williams* create confusion not only for how and whether experts may use testimonial hearsay, but more broadly about how some of the hearsay exceptions square with the confrontation clause bar on testimonial hearsay.

The question in *Williams* was whether an expert's testimony violates the Confrontation Clause when the expert relies on hearsay. A plurality of four Justices, in an opinion written by Justice Alito, found no confrontation violation for two independent reasons. 1) First, the hearsay (the report of a DNA analyst) was never admitted for its truth, but was only used as a basis of the expert's own conclusion of the expert that Williams's DNA was found at the crime scene. Justice Alito emphasized that the expert witness conducted her own analysis of the data and did not simply

parrot the conclusions of the out-of-court analyst. Second, the DNA test that was conducted was not testimonial in any event, because at the time it was conducted the suspect was at large, and so the DNA was not prepared with the intent that it be used against a *targeted individual*.

Justice Kagan, in a dissenting opinion for four Justices, rejected both of the grounds on which Justice Alito relied to affirm Williams's conviction. She stated that it was a "subterfuge" to say that it was only the expert's opinion (and not the underlying report) that was admitted against Williams. She reasoned that where the expert relies on a report, the expert's opinion is useful only if the report itself is true. Therefore, according to Justice Kagan, the argument that the Cellmark report was not admitted for its truth rests on an artificial distinction that cannot satisfy the right to confrontation. As to Justice Alito's "targeting the individual" test of testimoniality, Justice Kagan declared that it was not supported by the Court's prior cases defining testimoniality in terms of primary motive. Her test of "primary motive" is whether the statement was prepared primarily for the purpose of *any* criminal prosecution, which the Cellmark report clearly was. [1]

Justice Thomas was the tiebreaker. He essentially agreed completely with Justice Kagan's critique of Justice Alito's two grounds for affirming the conviction. But Justice Thomas concurred in the judgment because he had his own reason for affirming the conviction. In his view, the use of the Cellmark report for its truth did not offend the Confrontation Clause because that report was not sufficiently "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.

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[1] Justice Breyer wrote a concurring opinion. He argued that rejecting the premise that an expert can rely on testimonial hearsay — as permitted by Fed.R.Evid. 703 — would end up requiring the government to call every person who had anything to do with a forensic test. That was a result he found untenable. He also set forth several possible approaches to permitting/limiting experts' reliance on lab reports, some of which he found "more compatible with *Crawford* than others" and some of which "seem more easily considered by a rules 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.

Fallout from Williams:

It must be noted that *eight* members of the Court rejected Justice Thomas's view that testimoniality is defined by whether a statement is sufficiently formal as to constitute an affidavit or certification. Yet if a court is counting Justices, it appears that it will often be necessary for the government to comply with the rather amorphous standards for "informality" established by Justice Thomas. Thus, if the government offers hearsay that would be testimonial under the Kagan view of "primary motive" but not under the Alito view, then the government may have to satisfy the Thomas requirement that the hearsay is not tantamount to a formal affidavit. Similarly, if the government proffers an expert who relies on testimonial hearsay, but the declarant does not testify, then 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 rejected the argument that the confrontation clause is satisfied so long as the testimonial hearsay is used only as the basis of the expert's opinion.

In the end Justice Thomas's formality requirement may not be much of a bar to the government after *Williams.* As Justice Kagan noted, it is possible that the government could satisfy the Thomas view "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.

It should be noted that much of the post-*Crawford* landscape is unaltered by *Williams*. For example, take a case in which a victim has just been shot. He makes a statement to a neighbor "I've just been shot by Bill. Call an ambulance." Surely that statement — admissible against the accused as an excited utterance — satisfies the Confrontation Clause on the same grounds after *Williams* as it did before. Such a statement is not testimonial because even under the Kagan view, it was not made with the primary motive that it would be used in a criminal prosecution. And *a fortiori* it 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.

Finally, it should be noted that since *Williams*, the Court has denied certiorari on more than 20 cases that essentially present the question of what *Williams* means. Maybe the Court is hoping that the confusion it caused on how and whether experts can rely on hearsay will somehow just go away.

II. Cases Defining "Testimonial" Hearsay, Arranged By Subject Matter

"Admissions" — Hearsay Statements by the Defendant

Defendant's own hearsay statement was not testimonial: *United States v. Lopez,* 380 F.3d 538 (1st Cir. 2004): The defendant blurted out an incriminating statement to police officers after they found drugs in his residence. The court held that this statement was not testimonial under *Crawford*. The court declared that "for reasons similar to our conclusion that appellant's statements were not the product of custodial interrogation, the statements were also not testimonial." That is, the statement was spontaneous and not in response to police interrogation.

Note: The *Lopez* court had an easier way to dispose of the case. Both before and after *Crawford*, an accused has no right to confront *himself*. If the solution to confrontation is cross-examination, as the Court in *Crawford* states, then it is silly to argue that a defendant has the right to have his own statements excluded because he had no opportunity to cross-examine himself. *See United States v. Hansen,* 434 F.3d 92 (1st Cir. 2006) (admission of defendant's own statements does not violate *Crawford*); *United States v. Orm Hieng,* 679 F.3d 1131 (9th Cir. 2012): "the Sixth Amendment simply has no application [to the defendant's own hearsay statements] because a defendant cannot complain that he was denied the opportunity to confront himself."

Defendant's own statements, reporting statements of another defendant, are not testimonial under the circumstances: *United States v. Gibson,* 409 F.3d 325 (6th Cir. 2005): In a case involving fraud and false statements arising from a mining operation, the trial court admitted testimony from a witness that Gibson told him that another defendant was planning on doing something that would violate regulations applicable to mining. The court recognized that the testimony encompassed double hearsay, but held that each level of hearsay was admissible as a statement by a party-opponent. Gibson also argued that the testimony violated *Crawford*. But the court held that Gibson's statement and the underlying statement of the other defendant were both casual remarks made to an acquaintance, and therefore were not testimonial.

Text messages were properly admitted as coming from the defendant: *United States v. Brinson,* 772 F.3d 1314 (10th Cir. 2014). In a prosecution for sex trafficking, text messages sent to a prostitute were admitted against the defendant. The defendant argued that admitting the texts violated his right to confrontation, but the court disagreed. The court stated that the texts were properly admitted as statements of a party-opponent, because the government had properly established by a preponderance of the evidence that the texts were sent by the defendant. They were therefore "not hearsay" under Rule 801(d)(2)(A), and "[b]ecause the messages did not constitute 'hearsay' their introduction did not violate the Confrontation Clause."

Note: The court in *Brinson* was right but for the wrong reasons. It is true that if a statement is "not hearsay" its admission does not violate the Confrontation Clause. (See the many cases collected under the "not hearsay" headnote, infra). But party-opponent

statements are only technically "not hearsay." They are in fact hearsay because they are offered for their truth — they are hearsay subject to an exemption. The Evidence Rules' technical categorization in Rule 801(d)(2) cannot determine the scope of the Confrontation Clause. If that were so, then coconspirator statements would automatically satisfy the Confrontation Clause because they, too, are classified as "not hearsay" under the Federal Rules. That would have made the Supreme Court's decision in *Bourjaily v. United States* unnecessary; and the Court in *Crawford* would not have had to discuss the fact that coconspirator statements are ordinarily not testimonial. The real reason that party-opponent statements are not hearsay is that when the defendant makes a hearsay statement, he has no right to confront himself.

Bruton — Testimonial Statements of Co-Defendants

Bruton* line of cases not applicable unless accomplice's hearsay statement is testimonial: *United States v. Figueroa-Cartagena, 612 F.3d 69 (1st Cir. 2010): The defendant's codefendant had made hearsay statements in a private conversation that was taped by the government. The statements directly implicated both the codefendant and the defendant. At trial the codefendant's statements were admitted against him, and the defendant argued that the *Bruton* line of cases required severance. But the court found no *Bruton* error, because the hearsay statements were not testimonial in the first place. The statements were from a private conversation so the speaker was not primarily motivated to have the statements used in a criminal prosecution. The court stated that the "*Bruton/Richardson* framework presupposes that the aggrieved co-defendant has a Sixth Amendment right to confront the declarant in the first place."

Bruton* does not apply unless the testimonial hearsay directly implicates the nonconfessing codefendant: *United States v. Lung Fong Chen, 393 F.3d 139, 150 (2d Cir. 2004)**:** The court held that a confession of a co-defendant, when offered only against the co-defendant, is regulated by *Bruton*, not *Crawford*: so that the question of a Confrontation violation is dependent on whether the confession is powerfully incriminating against the non-confessing defendant. If the confession does not directly implicate the defendant, then there will be no violation if the judge gives an effective limiting instruction to the jury. *Crawford* does not apply because if the instruction is effective, the co-defendant is not a witness "against" the defendant within the meaning of the Confrontation Clause.

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." ***See also United States v. Shavers,*** 693 F.3d 363 (3rd Cir. 2012) (admission of non-testifying co-defendant's inculpatory statement did not violate *Bruton* because it was made casually to an acquaintance and so was non-testimonial; the statement bore "no resemblance to the abusive governmental investigation tactics that the Sixth Amendment seeks to prevent").

Bruton* protection does not apply unless the codefendant's statements are testimonial: *United States v. Dargan, 738 F.3d 643 (4th Cir. 2013): The court held that a statement made to a cellmate in an informal setting was not testimonial — therefore admitting the statement against the nonconfessing codefendant did not violate *Bruton* because the premise of *Bruton* is that the nonconfessing defendant's confrontation rights are violated when the confessing defendant's statement is admissible at trial. But after *Crawford* there can be no confrontation violation unless the hearsay statement is testimonial.

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

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

In this case, the court found no error in admitting the confession against the codefendant who made it. As to the other defendants, the court found that the reference to them in the confession was vague, and therefore a limiting instruction was sufficient to assure that the confession would not be used against them. Thus, the *Bruton* problem was resolved by a limiting instruction.

Codefendant's testimonial statements were not admitted "against" the defendant in light of limiting instruction: *United States v. Harper,* 527 F.3d 396 (5th Cir. 2008): Harper's co-defendant made a confession, but it did not directly implicate Harper. At trial the confession was admitted against the co-defendant and the jury was instructed not to use it against Harper. The court recognized that the confession was testimonial, but held that it did not violate Harper's right to confrontation because the co-defendant was not a witness "against" him. The court relied on the post-*Bruton* case of *Richardson v. Marsh,* and held that the limiting instruction was sufficient to

protect Harper's right to confrontation because the co-defendant's confession did not directly implicate Harper and so was not as "powerfully incriminating" as the confession in *Bruton.* The court concluded that because "the Supreme Court has so far taken a 'pragmatic' approach to resolving whether jury instructions preclude a Sixth Amendment violation in various categories of cases, and because *Richardson* has not been expressly overruled, we will apply *Richardson* and its pragmatic approach, as well as the teachings in *Bruton.*"

Bruton* inapplicable to statement made by co-defendant to another prisoner, because that statement was not testimonial: *United States v.Vasquez, , 766 F.3d 373 (5th Cir. 2014): The defendant's co-defendant made a statement to a jailhouse snitch that implicated the defendant in the crime. The defendant argued that admitting the codefendant's statement at his trial violated *Bruton*, but the court disagreed. It stated that *Bruton* "is no longer applicable to a non-testimonial prison yard conversation because *Bruton* is no more than a by-product of the Confrontation Clause." The court further stated that "statements from one prisoner to another are clearly non-testimonial."

Bruton* protection does not apply unless codefendant's statements are testimonial: *United States v. Johnson, 581 F.3d 320 (6th Cir. 2009): The court held that after *Crawford, Bruton* is applicable only when the codefendant's statement is testimonial.

Bruton* protection does not apply unless codefendant's statements are testimonial: *United States v. Dale, 614 F.3d 942 (8th Cir. 2010): The court held that after *Crawford, Bruton* is applicable only when the codefendant's statement is testimonial.

Statement admitted against co-defendant only does not implicate *Crawford: Mason v. Yarborough,* 447 F.3d 693 (9th Cir. 2006): A non-testifying codefendant confessed during police interrogation. At the trial of both defendants, the government introduced only the fact that the codefendant confessed, not the content of the statement. The court first found that there was no *Bruton* violation, because the defendant's name was never mentioned — *Bruton* does not prohibit the admission of hearsay statements of a non-testifying codefendant if the statements implicate the defendant only by inference and the jury is instructed that the evidence is not admissible against the defendant. For similar reasons, the court found no *Crawford* violation, because the codefendant was not a "witness against" the defendant. "Because Fenton's words were never admitted into evidence, he could not 'bear testimony' against Mason."

Statement that is non-testimonial cannot raise a *Bruton* problem: *United States v. Patterson,* 713 F.3d 1237 (10th Cir. 2013): The defendant challenged a statement by a non-testifying codefendant on *Bruton* grounds. The court found no error, because the statement was made in furtherance of the conspiracy. Accordingly, it was non-testimonial. That meant there was no *Bruton* problem because *Bruton* does not apply to non-testimonial hearsay. *Bruton* is a confrontation case and the Supreme Court has held that the Confrontation Clause extends only to testimonial hearsay. ***See also United States v. Clark,*** 717 F.3d 790 (10th Cir. 2013) (No *Bruton* violation because the codefendant hearsay was a coconspirator statement made in furtherance of the conspiracy and so was not testimonial); ***United States v. Morgan***, 748 F.3d 1024 (10th Cir. 2014) (statement admissible

as a coconspirator statement cannot violate *Bruton* because "*Bruton* applies only to testimonial statements" and the statements were made between coconspirators dividing up the proceeds of the crime and so "were not made to be used for investigation or prosecution of crime.").

Co-Conspirator Statements

Co-conspirator statement not testimonial: *United States v. Felton,* 417 F.3d 97 (1st Cir. 2005): The court held that a statement by the defendant's coconspirator, made during the course and in furtherance of the conspiracy, was not testimonial under *Crawford.* **Accord *United States v. Sanchez-Berrios,*** 424 F.3d 65 (1st Cir. 2005) (noting that *Crawford* "explicitly recognized that statements made in furtherance of a conspiracy by their nature are not testimonial."). ***See also United States v. Turner,*** 501 F.3d 59 (1st Cir. 2007) (conspirator's statement made during a private conversation were not testimonial);***United States v. Ciresi*****,** 697 F.3d 19 (1st Cir. 2012) (statements admissible as coconspirator hearsay under Rule 801(d)(2)(E) are "by their nature" not testimonial because they are "made for a purpose other than use in a prosecution.") .

Surreptitiously recorded statements of coconspirators are not testimonial: *United States v. Hendricks,* 395 F.3d 173 (3rd Cir. 2005): The court found that surreptitiously recorded statements of an ongoing criminal conspiracy were not testimonial within the meaning of *Crawford* because they were informal statements among coconspirators. **Accord *United States v. Bobb,*** 471 F.3d 491 (3rd Cir. 2006) (noting that the holding in *Hendricks* was not limited to cases in which the declarant was a confidential informant).

