ADVISORY COMMITTEE
ON
RULES OF EVIDENCE

Washington, D.C.
April 21, 2017

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ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

Washington, D.C.

April 21, 2017

I. Opening Business

Opening business includes:

- Approval of the minutes of the fall 2016 meeting.
- A report on the January, 2017 meeting of the Standing Committee.
- A tribute to Ken Broun, who is retiring as consultant to the Committee.

II. Proposed Amendments to Rule 807, the Residual Exception

The Committee has prepared a working draft of a proposal to amend Rule 807, including changes to the substantive provisions (on which no final agreement has been reached) and changes to the notice provisions (which have been approved unanimously by the Committee). At this meeting, the question for the Committee is whether to submit proposed changes to Rule 807 to the Standing Committee, with the recommendation that they be issued for public comment. The Reporter's memorandum on the proposed amendment --- along with two case digests discussing cases excluding and admitting residual hearsay --- is behind Tab 2 of the agenda book.

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

Over the last four meetings the Committee has been working on a possible change to Rule 801(d)(1)(A) that would provide for broader substantive admissibility of prior inconsistent statements. The current working draft would allow substantive admission of a witness's prior inconsistent statement if it was video-recorded. At this meeting, the question for the Committee is whether to submit a proposed change to Rule 801(d)(1)(A) with the recommendation that it be issued for public comment. The Reporter's memorandum on the proposed amendment to Rule

801(D)(1)(A) is behind Tab 3 of the agenda book. Professor Richter's memo on the practice in states that have broader but not complete substantive admissibility of prior inconsistent statements is also included behind Tab 3.

IV. Consideration of a Possible Amendment to Rule 606(b) In Response to a Supreme Court Decision

In the recent case of *Pena-Rodriguez v. Colorado,* the Supreme Court held that the bar posed by Rule 606(b) on juror testimony about jury deliberations was unconstitutional to the extent it barred testimony about racist statements made during the deliberations. The possible responses to the Court's decision, as well as the decision itself, are set forth in a memo behind Tab 4.

V. Consideration of Possible Changes to Rule 404(b)

At the Pepperdine Conference last fall, most of the discussion was about recent trends in applying Rule 404(b). Recent cases have implemented the following protections: 1) requiring the government to articulate a specific proper purpose, and to explain how the bad act is probative of that purpose without depending on a propensity inference; 2) conditioning admissibility of a bad act on the defendant having actively contested the element of the crime to which the bad act is pertinent; and 3) limiting the doctrine which states that Rule 404(b) is inapplicable if the bad act is "inextricably intertwined" with the charged crime.

Pursuant to Committee discussion after the Conference, the Reporter has prepared a memorandum on these new trends. The memorandum raises the possibility of possible changes to Rule 404(b) that would embrace these new developments. The possibilities for change are in the preliminary discussion stage. The Reporter's memo on possible changes to Rule 404(b) is behind Tab 5 of the Agenda Book.

VI. Conference on Rule 702

The Committee is sponsoring a Conference on Rule 702 in October, to coincide with the Committee's fall meeting. The Conference agenda will include a discussion of a number of recent developments regarding expert testimony, with the goal of determining whether any changes to Rule 702 are necessary to accommodate these developments. Among the issues to be considered are: 1) recent challenges to forensic expert testimony; 2) problems in applying the *Daubert* standards in cases involving non-scientific and "soft science" experts; 3) problems in applying Rule 702 in criminal cases; and 4) the failure of some courts to recognize that deficiencies in foundation and misapplication of methods are questions of admissibility and not weight. The Reporter's memo on the Conference is behind Tab 6 of the Agenda Book.

VII. Hearsay Exception for Recent Perceptions

The Committee has decided to defer action on an amendment that would add a "recent perceptions" exception to Rule 804(b) --- an exception that would be designed primarily to provide broader admissibility for electronic communications such as texts and tweets. The Committee directed the Reporter to monitor developments in the case law on admissibility of social media communications. The Reporter's updated outline of recent federal case law on electronic communications and the hearsay rule is behind Tab 7.

VIII. *Crawford* Outline

The Reporter's updated outline on cases applying the Supreme Court's Confrontation Clause jurisprudence is behind Tab 8.

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ADVISORY COMMITTEE ON EVIDENCE RULES

Chair, Advisory Committee on Evidence Rules	**Honorable William K. Sessions III** United States District Court Federal Building 11 Elmwood Avenue, 5th Floor Burlington, VT 05401
Reporter, Advisory Committee on Evidence Rules	**Professor Daniel J. Capra** Fordham University School of Law 150 West 62nd Street New York, NY 10023
Members, Advisory Committee on Evidence Rules	**Honorable James P. Bassett** Associate Justice New Hampshire Supreme Court One Charles Doe Drive Concord, NH 03301 **Daniel P. Collins, Esq.** Munger Tolles & Olson LLP 355 South Grand Ave., 35th Floor Los Angeles, CA 90071 **James A. Crowell IV** Acting Principal Associate Deputy Attorney General (ex officio) Office of the Deputy Attorney General U. S. Department of Justice 950 Pennsylvania Avenue, N.W., Suite 4208 Washington, DC 20530 **A.J. Kramer, Esq.** Federal Public Defender Indiana Plaza 625 Indiana Avenue, N.W. – Suite 550 Washington, DC 20004 **Honorable Debra Ann Livingston** United States Court of Appeals Thurgood Marshall United States Courthouse 40 Centre Street, Room 2303 New York, NY 10007-1501 **Traci L. Lovitt, Esq.** Jones Day 100 High Street, 21st Floor Boston, MA 02110-1781

Members, Advisory Committee on Evidence Rules *(cont'd)*	**Honorable John Thomas Marten** United States District Court United States Courthouse 401 North Market Street, Room 232 Wichita, KS 67202-2000 **Honorable John A. Woodcock, Jr.** United States District Court Margaret Chase Smith Federal Building 202 Harlow Street, 3rd Floor Bangor, ME 04401-4901
Consultant, Advisory Committee on Evidence Rules	**Professor Liesa Richter** University of Oklahoma School of Law 300 Timberdell Road Norman, OK 73019
Liaison Members, Advisory Committee on Evidence Rules	**Honorable James C. Dever III** *(Criminal)* United States District Court Terry Sanford Federal Building 310 New Bern Avenue, Room 716 Raleigh, NC 27601-1418 **Honorable Solomon Oliver, Jr.** *(Civil)* United States District Court Carl B. Stokes United States Courthouse 801 West Superior Avenue, Room 19A Cleveland, OH 44113 **Honorable Richard C. Wesley** *(Standing)* United States Court of Appeals Livingston County Government Center Six Court Street Geneseo, NY 14454-1043
Secretary, Standing Committee and Rules Committee Officer	**Rebecca A. Womeldorf** Secretary, Committee on Rules of Practice & Procedure and Rules Committee Officer Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov

LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	**Gregory G. Garre, Esq.**	***(Standing)***
	Judge Pamela Pepper	***(Bankruptcy)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Judge Susan P. Graber**	***(Standing)***
Liaisons for the Advisory Committee on Civil Rules	**Judge A. Benjamin Goldgar**	***(Bankruptcy)***
	Peter D. Keisler, Esq.	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
Liaisons for the Advisory Committee on Evidence Rules	**Judge James C. Dever III**	***(Criminal)***
	Judge Solomon Oliver, Jr.	***(Civil)***
	Judge Richard C. Wesley	***(Standing)***

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Rebecca A. Womeldorf
Secretary, Committee on Rules of Practice &
Procedure and Rules Committee Officer
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-1820 Fax 202-502-1755
Rebecca_Womeldorf@ao.uscourts.gov

Julie Wilson
Attorney Advisor
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-3678 Fax 202-502-1755
Julie_Wilson@ao.uscourts.gov

Scott Myers
Attorney Advisor (Bankruptcy)
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-1913 Fax 202-502-1755
Scott_Myers@ao.uscourts.gov

Bridget M. Healy
Attorney Advisor
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-240
Washington, DC 20544
Phone 202-502-1313 Fax 202-502-1755
Bridget_Healy@ao.uscourts.gov

Shelly Cox
Administrative Specialist
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-4487 Fax 202-502-1755
Shelly_Cox@ao.uscourts.gov

Frances F. Skillman
Paralegal Specialist
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-3945 Fax 202-502-1755
Frances_Skillman@ao.uscourts.gov

FEDERAL JUDICIAL CENTER

Tim Reagan *(Rules of Practice & Procedure)* Senior Research Associate Federal Judicial Center Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 6-436 Washington, DC 20002 Phone 202-502-4097 Fax 202-502-4199	**Marie Leary** *(Appellate Rules Committee)* Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4069 Fax 202-502-4199 mleary@fjc.gov
Molly T. Johnson *(Bankruptcy Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 315-824-4945 mjohnson@fjc.gov	**Emery G. Lee** *(Civil Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4078 Fax 202-502-4199 elee@fjc.gov
Laural L. Hooper *(Criminal Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4093 Fax 202-502-4199 lhooper@fjc.gov	**Timothy T. Lau** *(Evidence Rules Committee)* Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4089 Fax 202-502-4199 tlau@fjc.gov

TAB 1

TAB 1A

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Advisory Committee on Evidence Rules

Minutes of the Meeting of October 21, 2016

Los Angeles, California

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 21, 2016 at Pepperdine University School of Law in Los Angeles, California.

The following members of the Committee were present:

Hon. William K. Sessions, III, Chair
Hon. James P. Bassett
Hon. Debra Ann Livingston
Hon. John T. Marten
Daniel P. Collins, Esq.
Traci Lovitt, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Esq., Public Defender

Also present were:

Hon. David G. Campbell, Chair of the Committee on Rules of Practice and Procedure
Hon. Solomon Oliver, Liaison from the Civil Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
Timothy Lau, Federal Judicial Center
Rebecca A. Womeldorf, Chief, Rules Committee Support Office
Shelly Cox , Rules Committee Support Office
Michael Shepard, Hogan Lovells, American College of Trial Lawyers
Professor Liesa Richter, University of Oklahoma School of Law

I. Opening Business

Approval of Minutes

The minutes of the Spring, 2016 Committee meeting were approved.

June Meeting of the Standing Committee

Judge Sessions reported on the June, 2016 meeting of the Standing Committee. The Evidence Rules Committee had two action items at the meeting: 1) a proposal to limit the hearsay exception for ancient documents (Rule 803(16)) to documents prepared before January 1, 1998; and 2) a proposal to add two subdivisions to Rule 902 that would allow for authentication of certain electronic evidence by way of a certificate of a qualified person. Both those proposals were unanimously approved by the Standing Committee. Judge Sessions also reported to the Standing Committee about ongoing Committee projects, including proposals to expand substantive admissibility of prior inconsistent statements (Rule 801(d)(1)(A)); to amend the residual exception (Rule 807) to provide for more uniformity and to streamline the trustworthiness requirement; and to amend the notice provisions for Rules 404(b) and Rule 807 to provide for more uniformity.

Introduction of New Committee Members

Judge Sessions welcomed and introduced the two new Committee members: Justice James Bassett, who sits on the New Hampshire Supreme Court; and Traci Lovitt, a partner at Jones Day in Boston.

II. Conference on Rule 404(b), Rule 807 and Rule 801(d)(1)(B)

The morning of the meeting was devoted to a Conference ("the Conference") on the following topics: 1. New developments in regulating admissibility of bad act evidence under Rule 404(b); 2. The Committee's working draft of a proposal to amend Rule 807, the residual exception to the hearsay rule; and 3. The Committee's working draft of a proposal to amend Rule 801(d)(1)(A) to provide for somewhat broader substantive use of prior inconsistent statements.

The first topic, Rule 404(b), was chosen because the Committee has an obligation to monitor new developments in the law of evidence. Several circuits have recently made major efforts to clarify how Rule 404(b) should work, emphasizing that courts must be careful to assure that the probative value of a bad act for a proper purpose proceeds through non-propensity inferences. Moreover, review of Rule 404(b) is warranted because the Committee has already agreed, unanimously, to propose an amendment to the notice provision of Rule 404(b), that would eliminate the requirement that the defendant demand discovery of Rule 404(b)

material. Because the Committee will be proposing that change to the notice provision, there is an opportunity, and a responsibility, to examine whether the rule (and especially the notice provision) should be amended in any other respect. And the Conference can provide important assistance from experts in reviewing the operation of Rule 404(b) and in determining whether amendments are necessary.

The second and third topics were chosen so that the Committee could get advance comment from experts on whether the proposed rule changes to Rules 807 and 801(d)(1)(A) were workable.

The Committee invited a stellar group to participate in the Conference. Panelists included judges (Hamilton, Phillips, and Manella), and outstanding professors and practitioners from the Los Angeles area. The discussion was robust and incisive, and many helpful suggestions were made and debated. The transcript of the Conference will be published in the Fordham Law Review, along with accompanying articles by several of the participants.

At the Committee meeting, held after the Conference, Committee members discussed the many ideas and arguments raised by the participants. The Committee generally concluded that the Conference was excellent, and that it gave the Committee plenty to think about regarding Rule 404(b) and the proposed amendments to Rules 807 and 801(d)(1)(A).

Among the specific points raised by Committee members regarding Rule 404(b) were the following:[1]

● There is a new trend in certain courts to require the government to explain precisely how a bad act is probative for a not-for-character purpose, and requiring that the showing of probative value for such a purpose proceeds through a non-propensity chain of inferences. A careful analysis is particularly important in cases where the asserted proper purpose is intent. The distinction between intent and propensity is very thin, if it even exists at all. And the instruction that is given to the jury about the distinction between intent and propensity is difficult if not impossible to follow.

● There is a huge difference among the circuits in the treatment of Rule 404(b) evidence. While some circuits are beginning to require an articulation of non-propensity inferences, other circuits are not --- in these latter circuits it is usually enough for the government to say that the evidence is offered for intent and knowledge, and the court finds that these issues are in dispute simply because the defendant has pleaded not guilty.