Statement admissible as coconspirator hearsay is not testimonial: *United States v. Robinson*, 367 F.3d 278 (5th Cir. 2004): The court affirmed a drug trafficker's murder convictions and death sentence. It held that coconspirator statements are not "testimonial" under *Crawford* as they are made under informal circumstances and not for the purpose of creating evidence. ***Accord United States v. Delgado,*** 401 F.3d 290 (5th Cir. 2005); ***United States v. Olguin,*** 643 F.3d 384 (5th Cir. 2011); ***United States v. Alaniz,*** 726 F.3d 586 (5th Cir. 2013). ***See also United States v. King,*** 541 F.3d 1143 (5th Cir. 2008) ("Because the statements at issue here were made by co-conspirators in the furtherance of a conspiracy, they do not fall within the ambit of *Crawford's* protection"). Note that the court in *King* rejected the defendant's argument that the co-conspirator statements were testimonial because they were "presented by the government for their testimonial value." Accepting that 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") ***United States v. Tragas,*** 727 F.3d 610 (6th Cir. 2013) ("As coconspirator statements were made in furtherance of the conspiracy, they were categorically non-testimonial.").

Coconspirator statements made to an undercover informant are not testimonial: *United States v. Hargrove,* 508 F.3d 445 (7th Cir. 2007): The defendant, a police officer, was charged with taking part in a conspiracy to rob drug dealers. One of his coconspirators had a discussion with a potential member of the conspiracy (in fact an undercover informant) about future robberies. The defendant argued that the coconspirator's statements were testimonial, but the court disagreed. It held that "*Crawford* did not affect the admissibility of coconspirator statements." The court specifically rejected the defendant's argument that *Crawford* somehow undermined *Bourjaily*, noting that in both *Crawford* and *Davis*, "the Supreme Court specifically cited *Bourjaily* — which as here involved a coconspirator's statement made to a government informant — to illustrate a category of nontestimonial statements that falls outside the requirements of the Confrontation Clause."

Statements by a coconspirator during the course and in furtherance of the conspiracy are not testimonial: *United States v. Lee,* 374 F.3d 637 (8th Cir. 2004): The court held that statements admissible under the coconspirator exemption from the hearsay rule are by definition not testimonial. As those statements 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); ***United States v. Grasso,*** 724 F.3d 1077 (9th Cir. 2013) ("co-conspirator statements in furtherance of a conspiracy are not testimonial").

Statements admissible under the co-conspirator exemption are not testimonial: *United States v. Townley,* 472 F.3d 1267 (10th Cir. 2007): The court rejected the defendant's argument that hearsay is testimonial under *Crawford* whenever "confrontation would have been required at common law as it existed in 1791." It specifically noted that *Crawford* did not alter the rule from *Bourjaily* that a hearsay statement admitted under Federal Rule 801(d)(2)(E) does not violate the Confrontation Clause. ***Accord United States v. Ramirez,*** 479 F.3d 1229 (10th Cir. 2007) (statements admissible under Rule 801(d)(2)(E) are not testimonial under *Crawford*); ***United States v. Patterson,*** 713 F.3d 1237 (10th Cir. 2013) (same); ***United States v. Morgan***, 748 F.3d 1024 (10th Cir. 2014) (statements made between coconspirators dividing up the proceeds of the crime were not testimonial because they "were not made to be used for investigation or prosecution of crime.").

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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's statement,

bragging that he and the defendant had drugs to sell after a robbery, was admissible under Rule 801(d)(2)(E) and was not testimonial, because it was merely "bragging to a friend" and not a formal statement intended for trial.

Cross-Examination

Cross-examination of prior testimony was adequate even though defense counsel was found ineffective on other grounds: *Rolan v. Coleman,* 680 F.3d 311 (3rd Cir. 2012): The habeas petitioner argued that his right to confrontation was violated when he was retried and testimony from the original trial was admitted against him. The prior testimony was obviously testimonial under *Crawford.* The question was whether the witness — who was unavailable for the second trial — was adequately cross-examined at the first trial. The defendant argued that cross-examination could not have been adequate because the court had already found defense counsel to be 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.*"

State court was not unreasonable in finding that cross-examination by defense counsel at the preliminary hearing was sufficient to satisfy the defendant's right to confrontation: *Williams v. Bauman,* 759 F.3d 630 (9th Cir. 2014): The defendant argued that his right to confrontation was violated when the transcript of the preliminary hearing testimony of an eyewitness was admitted against him at his state trial. The witness was unavailable for trial and the defense counsel cross-examined him at the preliminary hearing. The court found that the state was not unreasonable in concluding that the cross-examination was adequate, thus satisfying the right to confrontation. The court noted that "Williams has failed to identify any Supreme Court precedent supporting his contention that his opportunity to cross-examine Banks at his own preliminary hearing was inadequate to satisfy the rigors of the Confrontation Clause." The court noted that "there is some question whether a preliminary hearing necessarily offers an adequate opportunity to cross-examine for Confrontation Clause purposes" but concluded that if there is "reasonable room for debate" on the question, then the state court's decision to align itself on one side of the argument is beyond the federal court's power to remedy on habeas review.

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

Accomplice's jailhouse statement was admissible as a declaration against interest and accordingly was not testimonial: *United States v. Pelletier,* 666 F.3d 1 (1st Cir. 2011): The defendant's accomplice made hearsay statements to a jailhouse buddy, indicating among other things that he had smuggled marijuana for the defendant. The court found that the statements were properly admitted as declarations against interest. The court noted specifically that the fact that the accomplice made the statements "to fellow inmate Hafford, rather than in an attempt to curry favor with police, cuts in favor of admissibility." For similar reasons, the hearsay was not testimonial under *Crawford.* The court stated that the statements were made "not under formal circumstances, but rather to a fellow inmate with a shared history, under circumstances that did not portend their use at trial against Pelletier."

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Saget,* 377 F.3d 223 (2nd Cir. 2004) (Sotomayor, J.): The defendant's accomplice spoke to an undercover officer, trying to enlist him in the defendant's criminal scheme. The accomplice's statements were admitted at trial as declarations against penal interest under Rule 804(b)(3), as they tended to implicate the accomplice in a conspiracy. After *Williamson v. United States,* hearsay statements made by an accomplice to a law enforcement officer while in custody are not admissible under Rule 804(b)(3) when they implicate the defendant, because the accomplice may be currying favor with law enforcement. But in the instant case, the accomplice's statement was not barred by *Williamson,* because it was made to an undercover officer—the accomplice didn't know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant. For similar reasons, the statement was not testimonial under *Crawford*—it was not the kind of formalized statement to law enforcement, prepared for trial, such as a "witness" would provide. ***See also United States v. Williams,*** 506 F.3d 151 (2d Cir. 2007): Statement of accomplice implicating himself and defendant in a murder was admissible under Rule 804(b)(3) where it was made to a friend in informal circumstances; for the same reason the statement was not testimonial. The defendant's argument about insufficient indicia of reliability was misplaced because the Confrontation Clause no longer imposes a reliability requirement. ***Accord United States v. Wexler,*** 522 F.3d 194 (2nd Cir. 2008) (inculpatory statement made to friends 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 both himself and the defendant. These statements were made to the accomplice's roommate. The court found that these statements were not testimonial under *Crawford*: "There is nothing in *Crawford* to suggest that 'testimonial evidence' includes spontaneous out-of-court statements made outside any arguably judicial or investigatorial context."

Declaration against penal interest, made to a friend, is not testimonial: *United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005): The defendant was charged with bank robbery. One of the defendant's accomplices (Clarke), was speaking to a friend (Wright) some time after the robbery. Wright told Clarke that he looked "stressed out." Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The court found no error in admitting Clarke's hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark's interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the court found that Clarke's statement was not testimonial under *Crawford:*

> Clarke made the statements to his friend by happenstance; Wright was not a police officer or a government informant seeking to elicit statements to further a prosecution against Clarke or Franklin. To the contrary, Wright was privy to Clarke's statements only as his friend and confidant.

The court distinguished other cases in which an informant's statement to police officers was found testimonial, on the ground that those other cases involved accomplice statements knowingly made

to police officers, so that "the informant's statements were akin to statements elicited during police interrogation, i.e., the informant could reasonably anticipate that the statements would be used to prosecute the defendant."

See also United States v. Gibson, 409 F.3d 325 (6th Cir. 2005) (describing statements as nontestimonial where "the statements were not made to the police or in the course of an official investigation, nor in an attempt to curry favor or shift the blame."); ***United States v. Johnson,*** 440 F.3d 832 (6th Cir. 2006) (statements by accomplice to an undercover informant he thought to be a cohort were properly admitted against the defendant; the statements were not testimonial because the declarant didn't know he was speaking to law enforcement, and so a person in his position "would not have anticipated that his statements would be used in a criminal investigation or prosecution of Johnson.").

Statement admissible as a declaration against penal interest is not testimonial: *United States v. Johnson*, 581 F.3d 320 (6th Cir. 2009): The court held that the tape-recorded confession of a coconspirator describing the details of an armed robbery, including his and the defendant's roles, was properly admitted as a declaration against penal interest. The court found that the statements tended to disserve the declarant's interest because "they admitted his participation in an unsolved murder and bank robbery." And the statements were trustworthy because they were made to a person the declarant thought to be his friend, at a time when the declarant did not know he was being recorded "and therefore could not have made his statement in order to obtain a benefit from law enforcement." Moreover, the hearsay was not testimonial, because the declarant did not know he was being recorded or that the statement would be used in a criminal proceeding against the defendant.

Accomplice confession to law enforcement is testimonial, even if redacted: *United States v. Jones,* 371 F.3d 363 (7th Cir. 2004): An accomplice's statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, could be admissible as a declaration against interest (a question it did not decide), its admission would violate the Confrontation Clause after *Crawford*. The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And because the defendant never had a chance to cross-examine the accomplice, "under *Crawford*, no part of Rock's confession should have been allowed into evidence."

Declaration against interest made to an accomplice who was secretly recording the conversation for law enforcement was not testimonial: *United States v. Watson,* 525 F.3d 583 (7th Cir. 2008): After a bank robbery, one of the perpetrators was arrested and agreed to cooperate with the FBI. She surreptitiously recorded a conversation with Anthony, in which Anthony implicated himself and Watson in the robbery. The court found that Anthony's statement was against

his own interest, and rejected Watson's contention that it was testimonial. The court noted that Anthony could not have anticipated that the statement would be used at a trial, because he did not know that the FBI was secretly recording the conversation. It concluded: "A statement unwittingly made to a confidential informant and recorded by the government is not testimonial for Confrontation Clause purposes." ***Accord United States v. Volpendesto*** , 746 F.3d 273 (7th Cir. 2014): Statements of an accomplice made to a confidential informant were properly admitted as declarations against interest and for the same reasons were not testimonial. The defendant argued that the court should reconsider its ruling in *Watson* because the Supreme Court, in *Michigan v. Bryant,* had in the interim stated that in determining primary motive, the court must look at the motivation of both the declarant and the other party to the conversation, and in this case as in *Watson* the other party was a confidential informant trying to obtain statements to use in a criminal prosecution. But the court noted that in *Bryant* the Court stated that the relevant inquiry "is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had." Applying this objective approach, the court concluded that the conversation "looks like a casual, confidential discussion between co-conspirators."

Accomplice's confession to law enforcement was testimonial, even if redacted: *United States v. Shaw,* 758 F.3d 1187 (10th Cir. 2014): At the defendant's trial, the court permitted a police officer to testify about a confession made by the defendant's alleged accomplice. The accomplice was not a co-defendant, but the court, relying on the *Bruton* line of cases, ruled that the confession could be admitted so long as all references to the defendant were replaced with a neutral pronoun. The court of appeals found that this was error, because the confession to law enforcement, was, under *Crawford,* clearly testimonial. It stated that "[r]edaction does not override the Confrontation Clause. It is just a tool to remove, in appropriate cases, the prejudice to the defendant from allowing the jury to hear evidence admissible against the codefendant but not admissible against the defendant." The trial court's reliance on the *Bruton* cases was flawed because in those cases the accomplice is joined as a codefendant and the confession is admissible against the accomplice. In this case, where the defendant was tried alone and the confession was offered against him only, it was inadmissible for any purpose, whether or not redacted.

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.

3. An emergency's duration and scope may depend in part on the type of weapon involved; in *Davis* and *Hammon* the assailants used their fists, which limited the scope of the emergency — unlike in this case where the perpetrator used a gun, and so questioning could permissibly be broader.

4. A victim's medical condition is important to the primary purpose inquiry to the extent that it sheds light on the victim's ability to have any purpose at all in responding to police questions and on the likelihood that any such purpose would be a testimonial one. It also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.

5. Whether an ongoing emergency exists is simply one factor informing the ultimate inquiry regarding an interrogation's "primary purpose." Another is the encounter's informality. Formality suggests the absence of an emergency, but informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.

6. The statements and actions of *both* the declarant and interrogators provide objective evidence of the interrogation's primary purpose. Looking to the contents of both the questions and the answers ameliorates problems that could arise from looking solely to one participant, because both interrogators and declarants may have mixed motives.

Applying all these considerations to the facts, the Court found that the circumstances of the encounter as well as the statements and actions of the shooting victim and the police objectively indicated that the interrogation's "primary purpose" was "to enable police assistance to meet an ongoing emergency." The circumstances of the interrogation involved an armed shooter, whose motive for and location after the shooting were unknown and who had mortally wounded the victim within a few blocks and a few minutes of the location where the police found him. Unlike the emergencies in *Davis* and *Hammon*, the circumstances presented in *Bryant* indicated a potential threat to the police and the *public*, even if not the victim. And because this case involved a gun, the physical separation that was sufficient to end the emergency in *Hammon* was not necessarily sufficient to end the threat.

The Court concluded that the statements and actions of the police and victim objectively indicated that the primary purpose of their discussion was not to generate statements for trial. When

the victim responded to police questions about the crime, he was lying in a gas station parking lot bleeding from a mortal gunshot wound, and his answers were punctuated with questions about when emergency medical services would arrive. Thus, the Court could not say that a person in his situation would have had a "primary purpose" "to establish or prove past events potentially relevant to later criminal prosecution." For their part, the police responded to a call that a man had been shot. They did not know why, where, or when the shooting had occurred; the shooter's location; or anything else about the crime. They asked exactly the type of questions necessary to enable them "to meet an ongoing emergency" — essentially, who shot the victim and where did the act occur. Nothing in the victim's responses indicated to the police that there was no emergency or that the emergency had ended. The informality suggested that their primary purpose was to address what they considered to be an ongoing emergency — apprehending a suspect with a gun — and the circumstances lacked the formality that would have alerted the victim to or focused him on the possible future prosecutorial use of his statements.

Justice Sotomayor wrote the majority opinion for five Justices. Justice Thomas concurred in the judgment, adhering to his longstanding view that testimoniality is determined by whether the statement is the kind of formalized accusation that was objectionable under common law — he found no such formalization in this case. Justices Scalia and Ginsburg wrote dissenting opinions. Justice Kagan did not participate.

911 call reporting drunk person with an unloaded gun was not testimonial: *United States v. Cadieux,* 500 F.3d 37 (1st Cir. 2007): In a felon-firearm prosecution, the trial court admitted a tape of a 911 call, made by the daughter of the defendant's girlfriend, reporting that the defendant was drunk and walking around with an unloaded shotgun. The court held that the 911 call was not testimonial. It relied on the following factors: 1) the daughter spoke about events "in real time, as she witnessed them transpire"; 2) she specifically requested police assistance; 3) the dispatcher's questions were tailored to identify "the location of the emergency, its nature, and the perpetrator"; and 4) the daughter was "hysterical as she speaks to the dispatcher, in an environment that is neither tranquil nor, as far as the dispatcher could reasonably tell, safe." The defendant argued that the call was testimonial because the daughter was aware that her statements to the police could be used in a prosecution. But the court found that after *Davis*, awareness of possible use in a prosecution is not enough for a statement to be testimonial. A statement is testimonial only if the "primary motivation" for making it is for use in a criminal prosecution.

911 call was not testimonial under the circumstances: *United States v. Brito,* 427 F.3d 53 (1st Cir. 2005): The court affirmed a conviction of firearm possession by an illegal alien. It held that statements made in a 911 call, indicating that the defendant was carrying and had fired a gun, were properly admitted as excited utterances, and that the admission of the 911 statements did not violate the defendant's right to confrontation. The court declared that the relevant question is whether the statement was made with an eye toward "legal ramifications." The court noted that

under this test, statements to police made while the declarant or others are still in personal danger are ordinarily not testimonial, because the declarant in these circumstances "usually speaks out of urgency and a desire to obtain a prompt response." In this case the 911 call was properly admitted because the caller stated that she had "just" heard gunshots and seen a man with a gun, that the man had pointed the gun at her, and that the man was still in her line of sight. Thus the declarant was in "imminent personal peril" when the call was made and therefore 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.

See also United States v. Mouzone, 687 F.3d 207 (5th Cir. 2012) (911 calls found non-testimonial as "each caller simply reported his observation of events as they unfolded"; the 911 operators were not attempting to "establish or prove past events"; and "the transcripts simply reflect an effort to

meet the needs of the ongoing emergency").

911 call, and statements made by the victim after police arrived, are excited utterances and not testimonial: *United States v. Arnold,* 486 F.3d 177 (6th Cir. 2007) (en banc): In a felon-firearm prosecution, the court admitted three sets of hearsay statements made by the daughter of the defendant's girlfriend, after an argument between the daughter (Tamica) and the defendant. The first set were statements made in a 911 call, in which Tamica stated that Arnold pulled a pistol on her and is "fixing to shoot me." The call was made after Tamica got in her car and went around the corner from her house. The second set of statements occurred when the police arrived within minutes; Tamica was hysterical, and without prompting said that Arnold had pulled a gun and was trying to kill her. The police asked what the gun looked like and she said "a black handgun." At the time of this second set of statements, Arnold had left the scene. The third set of statements was made when Arnold returned to the scene in a car a few minutes later. Tamica identified Arnold by name and stated "that's the guy that pulled the gun on me." A search of the vehicle turned up a black handgun underneath Arnold's seat.

The court first found that all three sets of statements were properly admitted as excited utterances. For each set of statements, Tamica was clearly upset, she was concerned about her safety, and the statements were made shortly after or right at the time of the two startling events (the gun threat for the first two sets of statements and Arnold's return for the third set of statements).

The court then concluded that none of Tamica's statements fell within the definition of "testimonial" as developed by the Court in *Davis*. Essentially the court found that the statements were not testimonial for the very reason that they were excited utterances — Tamica was upset, she was responding to an emergency and concerned about her safety, and her statements were largely spontaneous and not the product of an extensive interrogation.

911 call is 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.***

Statements made by mother to police, after her son was taken hostage, were not testimonial: *United States v. Lira-Morales,* 759 F.3d 1105 (9th Cir. 2014): The defendant was charged with hostage-taking and related crimes. At trial, the court admitted statements from the hostage's mother, describing a telephone call with her son's captors. The call was arranged as part of a sting operation to rescue the son. The court found that the mother's statements to the officers about what the captors had said were not testimonial, because the primary motive for making the call — and thus the report about it to the police officers — was to rescue the son. The court noted that throughout the event the mother was "very nervous, shaking, and crying in response to continuous ransom demands and threats to her son's life." Thus the agents faced an "emergency situation" and "the primary purpose of the telephone call was to respond to these threats and to ensure [the son's] safety." The defendant argued that the statements were testimonial because an agent attempted, unsuccessfully, to record the call that they had set up. But the court rejected this argument, noting that the agent "primarily sought to record the call to obtain information about Aguilar's location and to facilitate the plan to rescue Aguilar. Far from an attempt to build a case for prosecution, Agent Goyco's actions were good police work directed at resolving a life-threatening hostage situation. * * * That Agent Goyco may have also recorded the call in part to build a criminal case does not alter our conclusion that the *primary* purpose of the call was to diffuse the emergency hostage situation."

Excited utterance not testimonial under the circumstances, even though made to law enforcement: *Leavitt v. Arave*, 371 F.3d 663 (9th Cir. 2004): In a murder case, the government introduced the fact that the victim had called the police the night before her murder and stated that she had seen a prowler who she thought was the defendant. The court found that the victim's statement was admissible as an excited utterance, as the victim was clearly upset and made the statement just after an attempted break-in. The court held that the statement was not testimonial under *Crawford*. The court explained as follows:

> Although the question is close, we do not believe that Elg's statements are of the kind with which *Crawford* was concerned, namely, testimonial statements. * * * Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which the Confrontation Clause was directed: the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.
>
> **Note: The court's decision in *Leavitt* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. The Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they are directed toward dealing with an emergency rather than prosecuting a crime. It is especially consistent with the pragmatic approach to applying the primary motive test established in *Michigan v. Bryant.***

Expert Witnesses

Confusion over expert witnesses testifying on the basis of testimonial hearsay: *Williams v. Illinois,* 132 S.Ct. 2221 (2012): This case is fully set forth in Part One. To summarize, the confusion is over whether an expert can, consistently with the Confrontation Clause, rely on testimonial hearsay so long as the hearsay is not explicitly introduced for its truth and the expert makes an independent judgment, i.e., is not just a conduit for the hearsay. That practice is permitted by Rule 703. Five members of the Court rejected the use of testimonial hearsay in this way, on the ground that it was based on an artificial distinction. But the plurality decision by Justice Alito embraces this Rule 703 analysis. At this 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. As seen elsewhere in this outline, some courts have found *Williams* to have no precedential effect other than controlling cases that present the same facts as *Williams.* And other courts have held that the use of testimonial hearsay by an expert is permitted without regard to its formality, so long as the expert makes an independent conclusion and the hearsay itself is not admitted into evidence.

Expert's reliance on testimonial hearsay does not violate the Confrontation Clause: *United States v. Henry*, 472 F.3d 910 (D.C. Cir. 2007): The court declared that *Crawford* "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, some lower courts are treating the Alito opinion as controlling on an expert's reliance on testimonial hearsay.**

Confrontation Clause violated where expert does no more that restate the results of a testimonial lab report: *United States v. Ramos-Gonzalez,* 664 F.3d 1 (1st Cir. 2011): In a drug case, a lab report indicated that substances found in the defendant's vehicle tested positive for

cocaine. The lab report was testimonial under *Melendez-Diaz,* and the person who conducted the test was not produced for trial. The government sought to avoid the *Melendez-Diaz* problem by calling an expert to testify to the results, but the court found that the defendant's right to confrontation was nonetheless violated, because the expert did not make an independent assessment, but rather simply restated the report. The court explained as follows:

> Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth Amendment infraction is minimal. Where an expert acts merely as a well-credentialed conduit for testimonial hearsay, however, the cases hold that her testimony violates a criminal defendant's right to confrontation. See, e.g., *United States v. Ayala,* 601 F.3d 256, 275 (4th Cir.2010) ("[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.

Confrontation Clause not violated where testifying expert conducts his own testing that replicates a testimonial report: *United States v. Soto,* 720 F.3d 51 (1st Cir. 2013): In a prosecution for identity theft and related offenses, a technician did a review of the defendant's laptop and came to conclusions that inculpated the defendant. At trial, a different expert testified that he did the same test and it came out exactly the same as the test done by the absent technician. The defendant argued that this was surrogate testimony that violated *Bullcoming v. New Mexico,* in which the Court held

that production of a surrogate who simply reported testimonial hearsay did not satisfy the Confrontation Clause. But the court disagreed:

> Agent Pickett did not testify as a surrogate witness for Agent Murphy. * * * Unlike in *Bullcoming*, Agent Murphy's forensic report was not introduced into evidence through Agent Pickett. Agent Pickett testified about a conclusion he drew from his own independent examination of the hard drive. The government did not need to get Agent Murphy's report into evidence through Agent Pickett. We do not interpret *Bullcoming* to mean that the agent who testifies against the defendant cannot know about another agent's prior examination or that agent's results when he conducts his examination. The government may ask an agent to replicate a forensic examination if the agent who did the initial examination is unable to testify at trial, so long as the agent who testifies conducts an independent examination and testifies to his own results.

The court reviewed the votes in *Bullcoming* and found that "it appears that six justices would find no Sixth Amendment violation when a second analyst retests evidence and testifies at trial about her conclusions about her independent examination." This count resulted from the fact that Justice Ginsburg, joined by Justice Scalia, stated that the Confrontation problem in *Bullcoming* could have been avoided if the testifying expert had simply retested the substance and testified on the basis of the retest.

The *Soto* court did express concern, however, that the testifying expert did more than simply replicate the results of the prior test: he also testified that the tests came to identical results:

> Soto's argument that Agent Murphy's report bolstered Agent Pickett's testimony hits closer to the mark. At trial, Agent Pickett testified that the incriminating documents in Exhibit 20 were found on a laptop that was seized from Soto's car. Although Agent Pickett had independent knowledge of that fact, he testified that "everything that was in John Murphy's report was exactly the way he said it was," and that Exhibit 20 "was contained in the same folder that John Murphy had said that he had found it in." * * * These two out-of-court statements attributed to Agent Murphy were arguably testimonial and offered for their truth. Agent Pickett testified about the substance of Agent Murphy's report which Agent Murphy prepared for use in Soto's trial. * * * Agent Pickett's testimony about Agent Murphy's prior examination of the hard drive bolstered Agent Pickett's independent conclusion that the Exhibit 20 documents were found on Soto's hard drive.

But the court found no plain error, in large part because the bolstering was cumulative.

Expert's reliance on out-of-court accusations does not violate *Crawford*, unless the accusations are directly presented to the jury*: United States v. Lombardozzi*, 491 F.3d 61 (2nd Cir. 2007): The court stated that *Crawford* is inapplicable if testimonial statements are not used for their truth, and that "it is permissible for an expert witness to form an opinion by applying her expertise because, in that limited instance, the evidence is not being presented for the truth of the

matter asserted." The court concluded that the expert's testimony would violate the Confrontation Clause "only if he communicated out-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion." The court found any error in introducing the hearsay statements directly to be harmless. ***See also United States v. Mejia,*** 545 F.3d 179 (2nd Cir. 2008) (violation of Confrontation Clause where expert directly relates statements made by drug dealers during an interrogation).

> **Note: These opinions from the 2nd Circuit precede *Williams* and are questionable if you count the votes in *Williams.* But these cases are quite consistent with the Alito opinion in *Williams* and as indicated in this outline, many lower courts permit an expert to rely on testimonial hearsay, so long as the hearsay is not admitted at trial and the expert reaches his own conclusions.**

Expert reliance on printout from machine does not violate *Crawford*: *United States v. Summers,* 666 F.3d 192 (4th Cir. 2011): The defendant objected to the admission of DNA testing performed on a jacket that linked him to drug trafficking. The court first considered whether the Confrontation Clause was violated by the government's failure to call the FBI lab employees who signed the internal log documenting custody of the jacket. The court found no error in admitting the log, because chain-of-custody evidence had been introduced by the defense and therefore the defendant had opened the door to rebuttal. The court next considered whether the Confrontation Clause was violated by testimony of an expert who relied on DNA testing results by lab analysts who were not produced at trial. The court again found no error. It emphasized that the expert did his own testing, and his reliance on the report was limited to a "pure instrument read-out." The court stated that "[t]he numerical identifiers of the DNA allele here, insofar as they are nothing more than raw data produced by a machine" should be treated the same as gas chromatograph data, which the courts have held to be non-testimonial. ***See also United States v. Shanton,*** 2013 WL 781939 (4th Cir.) (Unpublished) (finding that the result concerning the admissibility of the expert testimony in *Summers* was unaffected by *Williams*: "[W]e believe five justices would affirm: Justice Thomas on the ground that the statements at issue were not testimonial and Justice Alito, along with the three justices who joined his plurality opinion, on the ground that the statements were not admitted for the truth of the matter asserted.").

Expert reliance on confidential informants in interpreting coded conversation does not violate *Crawford: United States v. Johnson*, 587 F.3d 625 (4th Cir. 2009): The court found no error in admitting expert testimony that decoded terms used by the defendants and coconspirators during recorded telephone conversations. The defendant argued that the experts relied on hearsay statements by cooperators to help them reach a conclusion about the meaning of particular conversations. The defendant asserted that the experts were therefore relying on testimonial hearsay. The court 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) (no violation of the Confrontation Clause where the experts "did not act as mere transmitters and in fact did not repeat statements of particular declarants to the jury."). ***Accord United States v Palacios*****,** 677 F.3d 234 (4th Cir. 2012): Expert testimony on operation of a criminal enterprise, based in part on interviews with members, did not violate the Confrontation Clause because the expert "did not specifically reference" any of the testimonial interviews during his testimony, and simply relied on them as well as other information to give his own opinion.

Expert testimony translating coded conversations violated the right to confrontation where the government failed to make a sufficient showing that the expert was relying on her own evaluations rather than those of informants: *United States v. Garcia,* 752 F.3d 382 (4th Cir. 2014): The court reversed drug convictions in part because the law enforcement expert who translated purportedly coded conversations had relied on input from coconspirators who she had debriefed in coming to her conclusion. The court distinguished *Johnson, supra*, on the ground that in this case the government had not done enough to show that the expert had conducted her own independent analysis in reaching her conclusions as to the meaning of certain conversations. The court noted that "the question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay." In this case, "we cannot say that Agent Dayton was giving such independent judgments. While it is true she never made direct reference to the content of her interviews, this could just has well have been the result of the Government's failure to elicit a proper foundation for Agent Dayton's interpretations." The government argued that the information from the coconspirators only served to confirm the Agent's interpretations after the fact, but the court concluded that "[t]he record is devoid of evidence that this was, in fact, the sequence of Dayton's analysis, to Garcia's prejudice."