● Committee members agreed that it is important that bad acts be excluded if they are probative for a "proper" purpose only by proceeding through a propensity inference. Committee members also agreed that at some point the prosecution should have to articulate, and the court should have to find, that the stated proper purpose is shown through non-propensity inferences. But Committee members were not in agreement about whether Rule 404(b) should be amended to implement a more careful procedure than is being employed currently in some courts. One member stated that the solution would be to allow courts to be influenced by the cases decided

[1] Conference discussions regarding Rule 807 and 801(d)(1)(B) are set forth under separate headings below.

by the Seventh and Third Circuits --- the two circuits in the forefront of requiring a more careful analysis under Rule 404(b). But another member stated that there was no assurance at all that other circuits would follow suit, and that any such process even were it to occur might take decades.

● Some members thought that a change should be made to the notice provision of Rule 404(b). That change would require the government to articulate specifically the purpose for which the bad act evidence is offered. That kind of notice might get trial judges to focus on evaluating the evidence for a proper purpose at the outset of the case. Judge Campbell responded that an expanded notice provision might not be effective in attuning the court to the issue, because the prosecution might articulate every possible purpose in order to avoid being precluded from some proper purpose at a later point. Thus the expanded notice provision might simply result in front-loaded makework. Another member noted that the real problem is not that the government fails to articulate a specific proper purpose, but rather that the purpose proffered is often dependent on an assumption that the defendant has a propensity. The Reporter stated that if the rule is to be amended to require a showing of non-propensity inferences, that might be accomplished by adding language as follows:

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

● One member argued that there is a tension between the two provisions in Rule 404(b). Subdivision (1) prohibits bad acts if offered to prove that a person acted in accordance with character, while Subdivision (2) states that evidence is admissible if offered for another purpose, even if it could also be used for propensity. The Reporter responded that this apparent tension is handled in two steps: the bad act is admissible for the proper purpose so long as the probative value of the bad act in proving that purpose (1) proceeds through a non-propensity inference (the Rule 404(b) question) and (2) is not substantially outweighed by the risk that the jury will use the evidence for propensity (the Rule 403 question).

● One member suggested a more comprehensive amendment that would delete the provision in Rule 404(b) that sets forth the proper purposes, and that would add the following to the notice provision:

> <u>If a prosecutor intends to use such evidence at trial, the prosecutor must:</u>
> <u>(A) provide reasonable notice of the evidence that the prosecutor intends to offer at trial;</u>
> <u>(B) do so at least two weeks before trial, unless the court, for good cause, excuses this requirement;</u>
> <u>(C) articulate in the notice the non-propensity purpose for which the prosecution intends to offer the evidence; and</u>
> <u>(D) articulate the chain of reasoning supporting the purpose for offering the evidence.</u>

Judge Campbell noted that an effort to move up the timing of the notice (as provided in the above proposal) could be useful because it would make the court aware of the necessity to focus on whether the asserted purpose for the evidence proceeds through a non-propensity inference. He suggested that such a change could be accompanied by a Committee Note explaining that the timing of the notice is moved up because it is important to discuss and evaluate the purpose for which the evidence is offered at an early point in the proceedings.

● A member of the Committee suggested that if the government were required to state the purpose for the evidence in the notice, there should be a good cause exception for situations in which a proper purpose comes to light at some later point.

● Another member stated that the current notice provision is problematic because it allows the government to give only a vague indication of the evidence it intends to offer. The rule currently states that the government must inform the defendant of the "general nature" of the Rule 404(b) evidence. This member argued that in many cases the disclosure is so vague that it is impossible for the defendant to prepare arguments about the proper purpose of the evidence, if any. He suggested that the notice provision be amended to delete the term "general nature"--- so that the government would be required to "provide reasonable notice of any such evidence." The Reporter noted that the Committee had already agreed on a description of what needed to be disclosed under a proposed amendment to Rule 807 --- the "substance" of the evidence. Perhaps using the term "substance" in Rule 404(b) would require more specificity than the current "general nature," and would also provide uniformity with the notice provision in Rule 807.

After this extensive discussion, the Reporter was directed to prepare a memo for the next meeting that would present several drafting alternatives for a possible amendment to Rule 404(b), in light of the issues raised at the Conference. These alternatives include:

● deleting the reference in the notice provision to the "general nature" of the evidence (and perhaps substituting the word "substance");

● accelerating the timing of notice;

● requiring the government to provide in the notice a statement of the proper purpose for the evidence and how the evidence is probative for that purpose by proceeding through non-propensity inferences.

● adding a clause to Rule 404(b)(2) that would specify that the probative value for the articulated proper purpose must proceed through a non-propensity inference.

III. Proposal to Amend the Residual Exception

At previous meetings the Committee has had some preliminary discussion on whether Rule 807 --- the residual exception to the hearsay rule --- should be amended. Part of the motivation for an amendment would be to expand its coverage, because a comprehensive review of the case law over the last ten years provides some indication that reliable hearsay has been excluded. Also, expanding the residual exception somewhat may make it easier to propose limits on some of the more dubious hearsay exceptions. And another reason for an amendment would be that the rule could be improved to make the court's task of assessing trustworthiness easier and more uniform, and to eliminate confusion and unnecessary effort by deleting superfluous language.

At previous meetings, the Committee, after substantial discussion, preliminarily agreed on the following principles regarding Rule 807:

- The requirement that the court find trustworthiness "equivalent" to the circumstantial guarantees in the Rule 803 and 804 exceptions should be deleted --- without regard to expansion of the residual exception. That standard is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. It is common ground that statements falling within the Rule 804 exceptions are not as reliable as those admissible under Rule 803; and it is also clear that the bases of reliability differ from exception to exception. Moreover, one of the exceptions subject to "equivalence" review --- Rule 804(b)(6) forfeiture --- is not based on reliability at all. Given the difficulty of the "equivalence" standard, a better approach is simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy. This is especially so because a review of the case law indicates that the "equivalence" standard has not fulfilled the intent of the drafters to limit the discretion of the trial court. Given the wide spectrum of reliability found in the hearsay exceptions, it is not difficult to find a statement reliable by comparing it to a weak exception, or to find it unreliable by comparing it to a strong one.

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

- The requirements in Rule 807 that the residual hearsay must be proof of a "material fact" and that admission of residual hearsay be in "the interests of justice" have not served any good purpose. The inclusion of the language "material fact" is in conflict with the studious avoidance of the term "materiality" in Rule 403 --- and that avoidance

was well-reasoned, because the term "material" is so fuzzy. The courts have essentially held that "material" means "relevant" --- and so nothing is added to Rule 807 by including it there. Likewise nothing is added to Rule 807 by referring to the interests of justice because that guidance is already provided by Rule 102. These provisions were added to the residual exception to emphasize that the exception was to be used only in truly exceptional situations. Deleting them might change the tone a bit, to signal that while hearsay must still be reliable to be admitted under Rule 807, there is no longer a requirement that the use must be rare and exceptional. And at any rate it is good rulemaking to delete superfluous and confusing language.