Expert reliance on printout from machine and another expert's lab notes does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone." Moreover, the expert's reliance on another expert's lab notes did not violate *Crawford* because the court concluded that an expert is permitted to rely on hearsay (including testimonial hearsay) in reaching his conclusion. The court noted that the defendant could "insist that the data underlying an expert's testimony be admitted, see Fed.R.Evid. 705, but by offering the evidence

themselves defendants would waive any objection under the Confrontation Clause." The court observed that the notes of the chemist, evaluating the data from the machine, were testimonial and should not have been independently admitted, but it found no plain error in the admission of these notes.

Note: The court makes two holdings in *Moon.* The first is that expert reliance on a machine output does not violate *Crawford* because the machine is not a witness. That holding appears unaffected by *Williams* — at least it can be said that *Williams* says nothing about whether machine output is testimony. The second holding, that an expert's reliance on lab notes he did not prepare, is at the heart of *Williams.* It would appear that such a practice would be permissible even after *Williams* because 1) *post-Williams* courts have found that an expert may reliable on testimonial hearsay so long as the expert does his own analysis and the hearsay is not introduced at trial ; and 2) in any case, lab "notes" are not certificates or affidavits so they do not appear to be the kind of formalized statement that Justice Thomas finds to be testimonial.

Expert reliance on drug test conducted by another does not violate the Confrontation Clause — though on remand from *Williams* the court states that part of the expert's testimony might have violated the Confrontation Clause but finds harmless error*: United States v. Turner,* 591 F.3d 928 (7th Cir. 2010), on remand from Supreme Court, 709 F.3d 1187 (7th Cir. 2013) : At the defendant's drug trial, the government called a chemist to testify about the tests conducted on the substance seized from the defendant — the tests indicating that it was cocaine. The defendant objected that the witness did not conduct the tests and was relying on testimonial statements from other chemists, in violation of *Crawford.* The court found no error, emphasizing that no statements of the official who actually tested the substance were admitted at trial, and that the witness unequivocally established that his opinions about the test reports were his own.

Note: The Supreme Court vacated the decision in *Turner* and remanded for reconsideration in light of *Williams.* On remand, the court declared that while a rule from *Williams* was difficult to divine, it at a minimum "casts doubt on using expert testimony in place of testimony from an analyst who actually examined and tested evidence bearing on a defendant's guilt, insofar as the expert is asked about matters which lie solely within the testing analyst's knowledge." But the court noted that even after *Williams*, much of what the expert testified to was permissible because it was based on personal knowledge:

> We note that the bulk of Block's testimony was permissible. Block testified as both a fact and an expert witness. In his capacity as a supervisor at the state crime laboratory, he described the procedures and safeguards that employees of the laboratory observe in handling substances submitted for analysis. He also noted that he reviewed Hanson's work in this case pursuant to the laboratory's standard peer review procedure. As an expert forensic chemist, he went on to explain for the jury

how suspect substances are tested using gas chromatography, mass spectrometry, and infrared spectroscopy to yield data from which the nature of the substance may be determined. He then opined, based on his experience and expertise, that the data Hanson had produced in testing the substances that Turner distributed to the undercover officer-introduced at trial as Government Exhibits 1, 2, and 3-indicated that the substances contained cocaine base. * * *

As we explained in our prior decision, an expert who gives testimony about the nature of a suspected controlled substance may rely on information gathered and produced by an analyst who does not himself testify. Pursuant to Federal Rule of Evidence 703, the information on which the expert bases his opinion need not itself be admissible into evidence in order for the expert to testify. Thus, the government could establish through Block's expert testimony what the data produced by Hanson's testing revealed concerning the nature of the substances that Turner distributed, without having to introduce either Hanson's documentation of her analysis or testimony from Hanson herself. And because the government did not introduce Hanson's report, notes, or test results into evidence, Turner was not deprived of his rights under the Sixth Amendment's Confrontation Clause simply because Block relied on the data contained in those documents in forming his opinion.

Nothing in the Supreme Court's *Williams* decision undermines this aspect of our decision. On the contrary, Justice Alito's plurality opinion in *Williams* expressly endorses the notion that an appropriately credentialed individual may give expert testimony as to the significance of data produced by another analyst. Nothing in either Justice Thomas's concurrence or in Justice Kagan's dissent takes issue with this aspect of the plurality's reasoning. Moreover, as we have indicated, Block in part testified in his capacity as Hanson's supervisor, describing both the procedures and safeguards that employees of the state laboratory are expected to follow and the steps that he took to peer review Hanson's work in this case. Block's testimony on these points, which were within his personal knowledge, posed no Confrontation Clause problem.

The court saw two Confrontation problems in the expert's testimony: 1) his statement that Hanson followed standard procedures in testing the substances that Turner distributed to the undercover officer, and 2) his testimony that he reached the same conclusion about the nature of the substances that the analyst did. The court held that on those two points, "Block necessarily was relying on out-of-court statements contained in Hanson's notes and report. These portions of Block's testimony strengthened the government's case; and, conversely, their exclusion would have diminished the quantity and quality of evidence showing that the substances Turner distributed comprised cocaine base in the form of crack cocaine." And while the case was much like *Williams,* the court found two distinguishing factors: 1) it was tried to a jury, thus raising a question of whether Justice Alito's not-for-truth analysis was fully applicable; and 2) the test was conducted with a suspect in mind, as Turner had been arrested with the substances to be tested in his possession. The defendant also argued that the

report was "certified" and so was formal under the Thomas view. But the court noted that the analysts did not formally certify the results — the certification was made by the Attorney General to the effect that the report was a correct copy of the *report.* But the court implied that it was sufficiently formal in any case, because it was "both official and signed, it constituted a formal record of the result of the laboratory tests that Hanson had performed, and it was clearly designed to memorialize that result for purposes of the pending legal proceeding against Turner, who was named in the report."

Ultimately the court found it unnecessary to decide whether the defendant's Confrontation rights were violated because the error, if any, in the use of the analyst's report was harmless.

Avoiding the confusion wrought by *Williams*: *United States v. Garvey,* 688 F.3d 881 (7th Cir. 2012): 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 *Williams* 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."

No confrontation violation where expert did not testify that he relied on a testimonial report: *United States v. Maxwell,* 724 F.3d 724 (7th Cir. 2013): In a narcotics prosecution, the analyst from the Wisconsin State Crime Laboratory who originally tested the substance seized from Maxwell retired before trial, so the government offered the testimony of his co-worker instead. The coworker did not personally analyze the substance herself, but concluded that it contained crack cocaine after reviewing the data generated by the original analyst. The court found no plain error in permitting this testimony, explaining that there could be no Confrontation problem, even after *Bullcoming* and *Williams*, where there is no testimony that the expert relied on the report:

> What makes this case different (and relatively more straightforward) from those we have dealt with in the past is that Gee did not read from Nied's report while testifying (as in *Garvey*), she did not vouch for whether Nied followed standard testing procedures or state that she reached the same conclusion as Nied about the nature of the substance (as in *Turner*), and the government did not introduce Nied's report itself or any readings taken from the instruments he used (as in *Moon*). Maxwell argues that Nied's forensic analysis is testimonial, but Gee never said she relied on Nied's report or his interpretation of the data in reaching her own conclusion. Instead, Gee simply testified (1) about how evidence in the crime lab is typically tested when determining whether it contains a controlled substance, (2) that she had reviewed the data generated for the material in this case, and (3) that she reached an independent conclusion that the substance contained cocaine base after reviewing that data.

The court concluded that concluded that "Maxwell was not deprived of his Sixth Amendment right simply by virtue of the fact that Gee relied on Nied's data in reaching her own conclusions, especially since she never mentioned what conclusions Nied reached about the substance."

Expert's reliance on report of another law enforcement agency did not violate the right to confrontation: *United States v. Huether,* 673 F.3d 789 (8th Cir. 2012): In a trial on charges of sexual exploitation of minors, an expert testified in part on the basis of a report by the National Center for Missing and Exploited Children. The court found no confrontation violation because the NCMEC report was not introduced into evidence and the expert drew his own conclusion and was not a conduit for the hearsay.

No confrontation violation where expert who testified did so on the basis of his own retesting: *United States v. Ortega,* 750 F.3d 1020 (8th Cir. 2014): In a drug conspiracy prosecution, the defendant argued that his right to confrontation was violated because the expert who testified at trial that the substances seized from a coconspirator's car were narcotics had tested composite samples that another chemist had produced from the substances found in the car. But the court found no error, because the testifying expert had personally conducted his own test of the composite substances, and the original report of the other chemist who prepared the composite (and who concluded the substances were narcotics) was not offered by the government; nor was the testifying expert asked about the original test. The court noted that any objection about the composite really went to the chain of custody — whether the composite tested by the expert witness was in fact derived from what was found in the car — and the court observed that "it is up to the prosecution to decide what steps are so crucial as to require evidence." The defendant made no showing of bad faith or evidence tampering, and so any question about the chain of custody was one of weight and not admissibility. Moreover, the government's introduction of the original chemist's statement about creating the composite sample did not violate the Confrontation Clause because "chain of custody alone does not implicated the Confrontation Clause" as it is "not a testimonial statement offered to prove the truth of the matter asserted."

No Confrontation Clause violation where expert's opinion was based on his own assessment and not testimonial hearsay: *United States v. Vera,* 770 F.3d 1232 (9th Cir. 2014): Appealing from convictions for drug offenses, the defendants argued that the testimony of a prosecution expert on gangs violated the Confrontation Clause because it was nothing but a conduit for testimonial hearsay from former gang members. The court agreed with the premise that expert testimony violates the Confrontation Clause when the expert "is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation." But the court disagreed that the expert operated as a conduit in this case. The court found that the witness relied on his extensive experience with gangs and that his opinion "was not merely repackaged testimonial hearsay but was an original product that could have been tested through cross-examination."

Expert's reliance on notes prepared by lab technicians did not violate the Confrontation Clause: *United States v. Pablo*, 625 F.3d 1285 (10th Cir. 2010), ***on remand for reconsideration under Williams,* 696 F.3d 1280 (10th Cir. 2012)**: The defendant was tried for rape and other charges. Two lab analysts conducted tests on the rape kit and concluded that the DNA found at the scene matched the defendant. The defendant complained that the lab results were introduced through the testimony of a forensic expert and the lab analysts were not produced for cross-examination. In the original appeal the court found no plain error, reasoning that the notes of the lab analysts were not admitted into evidence and were never offered for their truth. To the extent they were discussed before the jury, it was only to describe the basis of the expert's opinion — which the court found to be permissible under Rule 703. The court observed that "[t]he extent to which an expert witness may disclose to a jury otherwise inadmissible testimonial hearsay without implicating a defendant's confrontation rights * * * is a matter of degree." According to the court, if an expert "simply parrots another individual's testimonial hearsay, rather than conveying her own independent judgment that only incidentally discloses testimonial hearsay to assist the jury in evaluating her opinion, then the expert is, in effect, disclosing the testimonial hearsay for its substantive truth and she becomes little more than a backdoor conduit for otherwise inadmissible testimonial hearsay." In this case the court, applying the plain error standard, found insufficient indication that the expert had operated solely as a conduit for testimonial hearsay.

***Pablo* was vacated for reconsideration in light of *Williams*. On remand, the court once again affirmed the conviction.** The court stated that "we need not decide the precise mandates and limits of *Williams,* to the extent they exist." The court noted that five members of the *Williams* Court "might find" that the expert's reliance on the lab test was for its truth. But "we cannot say the district court plainly erred in admitting Ms. Snider's testimony, as it is not plain that a majority of the Supreme Court would have found reversible error with the challenged admission." The court explained as follows in a parsing of *Williams:*

> On the contrary, it appears that five Justices would affirm the district court in this case, albeit with different Justices relying on different rationales as they did in Williams. The four-Justice plurality in *Williams* likely would determine that Ms. Snider's testimony was not offered for the truth of the matter asserted in Ms. Dick's report, but rather was offered for the separate purpose of evaluating Ms. Snider's credibility as an expert witness per Fed.R.Evid. 703; and therefore that the admission of her testimony did not offend the Confrontation Clause. Meanwhile, although Justice Thomas likely would conclude that the testimony was being offered for the truth of the matter asserted, he likely would further determine that the testimony was nevertheless constitutionally admissible because the appellate record does not show that the report was certified, sworn to, or otherwise imbued with the requisite "solemnity" required for the statements therein to be considered testimonial for purposes of the Confrontation Clause. Since Ms. Dick's report is not a part of the appellate record, we naturally cannot say that it plainly would meet Justice Thomas's solemnity test. In sum, it is not clear or obvious under current law that the district court erred in admitting Ms. Snider's testimony, so reversal is

unwarranted on this basis.

The *Pablo* court on remand concluded that " the manner in which, and degree to which, an expert may merely rely upon, and reference during her in-court expert testimony, the out-of-court testimonial conclusions in a lab report made by another person not called as a witness is a nuanced legal issue without clearly established bright line parameters, particularly in light of the discordant 4–1–4 divide of opinions in *Williams*."

Expert's testimony on gang structure and practice does not violate the Confrontation Clause even though it was based in part on testimonial hearsay. *United States v. Kamahele,* 748 F.3d 984 (10th Cir. 2014): Appealing from convictions for gang-related activity, the defendants argued that a government expert's testimony about the structure and operation of the gang violated the Confrontation Clause because it was based in part on interviews with cooperating witnesses and other gang members. The court found no error and affirmed, concluding that the admission of expert testimony violates the Confrontation Clause "only when the expert is simply parroting a testimonial fact." The court noted that in this case the expert "applied his expertise, formed by years of experience and multiple sources, to provide an independently formed opinion." Therefore, no testimonial hearsay was offered for its truth against the defendant.

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.

Fact that defendant had multiple reasons for killing a witness does not preclude a finding of forfeiture: *United States v. Jackson,* 706 F.3d 262 (4th Cir. 2013): The defendant argued that the constitutional right to confrontation can be forfeited only when a defendant was motivated *exclusively* by a desire to silence a witness. (In this case the defendant argued that while he murdered

a witness to silence him, he had additional reasons, including preventing the witness from harming the defendant's drug operation and as retaliation for robbing one of the defendant's friends.) The court rejected the argument, finding nothing in *Giles* to support it. To the contrary, the Court in *Giles* reasoned that the common law forfeiture rule was designed to prevent the defendant from profiting from his own wrong. Moreover, under a multiple-motive exception to forfeiture, defendants might be tempted to murder witnesses and then cook up another motive for the murder after the fact.

Forfeiture can be found on the basis of *Pinkerton* liability: *United States v. Dinkins,* 691 F.3d 358 (4th Cir. 2012): The court found that the defendant had forfeited his right of confrontation when a witness was killed by a coconspirator as an act to further the conspiracy by silencing the witness. The court concluded that in light of *Pinkerton* liability, "the Constitution does not guarantee an accused person against the legitimate consequence of his own wrongful acts."

Retaliatory murder of witnesses who testified against the accused in a prior case is not a forfeiture in the trial for murdering the witnesses: *United States v. Henderson,* 626 F.3d 626 (6th Cir. 2010): The defendant was convicted of bank robbery after two people (including his accomplice) testified against him. Shortly after the defendant was released from prison, the two witnesses were found murdered. At the trial for killing the two witnesses, the government offered statements made by the victims to police officers during the investigation of the bank robbery. These statements concerned their cooperation and threats made by the defendant. The trial judge admitted the statements after finding by a preponderance of the evidence that the defendant killed the witnesses. That decision, grounded in forfeiture, was made before *Giles* was decided. On appeal, the court found error under *Giles* because "Bass and Washington could not have been killed, in 1996 and 1998, respectively, to prevent them from testifying against [the defendant] in the bank robbery prosecution in 1981." Thus there was no showing of intent to keep the witnesses from testifying, as *Giles* requires for a finding of forfeiture. The court found the errors to be harmless.

Forfeiture of confrontation rights, like forfeiture under Federal Rule 804(b)(6), is found upon a showing by a preponderance of the evidence: *United States v. Johnson*, 767 F.3d 815 (9th Cir. 2014): The court affirmed convictions for murder and armed robbery. At trial hearsay testimony of an unavailable witness was admitted against the defendant, after the government made a showing that the defendant had threatened the witness; the trial court found that the defendant had forfeited his right under both the hearsay rule and the Confrontation Clause to object to the hearsay. The court found no error. It held that that a forfeiture of the right to object under both the hearsay rule and the Confrontation Clause is governed by the same standard: the government must establish by a preponderance of the evidence that the defendant acted wrongfully to cause the unavailability of a government witness, with the intent that the witness would not testify at trial. The defendant argued that the Constitution requires a showing of clear and convincing evidence before forfeiture of a right to confrontation can be found. But the court disagreed. It noted that a clear and convincing evidence standard had been applied by some lower courts when the Confrontation Clause regulated the admission of unreliable hearsay. But now, after Crawford v. Washington, the Confrontation

Clause does not bar unreliable hearsay from being admitted; rather it regulates testimonial hearsay. The court stated that after *Crawford,* "the forfeiture exception is consistent with the Confrontation Clause, not because it is a means for determining whether hearsay is reliable, but because it is an equitable doctrine designed to prevent defendants from profiting from their own wrongdoing." The court also noted that the Supreme Court's post-*Crawford* decisions of Davis v. Washington and Giles v. California "strongly suggest, if not squarely hold, that the preponderance standard applies." On the facts, the court concluded that "the evidence tended to show that Johnson alone had the means, motive, and opportunity to threaten [the witness], and did not show anyone else did. This was sufficient to satisfy the preponderance standard."

Grand Jury, Plea Allocutions, Etc.

Grand jury testimony and plea allocution statement are both testimonial: *United States v. Bruno,* 383 F.3d 65 (2nd Cir. 2004): The court held that a plea allocution statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant. It noted that the Court in *Crawford* had taken exception to previous cases decided by the Circuit that had admitted such statements as sufficiently reliable under *Roberts*. Those prior cases have been overruled by *Crawford.* The court also noted that the admission of grand jury testimony was error as it was clearly testimonial after *Crawford*. **See *also United States v. Becker,*** 502 F.3d 122 (2nd Cir. 2007) (plea allocution is testimonial even though redacted to take out direct reference to the defendant: "any argument regarding the purposes for which the jury might or might not have actually considered the allocutions necessarily goes to whether such error was harmless, not whether it existed at all"); ***United States v. Snype,*** 441 F.3d 119 (2nd Cir. 2006) (plea allocution of the defendant's accomplice was testimonial even though all direct references to the defendant were redacted); ***United States v. Gotti,*** 459 F.3d 296 (2nd Cir. 2006) (redacted guilty pleas of accomplices, offered to show that a bookmaking business employed five or more people, were testimonial under *Crawford*); ***United States v. Al-Sadawi,*** 432 F.3d 419 (2nd Cir. 2005) (*Crawford* violation where the trial court admitted portions of a cohort's plea allocution against the defendant, even though the statement was redacted to take out any direct reference to the defendant).

Defendant charged with aiding and abetting has confrontation rights violated by admission of primary wrongdoer's guilty plea: *United States v. Head,* 707 F.3d 1026 (8th Cir. 2013): The defendant was charged with aiding and abetting a murder committed by her boyfriend in Indian country. The trial court admitted the boyfriend's guilty plea to prove the predicate offense. The court found that the guilty plea was testimonial and reversed the aiding and abetting conviction. The court relied on *Crawford's* statement that "prior testimony that the defendant was unable to cross-examine" is one of the "core class of 'testimonial' statements."

Grand jury testimony is testimonial: *United States v. Wilmore,* 381 F.3d 868 (9th Cir. 2004): The court held, unsurprisingly, that grand jury testimony is testimonial under *Crawford*. It could hardly have held otherwise, because even under the narrowest definition of "testimonial" (i.e., the specific types of hearsay mentioned by the *Crawford* Court) grand jury testimony is covered within the definition.

Implied Testimonial Statements

Testimony that a police officer's focus changed after hearing an out-of-court statement impliedly included accusatorial statements from an accomplice and so violated the defendant's right to confrontation: *United States v. Meises,* 645 F.3d 5 (1st Cir. 2011): At trial an officer testified that his focus was placed on the defendant after an interview with a cooperating witness. The government did not explicitly introduce the statement of the cooperating witness. On appeal, the defendant argued that the jury could surmise that the officer's focus changed because of an out-of-court accusation of a declarant who was not produced at trial. The government argued that there was no confrontation violation because the testimony was all about the actions of the officer and no hearsay statement was admitted at trial. But the court agreed with the defendant and reversed the conviction. The court noted that it was irrelevant that the government did not introduce the actual statements, because such statements were effectively before the jury in the context of the trial. The court stated that "any other conclusion would permit the government to evade the limitations of the Sixth Amendment and the Rules of Evidence by weaving an unavailable declarant's statements into another witness's testimony by implication. The government cannot be permitted to circumvent the Confrontation Clause by introducing the same substantive testimony in a different form."

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.
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> * * *
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> Whatever locution is used, out-of-court statements admitted at trial are "statements" for the purpose of the Confrontation Clause * * * if, fairly read, they convey to the jury the substance of an out-of-court, testimonial statement of a witness who does not testify.

See also United States v. Brooks, 772 F.3d 1161 (9th Cir. 2014): An agent testified that he telephoned a postal supervisor and provided him a description of the suspect, and then later searched a particular parcel with a tracking number and mailing information he had been provided over the phone as identifying the package mailed by the suspect. The postal supervisor was not produced for trial. The government argued that the agent's testimony did not violate the Confrontation Clause because the postal supervisor's actual statements were never offered at trial. But the court declared that "out-of-court statements need not be repeated verbatim to trigger the protections of the Confrontation Clause." Fairly read, the agent's testimony revealed the substance of the postal supervisor's statements. And those statements were made with the motivation that they be used in a criminal prosecution. Therefore the agent's testimony violated the Confrontation Clause.

Informal Circumstances, Private Statements, etc.

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**

Prison telephone calls between defendant and his associates were not testimonial: *United States v. Jones,* 716 F.3d 851 (4th Cir. 2013): Appealing from convictions for marriage fraud, the defendant argued that the trial court erred in admitting telephone conversations between the defendant and his associates, who were incarcerated at the time. The calls were recorded by the prison. The court found no error in admitting the conversations because they were not testimonial. The calls involved discussions to cover up and lie about the crime, and they were casual, informal statements among criminal associates, so it was clear that they were not primarily motivated to be used in a criminal prosecution. The defendant argued that the conversations were testimonial because the parties knew they were being recorded. But the court noted that "a declarant's understanding that a statement could potentially serve as criminal evidence does not necessarily denote testimonial intent" and that "just because recorded statements are used at trial does not mean they were created for trial." The court also noted that a prison "has significant institutional reasons for recording phone calls outside or procuring forensic evidence — i.e., policing its own facility by monitoring prisoners' contact with individuals outside the prison."

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.

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.

Interpreter's statements were testimonial: *United States v. Charles,* 722 F.3d 1319 (11th Cir. 2013): The defendant was convicted of knowingly using a fraudulently authored travel document. When the defendant was detained at the airport, he spoke to the Customs Officer through an interpreter. At trial, the defendant's statements were reported by the officer. The interpreter was not called. The court held that the defendant had the right to confront the interpreter. It stated that the interpreter's translations were testimonial because they were rendered in the course of an interrogation and for these purposes the interpreter was the relevant declarant. But the court found that the error was not plain and affirmed the conviction. The court did not address the conflicting authority in the Ninth Circuit, supra. ***See also United States v. Curbelo,*** 726 F.3d 1260 (11th Cir. 2013) (transcripts of a wiretapped conversation that were translated constituted the translator's implicit out-of-court representation that the translation was correct, and the translator's implicit assertions were testimonial; but there was no violation of the Confrontation Clause because a party to the conversation testified to what was said based on his independent review of the recordings and the transcript, and the transcript itself was never admitted at trial).

Interrogations, Etc.

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

Accusations made to child psychologist appointed by law enforcement were testimonial: *McCarley v. Kelly,* 759 F.3d 535 (6th Cir. 2014): A three year old boy witnessed a murder but would not talk to the police about it. The police sought out a child psychologist, who interviewed the boy with the understanding that she would try to "extract information" from him about the crime and refer that information to the police. Helping the child was, at best, a secondary motive. Under these circumstances, the court found that the child's statements to the psychologist were testimonial and erroneously admitted in the defendant's state trial. The court noted that the sessions "were more akin to police interrogations than private counseling sessions."

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.
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> **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 testimonial hearsay.**

See also United States v. Summers, 666 F.3d 192 (4th Cir. 2011): (expert's reliance on a "pure instrument read-out" did not violate the Confrontation Clause because such a read-out is not "testimony").

Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone."

Electronic tabulation of phone calls is not a statement and therefore cannot be testimonial hearsay: *United States v. Lamons,* 532 F.3d 1251 (11th Cir. 2008): Bomb threats were called into an airline, resulting in the disruption of a flight. The defendant was a flight attendant accused of sending the threats. The trial court admitted a cd of data collected from telephone calls made to the airline; the data indicated that calls came from the defendant's cell phone at the time the threats were made. The defendant argued that the information on the cd was testimonial hearsay, but the court disagreed, because the information was entirely machine-generated. The court stated that "the witnesses with whom the Confrontation Clause is concerned are *human* witnesses" and that the purposes of the Confrontation Clause "are ill-served through confrontation of the machine's human operator. To say that a wholly machine-generated statement is unreliable is to speak of mechanical error, not mendacity. The best way to advance the truth-seeking process * * * is through the process of authentication as provided in Federal Rule of Evidence 901(b)(9)." The court concluded that there was no hearsay statement at issue and therefore the Confrontation Clause was inapplicable.

Medical/Therapeutic Statements

Statements by victim of abuse to treatment manager of Air Force medical program were admissible under Rule 803(4) and non-testimonial: *United States v. DeLeon,* 678 F.3d 317 (4th Cir. 2012): The defendant was convicted of murdering his eight-year-old son. Months before his death, the victim had made statements about incidents in which he had been physically abused by the defendant as part of parental discipline. The statements were made to the treatment manager of an Air Force medical program that focused on issues of family health. The court found that the statements were properly admitted under Rule 803(4) and (essentially for that reason) were non-testimonial because their primary purpose was not for use in a criminal prosecution of the defendant. The court noted that the statements were not made in response to an emergency, but that emergency was only one factor under *Bryant.* The court also recognized that the Air Force program "incorporates reporting requirements and a security component" but stated that these factors were not sufficient to render statements to the treatment manager testimonial. The court explained why the "primary motive" test was not met in the following passage:

> We note first that Thomas [the treatment manager] did not have, nor did she tell Jordan [the child] she had, a prosecutorial purpose during their initial meeting. Thomas was not employed as a forensic investigator but instead worked * * * as a treatment manager. And there is no evidence that she recorded the interview or otherwise sought to memorialize Jordan's answers as evidence for use during a criminal prosecution. * * * Rather, Thomas used the information she gathered from Jordan and his family to develop a written treatment plan and continued to provide counseling and advice on parenting techniques in subsequent meetings with family members. * * * Thomas also did not meet with Jordan in an interrogation room or at a police station but instead spoke with him in her office in a building

that housed * * * mental health service providers.

> Importantly, ours is also not a case in which the social worker operated as an agent of law enforcement. * * * Here, Thomas did not act at the behest of law enforcement, as there was no active criminal investigation when she and Jordan spoke. * * * An objective review of the parties' actions and the circumstances of the meeting confirms that the primary purpose was to develop a treatment plan — not to establish facts for a future criminal prosecution. Accordingly, we hold that the contested statements were nontestimonial and that their admission did not violate DeLeon's Sixth Amendment rights.

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.

Non-Verbal Information

Videotape of drug transaction was not hearsay and so its introduction did not violate the right to confrontation: *United States v. Wallace,* 753 F.3d 671 (7th Cir. 2014): In a drug prosecution, the government introduced a videotape, without sound, which appeared to show the defendant selling drugs to an undercover informant. The defendant argued that the tape was inadmissible hearsay and violated his right to confrontation, because the undercover informant was never called to testify. But the court disagreed and affirmed his conviction. The court reasoned that the video was

> a picture; it was not a witness who could be cross-examined. The agent narrated the video at trial, and his narration was a series of statements, so he was subject to being cross-examined and was, and thus was "confronted." [The informant] could have testified to what he saw, but what could he have said about the recording device except that the agents had strapped it on him and sent him into the house, whether the device recorded whatever happened to be in front of it? Rule 801(a) of the Federal Rules of Evidence does define "statement" to include "nonverbal conduct," but only if the person whose conduct it was "intended it as an assertion." We can't fit the videotape to this definition.

Photographs of seized evidence was not testimony so its admission did not violate the Confrontation Clause: *United States v. Brooks,* 772 F.3d 1161 (9th Cir. 2014): In a narcotics trial, the defendant objected to the admission of photographs of a seized package on the ground it admission would violate his right to confrontation. But the court disagreed. It noted that the *Crawford* Court defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." The photographs did not meet that definition because they "were not 'witnesses' against Brooks. They did not 'bear testimony' by declaring or affirming anything with a 'purpose.'"