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

The Committee developed a working draft of an amendment to Rule 807 that was the subject of review at the Conference on the day of the meeting. The working draft is as follows (including amendments to the notice provision that have been previously approved by the Committee, but are being held back until any amendments to the other provisions of the rule are either proposed or rejected).

Rule 807. Residual Exception

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

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

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

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

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

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

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

At the Conference, some concern was expressed about expanding the residual exceptions, and about the unintended consequences that might occur in the application of the categorical exceptions if the residual exception is expanded. Most of the participants approved of the proposed changes, however, and most of the comments were that the changes were salutary without respect to expansion or contraction of the residual exception. For example, rejecting the "equivalence" standard in favor of a more straightforward reliability inquiry was useful simply because it made the rule easier to apply. And deleting the standards of "material fact" and "interest of justice" was useful because they fulfilled no independent purpose.

At the Committee meeting, members discussed the commentary on the working draft of Rule 807 at the Conference. Members also discussed a proposal by the Reporter to delete the "more probative than any other evidence" language and substitute the milder requirement that the statement be more probative than any other statement that could be obtained *from the declarant.* The Reporter's rationale for such a change was that courts had used the existing "more probative" requirement to tell a party how to try its case, i.e., that the party should not use residual hearsay when there was some other evidence, from any source, that it could use to prove the point. The Reporter argued that it should be up to the party to determine which evidence is most persuasive, and so long as the hearsay is reliable, there is no good reason to exclude it simply because there is some other evidence that might be out there to prove the point. Moreover, the party should have the option to offer *both* the reliable hearsay and the other available evidence, because the whole of that presentation might well be greater than the sum of its parts --- the existing "more probative" requirement mandates that the party must use the other evidence even if the residual hearsay could add to that evidence for a stronger presentation.

The Committee's discussion about the residual exception raised the following points:

● Committee members were generally opposed to any change to the more probative requirement. Changing the mandated comparison from other available evidence to other statements of the declarant would generally mean that reliable hearsay would be admissible whenever the declarant was unavailable. That was the position taken by the original Advisory Committee, but Committee members determined that at this point it was not prudent to expand the residual exception to the Advisory Committee's original conception. Rather, the residual exception should be crafted to prohibit unjust and unnecessary exclusion of reliable hearsay, while also prohibiting overuse and unbridled judicial discretion. While that balance might be obtained by tweaking the trustworthiness language, it would not be obtained by the overuse that would be invited in changing the "more probative" requirement.

● At the Conference, one speaker suggested that it would be helpful to include a reference in the trustworthiness clause to "the totality of circumstances." This is a well-known standard and would emphasize that the trial court's review of trustworthiness should not be limited. Committee members agreed that the working draft of a proposed amendment to Rule 807 should be changed to incorporate the "totality of circumstances" standard.

● Judge Campbell expressed concern that there would be substantial negative public comment to any change to the residual exception, because any such change would increase judicial discretion in admitting hearsay. He suggested that changing the language that Congress added to the Advisory Committee proposal in 1972 might upset Congress. And he stated that the public might not be convinced that the case for expanding the residual exception had been made, even though the Committee has reviewed every reported case from the last ten years in which the residual exception was discussed.

● One Committee member suggested that the proposed changes could be justified simply as improvements to the rule, without regard to whether the residual exception should be expanded or not. For example, the changes to the trustworthiness clause make it easier to apply --- alleviating the difficult-to-apply requirement that the court find guarantees equivalent to the exceptions in Rules 803 and 804. Moreover, specifying that the court must consider corroborating evidence is an improvement because it resolves a conflict among the circuits, and helps to assure that the court will consider all relevant information to determine whether the hearsay is trustworthy. Finally, deleting the superfluous clauses (material fact and interest of just) will eliminate confusion, as well as the need for the court to say, in every case, that the standards are either met or not met when that decision is predetermined by other factors that the court has already considered.

Ultimately the Committee resolved to continue to consider the proposal to amend Rule 807 at the next meeting, focusing on changes that could be made to improve the trustworthiness clause, and deletion of the superfluous provisions regarding material fact and interest of justice. At the next meeting, the Committee will consider whether these changes can be supported as part of a good rulemaking effort, even if they do not result in expanding the residual exception.

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

Over the last several meetings, the Committee has been considering the possibility of expanding substantive admissibility of certain prior statements of testifying witnesses under Rule 801(d)(1) --- the rationale of that expansion being that unlike other forms of hearsay, the declarant who made the statement is subject to cross-examination about that statement. At the

Symposium on Hearsay in October, 2015, a panel was devoted to treatment of prior witness statements.

Since beginning its review of Rule 801(d)(1), the Committee has narrowed its focus. Here is a synopsis of the Committee's prior determinations:

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

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

● Currently Rule 801(d)(1)(A) provides for substantive admissibility only in unusual cases --- where the declarant made the prior statement under oath at a formal proceeding. Two possibilities for expansion are: 1) allowing for substantive admissibility of *all* prior inconsistent statements, as is the case in California, Wisconsin, and a number of other states; and 2) allowing substantive admissibility only when there is proof --- other than a witness's statement --- that the prior statement was actually made, as is the procedure in Connecticut, Illinois, and several other states. The Committee quickly determined that it would not propose an amendment that would provide for substantive admissibility of all prior inconsistent statements. The Committee was concerned about the possibility that a prior inconsistent statement could be used as critical substantive proof even if the witness denied ever making it and there was a substantial dispute about whether it was ever made. In such circumstances, it would be difficult to cross-examine the witness about a statement he denies making; and it would often be costly and distracting to have to prove whether a prior inconsistent statement was made if there is no reliable record of it.

● If the concern is whether the statement was ever made, a majority of Committee members have concluded that the concern could be answered by a requirement that the statement be videotaped. It was also noted that allowing substantive admissibility of videotaped inconsistent statements could lead to more statements being videotaped in expectation that they might be useful substantively--- which is a good result even beyond its evidentiary consequences. And it was further noted by some members that one of the major costs of the current rule is that a confounding limiting instruction must be given

whenever a prior inconsistent statement is admissible for impeachment purposes but not for its substantive effect. That cost may be justified when there is doubt that a prior statement was fairly made, but it may well be unjustified when the prior statement is on video --- as there is easy proof of the statement and its circumstances if the witness denies making it or tries to explain it away.

The Committee developed a working draft of an amendment that would allow substantive admissibility for videotaped prior inconsistent statements. A straw vote was taken at the Spring 2016 meeting, with five members in favor and three opposed. The working draft provides as follows:

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

*** * ***

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

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

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

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

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

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

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

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

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

At the Conference before the Committee meeting, participants generally were in favor of expanding the substantive admissibility of prior inconsistent statements. One participant --- who served as a state prosecutor in California, a state where all prior inconsistent statements are substantively admissible --- stated that without that rule many prosecutions (especially gang prosecutions) could not be brought.

After the Conference, the Committee discussed the working draft. The Committee's discussion raised the following points:

● One Committee member argued that expanding the exception could lead to abuse. The stated scenario was that a criminal defendant could coerce a witness to make a video statement that would exculpate him. Then, when the witness testified to the defendant's guilt at the trial, the defendant could admit the prior videotape as substantive evidence. There does not appear to be any reported indication that this abuse is occurring in the states where prior inconsistent statements are substantively admissible, but the Reporter stated that he would check the practice in those states for signs of abuse.

● Judge Campbell stated that it was a good idea to provide incentives for videotaping witness statements. But he feared that expanding substantive admissibility would also provide incentives to create video. He also expressed concern that with the increasing use and distribution of video, e.g., on YouTube and Facebook Live, an expanded rule would lead to broad use of such video, and this might be a problem.

● Another Committee member observed that given all the statements that are now being recorded, many might not be reliable --- though arguably that concern about reliability would be handled by the fact that the witness who made the statement would be subject to cross-examination about it. The member wondered whether there would be a category of cases that would be particularly affected by the change.

● Committee members generally agreed that if the amendment is to go forward, the language "recorded on video" should be changed because it is subject to becoming outmoded by technological change. Committee members suggested the term "audiovisual" --- which is the same term used in Civil Rule 30.

The Committee resolved to further consider the possible amendment to Rule 801(d)(1)(A) at the next meeting.

IV. Best Practices Manual on Authentication of Electronic Evidence

The Committee has determined that courts and litigants can use assistance in negotiating the difficulties of authenticating electronic evidence --- and that such assistance can be provided by publishing and distributing a best practices manual. The Reporter worked on preparing such a

manual with Greg Joseph and Judge Paul Grimm. The pamphlet, in final form, was reviewed and well-received by the Committee at a prior meeting, and also favorably reviewed at a Standing Committee meeting. The pamphlet is not a work of the Advisory Committee. It is a work of the three authors.

The Reporter informed the Committee that the best practices manual was submitted to the Federal Judicial Center, but the FJC declined to publish it in the form submitted, stating that it did not accord with the FJC template. The Reporter then negotiated to have the manual published by WestAcademic. West Academic published the pamphlet, and Greg Joseph provided his own funds to have the pamphlet distributed to every federal judge. The Reporter also obtained an agreement from WestAcademic to publish the best practices manual as an appendix to the yearly Federal Rules of Evidence book that WestAcademic publishes. Accordingly, the best practices manual will be updated every year.

The Committee congratulated the Reporter and his co-authors for arranging for maximum exposure of the best practices manual.

V. Consideration of a Proposed Amendment to Rule 702; Possible Symposium on Expert Evidence.

A law professor and another member of the public wrote an article asserting that courts are not following certain provisions of the 2000 amendment to Rule 702. That amendment provides that the trial court must find that an expert's opinion is based on sufficient facts or data (subdivision (b)); that the expert is using reliable methods (subdivision (c)); and that the methods are reliably applied (subdivision (d)). The article concludes that many courts are treating the questions of sufficient facts or data and reliable application as questions of weight and not admissibility.

The Reporter's memorandum to the Committee concluded that the article was essentially correct --- many courts are treating sufficiency of facts or data and reliable application as questions of weight. And this is directly contrary to Rules 702(b) and 702(d), which treat these questions as ones that the judge must decide under Rule 104(a). The question is, what to do about the reluctance of some courts to follow the rule as it is written. The Reporter suggested that any addition of words to the rule would be in the nature of "we really mean it" --- and if courts did not follow the rule before, there is no guarantee that they would follow it after such an amendment.

One member suggested that the rule might be amended to state specifically that the factual disputes over sufficiency of facts or data and reliable application were to be resolved under Rule 104(a). But another responded that this point was already evident in the Rule, because those factors are set forth as admissibility requirements. Moreover, to add specific language about Rule 104(a) to Rule 702 would raise questions about why such references are not included for admissibility requirements set forth in other rules.

A Committee member observed that while an amendment to solve the problem highlighted was unlikely to be successful, this did not mean that consideration of amendments to Rule 702 should be off the table. Committee members briefly considered the possibility of a project that would evaluate whether Rule 702 should be amended to take account of all of the questions that have recently been raised about the reliability of certain forensic evidence, such as ballistics and handwriting identification. These challenges can be found in the case law, as well as in important reports issued by the National Academy of Science and, most recently, the President's Council of Advisors on Science and Technology.

The Committee then discussed the possibility of sponsoring a Symposium on the subject of forensic evidence and the challenges of admitting that evidence under Rule 702. That Symposium could be held on the morning of the Fall, 2017 Committee meeting. The Chair suggested that the Symposium could cover not only the challenges to forensic expert testimony, but also whether changes should be made more generally to assure that courts are undertaking the gatekeeping function established by *Daubert* and the 2000 amendment to Rule 702. The Committee resolved to revisit the question of possible amendments to Rule 702, and the possibility of a Symposium on expert testimony, at its next meeting.

VI. Recent Perceptions (eHearsay)

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

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

The Committee did, however, resolve to continue to monitor the practice and case law on electronic evidence and the hearsay rule, in order to determine whether there is a real problem of reliable hearsay either being excluded or improperly admitted by misapplying the existing exceptions.

For the Fall meeting, the Reporter submitted, for the Committee's information, a short outline on federal case law involving eHearsay. Nothing in the outline to date indicates that reliable eHearsay is being routinely excluded, nor that it is being admitted by misapplying the

existing exceptions. Most eHearsay seems to be properly admitted as party-opponent statements, excited utterances, or state of mind statements. And many statements that are texted or tweeted are properly found to be not hearsay at all. At most there was only one or two reported cases in which hearsay was excluded that might have been admitted under a recent perceptions exception.

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

VII. *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 continues to remain in flux. And the fact that a new appointment to the Court (if any) might affect the development of the law of confrontation is a strong reason for adopting a wait-and-see approach. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VIII. Next Meeting

The Spring, 2017 meeting of the Evidence Rules Committee will be held in Washington, D.C., on Friday, April 21.

Respectfully submitted,

Daniel J. Capra

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 3, 2017 | Phoenix, Arizona

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure (the "Standing Committee") held its spring meeting at the Sandra Day O'Connor United States Courthouse in Phoenix, Arizona, on January 3, 2017. The following members participated in the meeting:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Gregory G. Garre, Esq.
Daniel C. Girard, Esq.
Judge Susan P. Graber
Judge Frank Mays Hull
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Amy St. Eve
Professor Larry D. Thompson
Judge Richard C. Wesley (by telephone)
Chief Justice Robert P. Young
Judge Jack Zouhary

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –
Judge Neil M. Gorsuch, Chair
Professor Gregory E. Maggs, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Michelle M. Harner, Associate Reporter

Advisory Committee on Civil Rules –
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules –
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter (by telephone)
Professor Nancy J. King, Associate Reporter (by telephone)

Advisory Committee on Evidence Rules –
Judge William K. Sessions III, Chair
Professor Daniel J. Capra, Reporter

Elizabeth J. Shapiro, Deputy Director of the Department of Justice's Civil Division, represented the Department on behalf of the Honorable Sally Q. Yates, Deputy Attorney General.