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."); ***United States v. Santiago,*** 566 F.3d 65 (1st Cir. 2009) (statements were not offered for their truth "but as exchanges with Santiago essential to understand the context of Santiago's own recorded statements arranging to 'cook' and supply the crack"; ***United States v. Liriano,*** 761 F.3d 131 (1st Cir. 2014) (even though statements were testimonial, admission did not violation the Confrontation Clause where they were properly offered to place the defendant's responses in context). ***See also Furr v. Brady,*** 440 F.3d 34 (1st Cir. 2006) (the defendant was charged with firearms offenses and intimidation of a government witness; an accomplice's confession to law enforcement did not implicate *Crawford* because it was not admitted for its truth; rather, it was admitted to show that the defendant knew about the confession and, in contacting the accomplice thereafter, intended to intimidate him).

Note: Five members of the Court in *Williams* disagreed with Justice Alito's analysis that the Confrontation Clause was not violated because the testimonial lab report was never admitted for its truth. The question from *Williams* is whether those five Justices are opposed to *any* use of the not-for-truth analysis in answering Confrontation Clause challenges. The answer is apparently that their objection to the not-for truth analysis in *Williams* does not extend to situations in which (in their personal view) the statement has a *legitimate* not-for-truth purpose. Thus, Justice Thomas distinguishes the expert's use of the lab report from the prosecution's admission of an accomplice's confession in *Tennessee v. Street,* where the confession "was not introduced for its truth, but only to impeach the defendant's version of events." In *Street* the defendant challenged his confession on the ground that he had been coerced to copy Peele's confession. Peele's confession was introduced not for its truth but only to show that it differed from Street's. For that purpose, it didn't matter whether it was true. Justice Thomas stated that "[u]nlike the confession in *Street,* statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose" because "to use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true." Justice Kagan in her opinion essentially repeats Justice Thomas's analysis and agrees with his distinction between legitimate and illegitimate use of the "not-for-truth" argument. Both Justices Kagan and Thomas

agree with the Court's statement in *Crawford* that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Both would simply add the proviso that the not-for-truth use must be *legitimate* or *plausible.*

It follows that the cases under this "not-for-truth" headnote are probably unaffected by *Williams,* as they largely permit admission of testimonial statements as offered "not-for-truth" only when that purpose is legitimate, i.e., *only when the statement is offered for a purpose as to which it is relevant regardless of whether it is true or not.*

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.
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> **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."

Admission of complaints offered for non-hearsay purpose did not violate the Confrontation Clause: *United States v. Adams,* 722 F.3d 788 (6th Cir. 2013): The defendants were convicted for participation in a vote-buying scheme in three elections. They complained that their confrontation rights were violated when the court admitted complaints that were contained within state election reports. The court of appeals rejected that argument, because the complaints were offered for proper non-hearsay purposes. Some of the information was offered to prove it was false, and other information was offered to show that the defendants adjusted their scheme based on the complaints received. The court did find, however, that the complaints were erroneously admitted under Rule 403, because of the substantial risk that the jury would use the assertions for their truth; that the probative value for the non-hearsay purpose was "minimal at best"; and the government had other less prejudicial evidence available to prove the point. Technically, this should mean that there was a violation of the Confrontation Clause, because the evidence was not *properly* offered for a not-for-truth purpose. But the court did not make that holding. It reversed on evidentiary grounds.

Informant's statements were not properly offered for "context," so their admission violated *Crawford*: *United States v. Powers,* 500 F.3d 500 (6th Cir. 2007): In a drug prosecution, a law enforcement officer testified that he had received information about the defendant's prior criminal activity from a confidential informant. The government argued on appeal that even though the informant's statements were testimonial, they did not violate *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." ***See also United States v. Macias-Farias,*** 706 F.3d 775 (6th Cir. 2013) (officer's testimony that he had received information from someone was offered not for its truth but to explain the officer's conduct, thus no confrontation violation).

Admission of the defendant's conversation with an undercover informant does not violate the Confrontation Clause, where the undercover informant's part of the conversation is offered only for "context": *United States v. Nettles,* 476 F.3d 508 (7th Cir. 2007): The defendant made plans to blow up a government building, and the government 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. Foster,*** 701 F.3d 1142 (7th Cir. 2012) ("Here, the CI's statement regarding the weight [of the drug] was not offered to show what the weight *actually* was * * * but rather to explain the defendant's acts and make his statements intelligible. The defendant's statement to 'give me sixteen fifty' (because the original price was 17) would not have made sense without reference to the CI's comment that the quantity was off. Because the statements were admitted only to prove context, *Crawford* does not require confrontation."); ***United States v. Ambrose,*** 668 F.3d 943 (7th Cir. 2012) (conversation between two crime family members about actions of a cooperating witness were not offered for their truth but rather to show that information had been leaked; because the statements were not offered for their truth, there was no violation of the right to confrontation).

For more on "context" see ***United States v. Wright,*** 722 F.3d 1064 (7th Cir. 2013): In a drug prosecution, the defendant's statement to a confidential information that he was "stocked up" would have been unintelligible without providing the context of the informant's statements inquiring about drugs, "and a jury would not have any sense of why the conversation was even happening." The court also noted that "most of the CI's statements were inquiries and not factual assertions." The court expressed concern, however, that the district court's limiting instruction on "context" was boilerplate, and that the jury "could have been told that the CI's half of the conversation was being played only so that it could understand what Wright was responding to, and that the CI's statements standing alone were not to be considered as evidence of Wright's guilt."

> **Note: The concerns expressed in *Nettles* about possible abuse of the "context" usage are along the same lines as those expressed by Justices Thomas and Kagan in *Williams,* when they seek to distinguish legitimate and illegitimate not-for-truth purposes. If 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."). ***See also United States v. Shores,*** 700 F.3d 366 (8th Cir. 2012) (confidential informant's accusation made to police officer was properly offered to prove the propriety of the investigation: "From the early moments of the trial, it was clear that Shores would be premising his defense on the theory that he was a victim of government targeting."); ***United States v. Wright,*** 739 F.3d 1160 (8th Cir. 2014) (Officer's statement to another officer, "come into the room, I've found something" was not hearsay because it was offered only to explain why the second officer came into the room and to rebut the defense counsel's argument that the officer entered the room in response to a loud noise : "If the underlying statement is testimonial but not hearsay, it can be admitted without violating the defendant's Sixth Amendment rights.").

Accusatory statements offered to explain why an officer conducted an investigation in a certain way are not hearsay and therefore admission does not violate *Crawford: United States v. Brown,* 560 F.3d 754 (8th Cir. 2009): Challenging drug conspiracy convictions, one defendant argued that it was error for the trial court to admit an out-of-court statement from a shooting victim to a police officer. The victim accused a person named "Clean" who was accompanied by a man named Charmar. The officer who took this statement testified that he entered "Charmar" into a database to help identify "Clean" and the database search led him to the defendant. The court found no error in admitting the victim's statement, stating that "it is not hearsay when offered to explain why an officer conducted an investigation in a certain way." The defendant argued that the purported nonhearsay purpose for admitting the evidence "was only a subterfuge to get Williams' statement about Brown before the jury." But the court responded that the defendant "did not argue at trial that the prejudicial effect of the evidence outweighed its nonhearsay value." The court also observed that the trial court twice instructed the jury that the statement was admitted for the limited purpose of understanding why the officer searched the database for Charmar. Finally, the court held that because the statement properly was not offered for its truth, "it does not implicate the confrontation clause."

Statement offered as foundation for good faith basis for asking question on cross-

examination does not implicate *Crawford: United States v. Spears,* 533 F.3d 715 (8th Cir. 2008): In a bank robbery case, the defendant testified and was cross-examined and asked about her knowledge of prior bank robberies. In order to inquire about these bad acts, the government was required to establish to the court a good-faith basis for believing that the acts occurred. The government's good-faith basis was the confession of the defendant's associate to having taken part in the prior robberies. The defendant argued that the associate's statements, made to police officers, were testimonial. But the court held that *Crawford* was inapplicable because the associate's statements were not admitted for their truth — indeed they were not admitted at all. The court noted that there was "no authority for the proposition that use of an out-of-court testimonial statement merely as the good faith factual basis for relevant cross-examination of the defendant at trial implicates the Confrontation Clause."

Admitting testimonial statements that were part of a conversation with the defendant did not violate the Confrontation Clause because they were not offered for their truth: *United States v. Spencer,* 592 F.3d 866 (8th Cir. 2010): Affirming drug convictions, the court found no error in admitting tape recordings of a conversation between the defendant and a government informant. The defendant's statements were statements by a party-opponent and admitting the defendant's own statements cannot violate the Confrontation Clause. The informant's statements were not hearsay because they were admitted only to put the defendant's statements in context.

Statement offered to prove it was false is not hearsay and so did not violate the Confrontation Clause: *United States v. Yielding,* 657 F.3d 688 (8th Cir. 2011): In a fraud prosecution, the trial court admitted the statement of an accomplice to demonstrate that she used a false cover story when talking to the FBI. The court found no error, noting that "the point of the prosecutor's introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false." The court found that the government introduced other evidence to show that the declarant's assertions that a transaction was a loan were false. The court cited *Bryant* for the proposition that because the statements were not hearsay, their admission did not violate the Confrontation Clause.

Admitting testimonial statements to show a common (false) alibi did not violate the Confrontation Clause: *United States v. Young,* 753 F.3d 757 (8th Cir. 2014): Young was accused of conspiring with Mock to murder Young's husband and make it look like an accident. The government introduced the statement that Mock made to police after the husband was killed. The statement was consistent in all details with the alibi that Young had independently provided. The

government offered Mock's statement for the inference that she had Young had collaborated on an alibi. Young argued that introducing Mock's statement to the police violated her right to confrontation, but the court disagreed. It observed that the Confrontation Clause does not bar the admission of out-of-court statements that are not hearsay. In this case, Mock's statement was not offered for its truth but rather "to show that Young and Mock had a common alibi, scheme, or conspiracy. In fact, Mock's statements to Deputy Salsberry are valuable to the government because they are false."

Statements not offered for truth do not violate the Confrontation Clause even if testimonial: *United States v. Faulkner,* 439 F.3d 1221 (10th Cir. 2006): The court stated that "it is clear from *Crawford* that the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement." ***See also United States v. Mitchell,*** 502 F.3d 931 (9th Cir. 2007) (information given by an eyewitness to a police officer was not offered for its truth but rather "as a basis" for the officer's action, and therefore its admission did not violate the Confrontation Clause); ***United States v. Brinson,*** 772 F.3d 1314 (10th Cir. 2014) (In a prosecution for sex trafficking, statements made to undercover police officer that set up a meeting for sex were properly admitted as not hearsay and so their admission did not violate the Confrontation Clause: "The prosecution did not present the out-of-court statements to prove the truth of the statements about the location, price, or lack of a condom. Rather, the prosecution offered these statements to explain why Officer Osterdyk went to Room 123, how he knew the price, and why he agreed to pay for oral sex."; the court also found that the statements were not testimonial anyway because the declarant did not know she was talking to a police officer.) .

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*, 690 F.3d 705 (5th Cir. 2012): In a drug trial, the defendant objected that a 911 call from a bystander to a drug transaction — together with 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].

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.

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 Judicial Conference and became effective December 1, 2013.

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

> The question presented is whether the Confrontation Clause permits the prosecution

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

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

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

Note: While 902(11) may still be viable after *Melendez-Diaz*, some of the rationales used by the *Adefehinti* court are now suspect. First, the *Melendez-Diaz* Court rejects the argument that the certificate is not testimonial just because the underlying records are nontestimonial. Second, the argument that the 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. See also *United States v. Lopez,* 747 F.3d 1141 (9th Cir. 2014) (adhering to pre-*Melendez -Diaz* case law holding that deportation documents in an A-file are not testimonial when admitted in illegal re-entry cases).

Proof of absence of business records is not testimonial: *United States v. Munoz-Franco,* 487 F.3d 25 (1st Cir. 2007): In a prosecution for bank fraud and conspiracy, the trial court admitted the minutes of the Board and Executive Committee of the Bank. The defendants did not challenge the admissibility of the minutes as business records, but argued that it was constitutional error to allow the government to rely on the absence of certain information in the minutes to prove that the Board was not informed about such matters. The court rejected the defendants' confrontation argument in the following passage:

> The Court in *Crawford* plainly characterizes business records as "statements that by their nature [are] not testimonial." 541 U.S. at 56. If business records are nontestimonial, it follows that the absence of information from those records must also be nontestimonial.

Note: This analysis appears unaffected by *Melendez-Diaz,* as no certificate or affidavit is involved and the record itself was not prepared for litigation purposes.

Business records are not testimonial: *United States v. Jamieson,* 427 F.3d 394 (6th Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were 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: Three circuits have held that the reasoning of *Ellis* remains sound after *Melendez-Diaz,* and that 902(11) and (12) certificates are not testimonial. *See United States v. Yeley-Davis,* 632 F.3d 673 (10th Cir. 2011), ***United States v. Johnson,*** 688 F.3d 494 (8th Cir. 2012), and ***United States v. Anekwu,*** 695 F.3d 967 (9th Cir. 2012) all infra.

Odometer statements, prepared before any crime of odometer-tampering occurred, are not testimonial: *United States v. Gilbertson,* 435 F.3d 790 (7th Cir. 2006): In a prosecution for odometer-tampering, the government proved its case by introducing the odometer statements prepared when the cars were sold to the defendant, and then calling the buyers to testify that the mileage on the odometers when they bought their cars was substantially less than the mileage set forth on the odometer statements. The defendant argued that introducing the odometer statements violated *Crawford.* He contended that the odometer statements were essentially formal affidavits, the very kind of evidence that most concerned the Court in *Crawford*. But the court held that the concern in *Crawford* was limited to affidavits prepared for trial as a testimonial substitute. This

concern did not apply to the odometer statements. The court explained as follows:

> The odometer statements in the instant case are not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution. The statements were not initiated by the government in the hope of later using them against Gilbertson (or anyone else), nor could the declarants (or any reasonable person) have had such a belief. The reason is simple: each declaration was made *prior* to Gilbertson even engaging in the crime. Therefore, there is no way for the sellers to anticipate that their statements regarding the mileage on the individual cars would be used as evidence against Gilbertson for a crime he commits in the future.

Note: this result is unaffected by *Melendez-Diaz* as the records clearly were not prepared for purposes of litigation — 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.**

In *United States v. Albino-Loe,* 747 F.3d 1206 (9th Cir. 2014), the court adhered to its ruling in *Weiland,* declaring that a routine certification or authenticity of a record (in that case documents in an A-file) are not testimonial in nature, because they "did not accomplish anything other than authenticating the A-file documents to which they were attached."