Other meeting attendees included: Judge Paul W. Grimm, former member of the Advisory Committee on Civil Rules and Chair of the Pilot Projects Working Group; Judge Robert Dow, Jr., Chair of the Rule 23 Subcommittee, Advisory Committee on Civil Rules; Zachary Porianda, Attorney Advisor to the Court Administration and Case Management (CACM) Committee; Professor Bryan A. Garner, Style Consultant; and Professor R. Joseph Kimble, Style Consultant.

Providing support to the Standing Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Julie Wilson	Attorney Advisor, RCSO
Scott Myers	Attorney Advisor, RCSO
Bridget Healy (by telephone)	Attorney Advisor, RCSO
Hon. Jeremy D. Fogel	Director, Federal Judicial Center (FJC)
Dr. Emery G. Lee III	Senior Research Associate, FJC
Dr. Tim Reagan	Senior Research Associate, FJC
Lauren Gailey	Law Clerk, Standing Committee

OPENING BUSINESS

Welcome and Opening Remarks

Judge Campbell called the meeting to order. He introduced the Standing Committee's new members, Judge Furman of the Southern District of New York, Judge Hull of the U.S. Court of Appeals for the Eleventh Circuit, attorney Peter Keisler of Sidley Austin, and Justice Young of the Michigan Supreme Court.

Judge Campbell discussed the timing and location of meetings. The Standing Committee holds a meeting in June, after the advisory committees' spring meetings have been concluded, and in time to approve matters to be published in August. The Standing Committee's winter meeting is held during the first week of January, after the advisory committees' fall meetings (which run from September through November) and the holidays, but before the reporters' spring semesters begin. Although it has been a tradition for the past few years to hold the winter meeting in Phoenix, Judge Campbell welcomed the members to suggest alternative locations.

In his previous role as Chair of the Advisory Committee on Civil Rules, Judge Campbell found the January meeting to be an invaluable opportunity to share proposals with the Standing Committee and solicit feedback from its members. Judge Campbell encouraged all to share their thoughts.

Report on Rules and Forms Effective December 1, 2016

The following Rules and Forms went into effect on December 1, 2016: Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, 6, new Form 7, and the new Appendix; Bankruptcy Rules 1010, 1011, 2002, 3002.1, 7008, 7012, 7016, 9006, 9027, 9033, new Rule 1012, and Official Forms 410S2, 420A, and 420B; Civil Rules 4, 6, and 82; and Criminal Rules 4, 41, and 45 (*see* Agenda Book Tab 1B).

Judge Molloy reported that Congress is considering possible legislative action that would undo the recent amendment to Criminal Rule 41. Judge Campbell added that the Department of Justice (DOJ) had been helpful in advising Congress of the intent behind the rule change. Discussion followed.

Report on September 2016 Judicial Conference Session,
Proposed Amendments Transmitted to the Supreme Court, and
Rules and Forms Published for Public Comment

Rebecca Womeldorf reported on the September 2016 session of the Judicial Conference. In its semiannual report to the Judicial Conference, the Standing Committee submitted several rules amendments for final approval and requested approval for publication of a number of other proposed rule amendments.

The Judicial Conference approved the proposed amendments to Bankruptcy Rules 1001, 1006(b), and 1015(b), and Evidence Rules 803(16) and 902. These amendments were submitted to the Supreme Court on September 28, 2016. The Court will review the package and, barring any objection, adopt it and transmit it to Congress by May 1, 2017. If Congress takes no action, the amendments will go into effect on December 1, 2017.

The Judicial Conference also approved the Mandatory Initial Discovery Pilot Project and the Expedited Procedures Pilot Project.

The Standing Committee previously approved for public comment proposed amendments to the following Rules: Appellate Rules 8, 11, 25, 28.1, 29, 31, 39, 41, and Form 4; Bankruptcy Rules 3002.1, 3015, 3015.1 (New), 5005, 8002, 8006, 8011, 8013, 8015, 8016, 8017, 8018.1 (New), 8022, and 8023, Part VIII Appendix (New), and Official Forms 309F, 417A, 417C, 425A, 425B, 425C, and 426; Civil Rules 5, 23, 62, and 65.1; and Criminal Rules 12.4, 45, and 49. These rules and forms were published for public comment in July and August 2016. Many of these changes are non-controversial. The proposal to amend Civil Rule 23 has generated the most interest at public hearings; other hearing testimony has pertained to electronic filing changes affecting all rule sets.

APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the June 6, 2016 meeting.**

INTER-COMMITTEE WORK

Coordination Efforts

Scott Myers of the RCSO delivered a report on coordination efforts regarding proposed rules amendments that affect more than one advisory committee. He described rules amendments currently out for public comment that have implications for more than one set of federal rules. The first example related to electronic filing, service, and signatures (proposed amendments to Appellate Rule 25, Bankruptcy Rule 5005, Civil Rule 5, and Criminal Rule 49). Mr. Myers noted that the advisory committees coordinated language prior to publication; any changes the advisory committees recommend when the rules are submitted to the Standing Committee for final approval will also go through the coordination process.

Mr. Myers explained that proposed amendments to Civil Rules 62 and 65.1 that would eliminate the term "supersedeas bond" also have inter-committee implications. The Appellate Rules Committee published proposed amendments to Appellate Rules 8, 11, and 39 that would eliminate the term, and that the Bankruptcy Rules Committee planned to do the same by recommending technical conforming amendments to Bankruptcy Rules 8007, 8010, and 8021. The advisory committees will need to coordinate any additional changes made as a result of comments received.

Proposed amendments published for comment to the criminal disclosure rule could impact the appellate, bankruptcy, and civil disclosure rules. As published, the criminal disclosure rule would change the timing for initial and supplemental corporate disclosure statements, and that parallel amendments to the appellate, bankruptcy, and civil disclosure rules would need to be made for consistency across the rules. A reporter to the Criminal Rules Committee said that this may be a case there where factors specific to criminal procedure warrant a change that need not be adopted by the other advisory committees. Mr. Myers added that if parallel amendments are pursued by the Appellate, Bankruptcy, and Civil Rules Committees, the effective date of any changes to rules in those areas would trail the proposed criminal rule change by a year.

Finally, Mr. Myers noted that the Bankruptcy Rules Committee planned to address at its next meeting an amendment to its privacy rule to address redaction of personal identifying information from filed documents. The proposal responded to a suggestion from the CACM Committee after a national creditor sought assistance from the Administrative Office in efficiently removing personal identifying information from thousands of proof of claims it had filed across the country. The Civil and Criminal Rules Committees considered recommending similar amendments to their privacy rules, but both committees determined that courts have the tools needed to handle the relatively small number of documents filed on their dockets containing protected personal identifying information. Accordingly, the Civil and Criminal Rules Committees did not plan to follow the lead of lead of the Bankruptcy Rules Committee in amending their privacy rules unless the Standing Committee believed amendments should be made to all the privacy rules in the interests of uniformity.

Judge Campbell solicited additional issues that will require or benefit from inter-committee coordination.

Five-Year Review of Committee Jurisdiction

Ms. Rebecca Womeldorf introduced discussion of the five-year review of committee jurisdiction required by the Judicial Conference. In 1987, the Judicial Conference established a requirement that "every five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished." In 2017, therefore, each Judicial Conference committee has been asked to complete a questionnaire to evaluate its mission, membership, operating procedures, and relationships with other committees in an effort to identify where improvements can be made.

As the Bankruptcy Rules Committee had completed a version of the Five-Year review, Judge Ikuta was invited to summarize its recommendations. Judge Ikuta discussed the Bankruptcy Rules Committee's responses, focusing on three issues: (1) inter-committee coordination, (2) voting rights for non-member participants such as the representative from the DOJ and the bankruptcy clerk participant, and (3) background knowledge requirements for judge members.

With respect to the first issue of coordination, Judge Ikuta said she supported the addition of the coordination report to the Standing Committee's agenda, but urged more coordination once overlap is identified, so that there is a clear process transparent to all, with perhaps one advisory committee leading the effort.

Judge Campbell asked Judge Ikuta what additional steps should be added to the Standing Committee's current coordination efforts. Judge Ikuta suggested that the existing charts of overlapping rules could provide a starting point from which to identify overlap among rules. Once points of overlap are identified, the question becomes how best to proceed. Should one advisory committee take the lead? Should all of the committees discuss the issue first? Should the procedure vary, depending on the particular situation? Judge Ikuta took the position that a specific procedure for handling overlapping provisions should be adopted.

The stated goal of coordination is generally parallel language among identical rules provisions across rules sets, adopted during the same rules cycle. A reporter stated that a coordination procedure *is* currently in place—proposed changes with inter-committee implications are to be referred to a subcommittee of the Standing Committee—and that process was followed when the time counting amendments were made to all the rule sets. This procedure was not followed precisely with respect to the current round of amendments concerning electronic filing, service, and signatures, but the basic procedure of using a Standing Committee subcommittee to coordinate when necessary is available when needed.

Another reporter agreed and added that the structure of committee hierarchy can complicate coordination. Although the Standing Committee is charged with coordinating the work of the advisory committees, and suggesting proposals for them to study, it does not simply direct advisory committees to amend particular rules. Rather, proposed rule changes flow up from the advisory committees to the Standing Committee, and it is not always clear until an advisory committee presents a fully developed recommendation that coordination with other advisory committees is needed. Even so, the Standing Committee may—and has—set up subcommittees

for the purpose of persuading the advisory committees to cooperate regarding related rules changes.

A staff member asked what role the Standing Committee liaisons, as part of the coordination machinery, could be expected to play in the coordination process. A Standing Committee member agreed that, while liaison members do not have voting privileges, they could be helpful to the coordination efforts by alerting the Standing Committee to possible overlapping changes under consideration.

A third reporter said advisory committees need more information about the other advisory committees' agenda items. Specifically, beyond the general subject matter under discussion, what exact amendments are under consideration for a parallel rule? Armed with this information, the advisory committees could better consider parallel amendments in the same meeting cycle. A suggestion was made that the most effective way to disseminate this information is to ensure that each advisory committee's agenda book is shared with the chairs and reporters of all of the other advisory committees. There was agreement that sharing agenda books would benefit coordination. A reporter reiterated that more proactive use of subcommittees can go a long way toward solving coordination issues.

A reporter observed that the Bankruptcy Rules are more frequently affected by coordination issues because many of the rules either incorporate or are modeled on the Civil and Appellate Rules. A staff member added that often changes to Bankruptcy Rules have lagged by a year or more parallel Civil or Appellate Rules changes, without issue. It may sometimes be necessary to ask the other advisory committees to delay a change for a year if the Standing Committee wants parallel changes to go into effect at the same time, but the fact that a bankruptcy version of a change sometimes goes into effect a year later than a parallel appellate or civil rule change has not been a historical source of problems for courts or attorneys, if it has been noticed at all. A reporter pointed to the recent proposal dealing with payments to class-action objectors as one that required substantial coordination between the Civil and Appellate Rules Committees and the current system worked well. A Standing Committee member cited Civil Rules 62 and 65 as another example of a successful coordination effort.

Judge Campbell identified four actions to be taken to further the Standing Committee's coordination efforts: (1) the RCSO will continue to identify, track, and report on proposed rules amendments affecting multiple advisory committees; (2) agenda books will be shared by each advisory committee with the chairs and reporters of all of the other advisory committees; (3) the RCSO will assist in establishing coordination subcommittees when that seems appropriate; and (4) the Standing Committee will look for opportunities for coordination and future process improvements. A Standing Committee member added that advisory committees affected by a proposed rule change could send a member to participate in the proposing advisory committee's meeting. Judge Campbell agreed that this would be a good idea in appropriate circumstances.

Judge Ikuta's second bankruptcy-specific issue in the Five-Year review concerned whether the Bankruptcy Rules Committee's substantive experts – such as a recent Chapter 13 trustee invitee, the bankruptcy clerk advisor, and the representatives from the DOJ and the Office of the United States Trustees – should be made voting members, and whether Article III judges being

considered for membership on the Bankruptcy Rules Committee should be required to have some knowledge of the bankruptcy process. Judge Campbell asked why the Bankruptcy Rules Committee's expert members do not currently vote. One possible answer is that the Bankruptcy Rules Committee does not consider them full voting members because they were not appointed by the Chief Justice. Several Standing Committee members noted that the DOJ representative on other rules committees have always voted, though clerk representatives have not. It was observed that because the United States Trustee is an arm of the DOJ, the government would have two votes if voting rights were extended to both representatives on the Bankruptcy Rules Committee.

Providing additional historical perspective, a reporter explained that the DOJ is unique among the committees' membership because it represents the Executive Branch in addition to the interests of the justice system generally. To give all bankruptcy expert invitees a vote could set a problematic precedent as many interest groups would seek to join the rules committees to advance their views. The DOJ is deserving of an exception from advocacy, however, because it is an Executive Branch agency, and the other two branches of government are represented in the rulemaking process.

A Standing Committee member supported making the bankruptcy DOJ representative a voting member, as was the case on the other rules committees, but added that the United States Trustee and DOJ representatives should have only one vote between them because they are the same office. After further discussion, Judge Campbell suggested the Bankruptcy Rules Committee should be consistent with the other advisory committees in its treatment of its expert members; the DOJ member should vote, and any other expert advisors should be treated like the clerk members of the other committees, who play an informational role but do not vote. No member objected to this approach.

Judge Ikuta's third bankruptcy-specific item from the Five-Year review concerned whether Article III judges being considered for membership on the Bankruptcy Rules Committee should be required to have bankruptcy experience. Judge Campbell agreed that bankruptcy experience should be considered in recommending potential members to the Chief Justice.

After further discussion of the Five-Year review, it was agreed that the Standing Committee should submit a single report for the rules committees.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report on behalf of the Civil Rules Committee, which met on November 3, 2016, in Washington, D.C. The Civil Rules Committee's single action item involved recommending to the Judicial Conference for approval a technical amendment to Rule 4(m).