Absence of records in database is not testimonial; and drug ledger is not testimonial: ***United States v. Mendez,*** 514 F.3d 1035 (10th Cir. 2008): In an illegal entry case, an agent testified that he searched the ICE database for information indicating that the defendant entered the country legally, and found no such information. The ICE database is "a nation-wide database of information which archives records of entry documents, such as permanent resident cards, border crossing cards, or certificates of naturalization." The defendant argued that the entries into the database (or the asserted lack of entries in this case) were testimonial. But the court disagreed, because the records "are not prepared for litigation or prosecution, but rather administrative and regulatory purposes." The court also observed that Rule 803(8) tracked *Crawford* exactly: a public record is admissible under Rule 803(8) unless it is prepared with an eye toward litigation or prosecution; and under *Crawford,* "the very same characteristics that preclude a statement from being classified as a public record are likely to render the statement testimonial."

Mendez also involved drug charges, and the defendant argued that admitting a drug ledger with his name on it violated his right to confrontation under *Crawford.* The court also rejected this argument. It stated first that the entries in the ledger were not hearsay at all, because they were offered to show that the book was a drug ledger and thus a "tool of the trade." As the entries were not offered for truth, their admission could not violate the Confrontation Clause. But the court further held that even if the entries were offered for truth, they were not testimonial, because "[a]t no point did the author keep the drug ledger for the *primary purpose* of aiding police in a criminal investigation, the focus of the *Davis* inquiry." (emphasis the court's). The court noted that it was not enough that the statements were relevant to a criminal prosecution, otherwise "any piece of evidence which aids the prosecution would be testimonial."

Note: Both holdings in the above case survive *Melendez-Diaz.* The first holding is about the absence of public records — 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 cases on the specific subject of Rule 902(11) certificates find that they are *not* testimonial, there is certainly no call at this point to propose an amendment to Rule 902(11).

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

> The Office of the Medical Examiner is required by D.C.Code § 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,* but it would appear to satisfy both the Alito and the Kagan version of the "primary motive" test. Both tests agree that a statement cannot be testimonial unless the primary motive for making it is to have it used in a criminal prosecution. The difference is that Justice Alito provides another qualification — the statement is testimonial only if it was made to be used in the *defendant's* criminal prosecution. In *Phoeun Lang* the first premise was not met — the statements were made for administrative purposes, and not primarily for use in any criminal prosecution.

Certain records of internet activity sent to law enforcement found testimonial: *United States v. Cameron*, 699 F.3d 621 (1st Cir. 2012): In a child pornography prosecution, the court held that admission of certain business records violated the defendant's right to Confrontation Clause. The evidence principally at issue related to accounts with Yahoo. Yahoo received an anonymous report that child pornography images were contained in a Yahoo account. Yahoo sent a report—called a "CP Report" — to the National Center for Missing and Exploited Children (NCMEC) listing the images being sent with the report, attaching the images, and listing the date and time at which the image was uploaded and the IP Address from which it was uploaded. NCMEC in turn sent a report of child pornography to the Maine State Police Internet Crimes Against Children Unit (ICAC), which obtained a search warrant for the defendant's computers. The government introduced testimony of a Yahoo employee as to how certain records were kept and maintained by the company, but the government did not introduce the Image Upload Data indicating the date and time each image was uploaded to the Internet. The government also introduced testimony by a NCMEC employee explaining how NCMEC handled tips regarding child pornography. The court held that admission of various data collected by Yahoo and Google automatically in order to further their business purposes was proper, because the data was contained in business records and was not testimonial for Sixth Amendment purposes. The court held, 2-1, that the reports Yahoo prepared and sent to NCMEC were different and were testimonial because there was strong evidence that the primary purpose of the reports was to prove past events that were potentially relevant to a criminal prosecution. The court relied on the following considerations to conclude that the CP Reports were

testimonial: 1) they referred to a "suspect" screen name, email address, and IP address — and Yahoo did not treat its customers as "suspects" in the ordinary course of its business; 2) before a CP Report is created, someone in the legal department at Yahoo has to determine that an account contained child pornography images; 3) Yahoo did not simply keep the reports but sent them to NCMEC, which was under the circumstances an agent of law enforcement, because it received a government grant to accept reports of child pornography and forward them to law enforcement. The government argued that Confrontation was not at issue because the CP Reports contained business records that were unquestionably nontestimonial, such as records of users' IP addresses. But the court responded that the CP Reports were themselves statements. The court noted that "[i]f the CP Reports simply consisted of the raw underlying records, or perhaps underlying records arranged and formatted in a reasonable way for presentation purposes, the Reports might well have been admissible."

The government also argued that the CP Reports were not testimonial under the Alito definition of primary motive in *Williams*. Like the DNA reports in *Williams*, the CP Reports were prepared at a time when the perpetrator was unknown and so they were not targeted toward a particular individual. The court distinguished *Williams* by relying on a statement in the Alito opinion that at the time of the DNA report, the technicians had "no way of knowing whether it will turn out to be incriminating or exonerating." In contrast, when the CP Reports were prepared, Yahoo personnel knew that they were incriminating: "Yahoo's employees may not have known *whom* a given CP Report might incriminate, but they almost certainly were aware that a Report would incriminate *somebody*."

Finally, the court held that the NCMEC reports sent to the police were testimonial, because they were statements independent of the CP Reports, and they were sent to law enforcement for the primary purpose of using them in a criminal prosecution. One judge, dissenting in part, argued that the connection between an identified user name, the associated IP address, and the digital images archived from that user's account all existed well before Yahoo got the anonymous tip, were an essential part of the service that Yahoo provided, and thus were ordinary business records that were not testimonial.

Note: *Cameron* does not explicitly hold that business records admissible under Rule 803(6) can be testimonial under *Crawford.* The court notes that under *Palmer v. Hoffman,* 318 U.S. 109 (1943), records are not admissible as business records when they are calculated for use in court. *Palmer* is still good law under Rule 803(6), as the Court recognized in *Melendez-Diaz.* The *Cameron* court noted that the Yahoo reports were subject to the same infirmity as the records found inadmissible in *Hoffman:* they were not made for business purposes, but rather for purposes of litigation.

It should also be noted that the Court's attempt to distinguish the Alito primary motive test is weak. The court relies on one sentence in Justice Alito's analysis, but the gravamen of that analysis is that there was no primary motive because the lab was not targeting a known individual. That is the same with the Yahoo CP reports.

Routine autopsy report was not testimonial: *United States v. James,* 712 F.3d 79 (2nd Cir. 2013): The court considered whether its *pre-Melendez-Diaz* case law — stating that autopsy reports were not testimonial — was still valid. The court adhered to its view that "routine" autopsy reports were not testimonial because they are not primarily motivated to create a record for a criminal trial. Applying the test of "routine" to the facts presented, the court found as follows:

> Somaipersaud's autopsy was anything other than routine — there is no suggestion that Jindrak or anyone else involved in this autopsy process suspected that Somaipersaud had been murdered and that the medical examiner's report would be used at a criminal trial. Ambrosi testified that causes of death are often undetermined in cases like this because it could have been a recreational drug overdose or a suicide. The autopsy report itself refers to the cause of death as "undetermined" and attributes it both to "acute mixed intoxication with alcohol and chlorpromazine" combined with "hypertensive and arteriosclerotic cardiovascular disease."
>
> The autopsy was completed on January 24, 1998, and the report was signed June 16, 1998, substantially before any criminal investigation into Somaipersaud's death had begun. During the course of Ambrosi's lengthy trial testimony, neither the government nor defense counsel elicited any information suggesting that law enforcement was ever notified that Somaipersaud's death was suspicious, or that any medical examiner expected a criminal investigation to result from it. Indeed, there is reason to believe that none is pursued in the case of most autopsies.

The court noted that "something in the order of ten percent of deaths investigated by the OCME lead to criminal investigations." It distinguished the 11th Circuit's opinion — discussed below — which found an autopsy report to be testimonial, noting that "the decision was based in part on the fact that the Florida Medical Examiner's Office was created and exists within the Department of Law Enforcement. Here, the OCME is a wholly independent office." Thus, an autopsy report prepared outside the auspices of a criminal investigation is very unlikely to be found testimonial under the Second Circuit's view.

Note that as to *Williams,* the *James* court declined to use either of the rationales espoused by Justice Alito on the ground that they had been rejected by five members of the Court. The court found that in fact there was no lesson at all to be derived from *Williams,* as there was no rationale

on which five members of the Court could agree. Thus, the Court found that *Williams* controlled only in cases exactly like it.

Business records are not testimonial: *United States v. Bansal,* 663 F.3d 634 (3rd Cir. 2011): In a prosecution related to a controlled substance distribution operation, the trial court admitted records kept by domestic and foreign businesses of various transactions. The court rejected the claim that the records were testimonial, stating that "the statements in the records here were made for the purpose of documenting business activity, like car sales and account balances, and not for providing evidence to law enforcement or a jury."

Admission of credit card company's records identifying customer accounts that had been compromised did not violate the right to confrontation: *United States v. Keita,* 742 F.3d 184 (4th Cir. 2014): In a prosecution for credit card fraud, the trial court admitted "common point of purchase" records prepared by American Express. These were internal documents revealing which accounts have been compromised. American Express creates the reports daily as part of regular business practice, and they are used by security analysts to determine whether to contact law enforcement or to investigate the matter internally in the first instance. The court held that the records were not testimonial (even though they could possibly be used for criminal prosecution), relying on the language in *Melendez-Diaz* stating that "business records are generally admissible absent confrontation." The court concluded that the records were primarily prepared for the administration of Amex's regularly conducted business.

Admission of purported drug ledgers violated the defendant's confrontation rights where the proof of authenticity was the fact that they were produced by an accomplice at a proffer session: *United States v. Jackson,* 625 F.3d 875 (5th Cir. 2010), amended 636 F.3d 687 (5th Cir. 2011): In a drug prosecution, purported drug ledgers were offered to prove the defendant's participation in drug transactions. An officer sought to authenticate the ledgers as business records but the court found that he was not a "qualified witness" under Rule 803(6) because he had no knowledge that the ledgers came from any drug operation associated with the defendant. The court found that the only adequate basis of authentication was the fact that the defendant's accomplice had produced the ledgers at a proffer session with the government. But because the production at the proffer session was unquestionably a testimonial statement — and because the accomplice was not produced to testify — admission of the ledger against the defendant violated his right to

confrontation under *Crawford.*

> ***Note:*** **The *Jackson* court does *not* hold that business records are testimonial. The reasoning is muddled, but the best way to understand it is that the evidence used to *authenticate* the business record — the cohort's production of the records at a proffer session — was testimonial.**

Pseudoephedrine logs are not testimonial: *United States v. Towns,* 718 F.3d 404 (5th Cir. 2013): In a methamphetamine prosecution, the agent testified to patterns of purchasing pseudoephedrine at various pharmacies. This testimony was based on logs kept by the pharmacies of pseudoephedrine purchases. The court found that the logs — and the certifications to the logs provided by the pharmacies — were properly admitted as business records. It further held that the records were not testimonial. As to the Rule 803(6) question, the court found irrelevant the fact that the records were required by statute to be kept and were pertinent to law enforcement. The court stated that "the regularly conducted activity here is selling pills containing pseudoephedrine; the purchase logs are kept in the course of that activity. Why they are kept is irrelevant at this stage." As to the certifications from the records custodians of the pharmacies, the court found them proper under Rule 803(6) and 902(11) — the certifications tracked the language of Rule 803(6) and there was no requirement that the custodians do anything more, such as explain the process of record keeping. As to the Confrontation Clause, the court noted that the Supreme Court in *Melendez-Diaz* had declared that business records are ordinarily non-testimonial. Moreover, the logs were not prepared solely with an eye toward trial. The court concluded as follows:

> The pharmacies created these purchase logs *ex ante* to comply with state regulatory measures, not in response to an active prosecution. Additionally, requiring a driver's license for purchases of pseudoephedrine deters crime. The state thus has a clear interest in businesses creating these logs that extends beyond their evidentiary value. Because the purchase logs were not prepared specifically and solely for use at trial, they are not testimonial and do not violate the Confrontation Clause.

Court rejects the "targeted individual" test in reviewing an affidavit pertinent to illegal immigration: *United States v. Duron-Caldera,* 737 F.3d 988 (5th Cir. 2013): The defendant was charged with illegal reentry. The dispute was over whether he was in fact an alien. He claimed he

was a citizen because his mother, prior to his birth, was physically present in the U.S. for at least ten years, at least five of which were before she was 14. To prove that this was not the case, the government offered an affidavit from the defendant's grandmother, prepared 40 years before the instant case. The affidavit was prepared in connection with an investigation into document fraud, including the alleged filing of fraudulent birth certificates by the defendant's parents and grandmother. The affidavit accused others of document fraud, and stated that the defendant's mother did not reside in the United States for an extended period of time. The trial court admitted the affidavit but the court of appeals held that it was testimonial and reversed. The government argued that the affidavit was a business record because it was found in regularly kept immigration records. But the court noted that it could not qualify as a business record because the grandmother was not acting in the ordinary course of regularly conducted activity.

The court found that the government had not shown that the affidavit was prepared outside the context of a criminal investigation, and therefore the affidavit was testimonial under the primary motive test. The government relied on the Alito opinion in *Williams*, under which the affidavit would not be testimonial, because it clearly was not targeted toward the defendant, as he was only a child when it was prepared. But the court rejected the targeted individual test. It noted first that five members of the court in *Williams* had rejected the test. It also stated that the targeted individual limitation could not be found in any of the *Crawford* line of cases before *Williams*: noting, for example, that in *Crawford* the Court defined testimonial statements as those one would expect to be used "at *a* later trial." Finally, the court stated that the targeted individual test was inconsistent with the terms of the Confrontation Clause, which provide a right of the accused to be confronted with the "*witnesses against him."* In this case, the grandmother, by way of affidavit, was a witness against the defendant.

Reporter's Note: The Court's construction of the Confrontation Clause could come out the other way. The references to "witnesses against him" could be interpreted as something personal, i.e., *at the time the statement was made*, it was being directed at the defendant. The *Duron-Caldera* court reads "witnesses" as of the time the statement is being introduced. But at that time, the witness is not there. All the "witnessing" is done at the time the statement is made; and if the witness is not targeting the individual at the time the statement is made, it could well be argued that the witness is not testifying "against him."

Another note from *Duron-Caldera:* The court notes that there is no rule to be taken from *Williams* under the *Marks* test --- under which you take the narrowest view on which the plurality and the concurrence can agree. In *Williams,* there is nothing on which the plurality and Justice Thomas agreed.

Preparing an exhibit for trial is not testimonial: ***United States v. Vitrano,*** 747 F.3d 922 (7th Cir. 2014): In a prosecution for fraud and perjury, the government offered records of phone calls made by the defendant. The defendant argued that there was a confrontation violation because the government did not call the technician who prepared the phone calls as an exhibit to testify. The court found that the confrontation argument was properly rejected, because no statements of the technician were admitted at trial. The court declared that "[p]reparing an exhibit for trial is not itself testimonial."

Records of sales at a pharmacy are business records and not testimonial under ***Melendez-Diaz: United States v. Mashek,*** 606 F.3d 922 (8th Cir. 2010): The defendant was convicted of attempt to manufacture methamphetamine. At trial the court admitted logbooks from local pharmacies to prove that the defendant made frequent purchases of pseudoephedrine. The defendant argued that the logbooks were testimonial under *Melendez-Diaz,* but the court disagreed and affirmed his conviction. The court first noted that the defendant probably waived his confrontation argument because at trial he objected only on the evidentiary grounds of hearsay and Rule 403. But even assuming the defendant preserved his confrontation argument, "*Melendez-Diaz* does not provide him any relief. The pseudoephedrine logs were kept in the ordinary course of business pursuant to Iowa law and are business records under Federal Rule of Evidence 803(6). Business records under Rule 803(6) are not testimonial statements; *see Melendez-Diaz,* 129 S.Ct. At 2539-40 (explaining that business records are typically not testimonial))." ***Accord, United States v. Ali,*** 616 F.3d 745 (8th Cir. 2010) (business records prepared by financial services company, offered as proof that tax returns were false, were not testimonial, as "*Melendez-Diaz* does not apply to the HSBC records that were kept in the ordinary course of business."); ***United States v. Wells,*** 706 F.3d 908 (8th Cir. 2013) (*Melendez–Diaz* did not preclude the admission of pseudoephedrine logs because they constituted non-testimonial business records under Federal Rule of Evidence 803(6)).

Rule 902(11) authentication was not testimonial: ***United States v. Thompson,*** 686 F.3d 575 (8th Cir. 2012): To prove unexplained wealth in a drug case, the government offered and the court admitted a record from the Iowa Workforce Development Agency showing no reported wages for Thompson's social security number during 2009 and 2010. The record was admitted through an affidavit of self-authentication offered pursuant to Rule 902(11). The court found that the earnings records themselves were non-testimonial because they were prepared for administrative purposes. As to the exhibit itself, the court stated that "[b]ecause the IWDA record itself was not created for the purpose of establishing or proving some fact at trial, admission of a certified copy of that record did not violate Thompson's Confrontation Clause rights." The court emphasized that "[b]oth the majority and dissenting opinions in *Melendez–Diaz* noted that a clerk's certificate authenticating a

record—or a copy thereof—for use as evidence was traditionally admissible even though the certificate itself was testimonial, having been prepared for use at trial." It concluded that "[t]o the extent Thompson contends that a copy of an existing record or a printout of an electronic record constitutes a testimonial statement that is distinguishable from the non-testimonial statement inherent in the original business record itself, we reject this argument." ***See also United States v. Johnson***, 688 F.3d 494 (8th Cir. 2012) (certificates of authenticity presented under Rule 902(11) are not testimonial, and the notations on the lab report by the technician indicating when she checked the samples into and out of the lab did not raise a confrontation question because they were offered only to establish a chain of custody and not to prove the truth of any matter asserted).

GPS tracking reports were properly admitted as non-testimonial business records: ***United States v. Brooks,*** 715 F.3d 1069 (8th Cir. 2013): Affirming bank robbery and related convictions, the court rejected the defendant's argument that admission at trial of GPS tracking reports violated his right to confrontation. The reports recorded the tracking of a GPS device that was hidden by a teller in the money taken from the bank. The court held that the records were properly admitted as business records under Rule 803(6), and they were not testimonial even though they were prepared by law enforcement. The court reasoned that the primary purpose of the tracking reports was to track the perpetrator in an ongoing pursuit — not for use at trial. The court stated that "[a]lthough the reports ultimately were used to link him to the bank robbery, they were not *created* . . . to establish some fact at trial. Instead, the GPS evidence was generated by the credit union's security company for the purpose of locating a robber and recovering stolen money."

Prior conviction in which the defendant did not have the opportunity to cross-examine witnesses cannot be used in a subsequent trial to prove the facts underlying the conviction: ***United States v. Causevic,*** 636 F.3d 998 (8th Cir. 2011): The defendant was charged with making materially false statements in an immigration matter — specifically that he lied about committing a murder in Bosnia. To prove the lie at trial, the government offered a Bosnian judgment indicating that the defendant was convicted in absentia of the murder. The court held that the judgment was testimonial to prove the underlying facts, and there was no showing that the defendant had the opportunity to cross-examine the witnesses in the Bosnian court. The court distinguished proof of the *fact* of a conviction being entered (such as in a felon-firearm prosecution), as in that situation the public record is prepared for recordkeeping and not for a trial. In contrast the factual findings supporting the judgment were obviously generated for purposes of a criminal prosecution.

Note: The statements of facts underlying the prior conviction are testimonial under

both versions of the primary motive test contested in *Williams.* They meet the Kagan test because they were obviously prepared for purpose of — indeed as part of — a criminal prosecution. And they meet the Alito proviso because they targeted the specific defendant against whom they were used at trial.

Affidavit that birth certificate existed was testimonial: *United States v. Bustamante,* 687 F.3d 1190 (9th Cir. 2012): The defendant was charged with illegal entry and the dispute was whether he was a United States citizen. The government contended that he was a citizen of the Philippines but could not produce a birth certificate, as the records had been degraded and were poorly kept. Instead it produced an affidavit from an official who searched birth records in the Phillipines as part of the investigation into the defendant's citizenship by the Air Force 30 years earlier. The affidavit stated that birth records indicated that the defendant was born in the Philippines and the affidavit purported to transcribe the information from the records. The court held that the affidavit was testimonial under *Melendez-Diaz* and reversed the conviction. The court distinguished this case from cases finding that birth records and certificates of authentication are not testimonial:

> Our holding today does not question the general proposition that birth certificates, and official duplicates of them, are ordinary public records "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial." *Melendez–Diaz*, 129 S.Ct. at 2539–40. But Exhibit 1 is not a copy or duplicate of a birth certificate. Like the certificates of analysis at issue in Melendez–Diaz, despite being labeled a copy of the certificate, Exhibit 1 is "quite plainly" an affidavit. It is a typewritten document in which Salupisa testifies that he has gone to the birth records of the City of Bacolod, looked up the information on Napoleon Bustamante, and summarized that information at the request of the U.S. government for the purpose of its investigation into Bustamante's citizenship. Rather than simply authenticating an existing non-testimonial record, Salupisa created a new record for the purpose of providing evidence against Bustamante. The admission of Exhibit 1 without an opportunity for cross examination therefore violated the Sixth Amendment.

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. ***See also United States v. Rojas-Pedroza,*** 716 F.3d 1253 (9th Cir. 2013) (adhering to *Orozco-Acosta* in response to the defendant's argument that it had been undermined by *Bullcoming* and *Bryant;* holding that a Notice of Intent in the defendant's A-File — which apprises the alien of the determination that he is removable — was non-testimonial because "their primary purpose is to effect removals, not to prove facts at a criminal trial."); ***United States v. Lopez,*** 762 F.3d 852 (9th Cir. 2014) (verification of removal — recording the physical removal of an alien across the border, is not testimonial; like a warrant of removal, it is made for administrative purposes and not primarily designed to be admitted as evidence at a trial; the only difference from a warrant of removal "is that a verification of removal is used to record the removal of aliens pursuant to expedited removal procedures, while the warrant of removal records the

removal of aliens following a hearing before an immigration judge"; also holding that, for the same reasons, the verification of removal was admissible as a public record under Rule 803(8)(A)(ii), despite the exclusion for law enforcement reports); ***United States v. Albino-Loe,*** 747 F.3d 1206 (9th Cir. 2014) (statements concerning the defendant's alienage in a notice of removal — which is the charging document for deportation — are not testimonial in an illegal entry case; the primary purpose of a notice of removal "is simply to effect removals, not to prove facts at a criminal trial").

Documents in alien registration file not testimonial: *United States v. Valdovinos-Mendez,* 641 F.3d 1031 (9th Cir. 2011): In an illegal re-entry prosecution, the defendant argued that admission of documents from his A-file violated his right to Confrontation. The court held that the challenged documents — a Warrant of Removal, a Warning to Alien ordered Deported, and the Order from the Immigration Judge — were not testimonial. They were not prepared with the primary motive of use in a criminal prosecution, because at the time they were prepared the crime of illegal reentry had not occurred.

Forms prepared by border patrol agents interdicting aliens found not testimonial: *United States v. Morales,* 720 F.3d 1194 (9th Cir. 2013): In a prosecution for illegally transporting aliens, the trial court admitted Field 826 forms, prepared by Border Patrol agents who interviewed the aliens. The Field 826 form records the date and location of arrest, the funds found in the alien's possession, and basic biographical data about the alien, and also provides the alien options, including an admission that the alien is illegally in the country and wishes to return home. The court of appeals rejected the defendant's argument that these forms were testimonial. It stated that "a Border Patrol agent uses the form in the field to document basic information, to notify the aliens of their administrative rights, and to give the aliens a chance to request their preferred disposition. The Field 826s are completed whether or not the government decides to prosecute the aliens or anyone else criminally. The nature and use of the Field 826 makes clear that its primary purpose is administrative, not for use as evidence at a future criminal trial. Even though statements within the form may become relevant to later criminal prosecution, this potential future use does not automatically place the statements within the ambit of 'testimonial.'" The court did find that the part of the report that contained information from the aliens was improperly admitted in violation of the *hearsay* rule. The Field 826 is a public record but information coming from the alien is not information coming from a public official. The court found the violation of the hearsay rule to be harmless error.

Social Security application was not testimonial as it was not prepared under adversarial circumstances: *United States v. Berry*, 683 F.3d 1015 (9th Cir. 2012): The court affirmed the defendant's conviction for social security fraud for taking money paid for maintenance of his son while the defendant was a representative payee. The trial judge admitted routine Social Security Administration records showing that the defendant applied for benefits on behalf of the son. The defendant argued that an SSA application was tantamount to a police report and therefore the record was inadmissible under Rule 803(8) and also that its admission violated his right to confrontation. The court disagreed, reasoning "that a SSA interviewer completes the application as part of a routine administrative process" and such a record is prepared for each and every request for benefits. "No affidavit was executed in conjunction with preparation of the documents, and there was no anticipation that the documents would become part of a criminal proceeding. Rather, every expectation was that Berry would use the funds for their intended purpose." The court quoted *Melendez–Diaz* for the proposition that "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." The court concluded as follows:

> [N]o reasonable argument can be made that the agency documents in this case were created solely for evidentiary purposes and/or to aid in a police investigation. Importantly, no police investigation even existed when the documents were created. * * * Because the evidence at trial established that the SSA application was part of a routine, administrative procedure unrelated to a police investigation or litigation, we conclude that the district court did not abuse its discretion by admitting the application under Fed.R.Evid. 803(8), and no constitutional violation occurred.

Affidavits authenticating business records and foreign public records are not testimonial: *United States v. Anekwu,* 695 F.3d 967 (9th Cir. 2012): In a fraud case, the government authenticated foreign public records and business records by submitting certificates of knowledgeable witnesses. This is permitted by 18 U.S.C. § 3505 for foreign records and Rule 902(12) for foreign business records. The court found that the district court did not commit plain error in finding that the certificates were not testimonial. The certificates were not themselves substantive evidence but rather a means to authenticate records. The court relied on the 10th Circuit's decision in *Yeley-Davis*, immediately below, and on the statement in *Melendez-Diaz* that certificates that do no more than authenticate other records are not testimonial.

Records of cellphone calls kept by provider as business records are not testimonial, and Rule 902(11) affidavit authenticating the records is not testimonial: *United States v. Yeley-Davis,* 632 F.3d 673 (10th Cir. 2011): In a drug case the trial court admitted cellphone records indicating that the defendant placed calls to coconspirators. The foundation for the records was provided by an affidavit of the records custodian that complied with Rule 902(11). The defendant argued that both the cellphone records and the affidavit were testimonial. The court rejected both arguments and affirmed the conviction. As to the records, the court found that they were not prepared "simply for litigation." Rather, the records were kept for Verizon's business purposes, and accordingly were not testimonial. As to the certificate, the court relied on pre-*Melendez-Diaz* cases such as *United States v. Ellis, supra,* which found that authenticating certificates were not the kind of affidavits that the Confrontation Clause was intended to cover. The defendant responded that cases such as *Ellis* had been abrogated by *Melendez-Diaz*, but the court disagreed:

> If anything, the Supreme Court's recent opinion supports the conclusion in *Ellis.* * * * Justice Scalia expressly described the difference between an affidavit created to provide evidence against a defendant and an affidavit created to authenticate an admissible record: "A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant." Id. at 2539. In addition, Justice Scalia rejected the dissent's concern that the majority's holding would disrupt the long-accepted practice of authenticating documents under Rule 902(11) and would call into question the holding in *Ellis*. See *Melendez-Diaz*, 129 S.Ct. at 2532 n. 1 ("Contrary to the dissent's suggestion, ... we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the ... authenticity of the sample ... must appear in person as part of the prosecution's case."); see also id. at 2547 (Kennedy, J., dissenting) (expressing concern about the implications for evidence admitted pursuant to Rule 902(11) and future of *Ellis*). The Court's ruling in *Melendez-Diaz* does not change our holding that Rule 902(11) certifications of authenticity are not testimonial.

The court found *Yeley-Davis* "dispositive" in *United States v. Brinson,* 772 F.3d 1314 (10th Cir. 2014), in which the court admitted a certificate of authenticity of credit card records. The court again distinguished *Melendez-Diaz* as a case concerned with affidavits showing the results of a forensic analysis — whereas the certificate of authenticity "does not contain any 'analysis' that would constitute out-of-court testimony. Without that analysis, the certificate is simply a non-testimonial

statement of authenticity." ***See also United States v. Keck,*** 643 F.3d 789 (10th Cir. 2011): Records of wire-transfer transactions were not testimonial because they "were created for the administration of Moneygram's affairs and not the purpose of establishing or proving some fact at trial. And since the wire-transfer data are not testimonial, the records custodian's actions in preparing the exhibits [by cutting and pasting the data] do not constitute a Confrontation Clause violation."

Immigration forms containing biographical data, country of origin, etc. are not testimonial: *United States v. Caraballo,* 595 F.3d 1214 (11th Cir. 2010): In an alien smuggling case, the trial court admitted I-213 forms prepared by an officer who found aliens crammed into a small room in a boat near the shore of the United States. The forms contained basic biographical information, and were used at trial to prove that the persons were aliens and not 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. * * *
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> 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.
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> 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.