Action Item

Technical Amendment to Rule 4(m) – Rule 4(m) establishes a time limit for serving the summons and complaint. The proposed rule text revises the final sentence of Rule 4(m), which was

amended on December 1, 2015, and again on December 1, 2016. The 2015 amendment shortened the time for service from 120 days to 90 days, and added to the list of exemptions to that time limit Rule 71.1(d)(3)(A), notices of a condemnation action. The 2016 amendment added to the list of exemptions Rule 4(h)(2) service on a corporation, partnership, or association at a place not within any judicial district of the United States. At the time the 2016 proposal was prepared, the advisory committee was working from Rule 4(m) as it was in 2014, because the 2015 amendment exempting service under Rule 71.1(d)(3)(A) had been proposed, but final action was more than a year in the future. For this reason, the part of the 2015 amendment adding Rule 71.1(d)(3)(A) was inadvertently omitted from the 2016 proposal. Therefore, that proposal, as published, recommended, and adopted, read:

> This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

The Standing Committee explored with Congress's Office of the Law Revision Counsel (OLRC) the possibility of correcting the rule text as a scrivener's error. The OLRC declined to do so, but did place in an explanatory footnote the official print for the House of Representatives Committee on the Judiciary.

Because the OLRC declined to correct the omission of Rule 71.1(d)(3)(A), it must be corrected through the Rules Enabling Act process. Given that the provision has already been published, reviewed, and adopted, and because its omission was inadvertent, further publication is not required. The final sentence of Rule 4(m) should read:

> This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

The Civil Rules Committee voted to recommend approval of this rule text for submission to the Judicial Conference in March 2017 as a technical amendment, looking toward adoption by the Supreme Court in the spring of 2017, for an effective date of December 1, 2017.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously voted to recommend the technical amendment to Rule 4(m) to the Judicial Conference for approval**.

Pilot Projects Working Group

Judge Bates, Judge Grimm, Judge Fogel, and Emery Lee of the FJC led the discussion of two pilot projects approved by the Judicial Conference in September 2016, both of which are intended to improve pre-trial case management and reduce the cost and delay of civil litigation: (1) the Expedited Procedures Pilot, which will utilize existing rules, practices, and procedures and is intended to confirm the merits of active case management under these existing rules and practices; and (2) the Mandatory Initial Discovery Pilot, which is intended to measure whether court-ordered, robust, mandatory discovery produced before traditional discovery will reduce cost, burden, and delay in civil litigation. It was noted that Chief Justice Roberts mentioned the pilot projects in his 2016 Year End Report.

Judge Bates advised that these projects are expected to be implemented beginning in the spring of 2017, likely with their starts staggered for administrative-convenience purposes. One key to the projects' success will be getting enough districts to participate.

To discuss these projects in more detail, Judge Bates called upon Judge Grimm, a former member of the Civil Rules Committee and Chair of the Pilot Projects Working Group. Judge Grimm noted that during the public comment period and in public hearings held on the 2015 Civil Rules Package, some practitioners questioned whether rule changes should be implemented absent empirical support. Other practitioners noted that active case management is essential to reducing the cost and delay of civil litigation. Both pilot projects are responsive to these concerns. The Mandatory Initial Discovery Pilot will provide empirical data regarding whether the procedures implemented in the pilot project are effective and warrant future rules amendments. The goal of the Expedited Procedures Pilot is to promote a culture change by confirming the benefits of active case management using existing procedural rules. The Pilot Projects Working Group is coordinating with the FJC to design the pilot projects to produce measurable markers that yield good data.

Judge Grimm reviewed the history of the Mandatory Initial Discovery Pilot. The concept of mandatory initial discovery was first introduced in the 1993 rules amendments. The idea was to create an obligation that parties exchange information relevant to claims and defenses underlying the litigation without a formal discovery request. "It was an idea whose time had perhaps not yet come." The 1993 amendments included opt-out provisions, and most opted out. As a result, mandatory initial discovery has been little-used, and there has been no opportunity to verify empirically whether such procedures would help to reduce the cost and length of litigation. Interestingly, approximately ten states have since adopted mandatory initial discovery, to great success.

The Mandatory Initial Discovery Pilot will be implemented through a standing order (*see* Agenda Book Tab 3B, Attachment 5). Participating courts will also have access to resources developed by the Pilot Projects Working Group, including a reference manual, model forms and orders, and additional educational materials.

Judge Grimm then turned to the Expedited Procedures Pilot, the goals of which include ensuring courts' compliance with the requirements of: a prompt Rule 16 conference; issuance of a scheduling order setting a definite period of discovery of no more than 180 days and allowing no more than one extension, and then only for good cause; the informal resolution of discovery disputes; a commitment on the part of judges to resolve dispositive motions within 60 days from the filing of a reply brief and a firm trial date. The trial date would be set either at the initial scheduling conference, after the filing of dispositive motions, or upon the resolution of those motions.

The Pilot Projects Working Group is continuing to develop and finalize the procedures and supporting materials for the pilot projects. Judge Grimm confirmed that the pilot projects will be staggered, with the Mandatory Initial Discovery Pilot beginning first. Once the pilot projects have begun, administrative support will be provided by RCSO and CACM. The pilots will last for three years, but data collection and analysis will continue for longer than three years.

Judge Grimm noted the need for additional recruitment of courts to participate. The original goal was to have least five pilot courts participating in each project. The Pilot Projects Working Group sought diversity among participating courts, in terms of both size and geography, and had initially sought participation from all active and senior judges on each court. Recruitment efforts in the Northern District of Illinois resulted in a participation rate of approximately 75 percent, which will permit intra-district comparisons between participating and non-participating judges.

The District of Arizona will participate in the Mandatory Initial Discovery Pilot. Judge Campbell reported that because Arizona's state rules of civil procedure already include provisions similar to those the pilot projects are intended to test, the District of Arizona's judges have found the experiences of their state counterparts in handling these rules to be reassuring. Twenty years after the adoption of mandatory initial discovery in Arizona state court, a survey revealed that 74 percent of Arizona practitioners "prefer to be in state court" over federal court, as opposed to 41 percent nationally. When surveyed, lawyers in Arizona responded that they prefer state court because "[they] spend less money, and . . . cases [are] resolved more quickly." Judge St. Eve, whose Northern District of Illinois is confirmed to participate as well, suggested this information might be useful in helping judges to convince their colleagues to participate.

The District of Montana is also considering taking part. However, Judge Molloy expressed concerns about the standing order, which Judge Grimm confirmed was mandatory due to the need to ensure consistent measurement. Judge Molloy stated that the complexity of the standing order, and the bar's negative response to the attempt in the early 1990s to make initial discovery mandatory, were—although not dispositive—concerning to the District of Montana.

The Eastern District of Kentucky is confirmed to participate in the Expedited Procedures Pilot. Thanks to the efforts of Judges Diamond and Pratter in the Eastern District of Pennsylvania, that district remains a possibility, as do the Southern District of Texas, the District of Utah, and the District of New Mexico.

Judge Grimm shared several lessons learned as it has tried to recruit participating courts: the process takes time, success requires buy-in from multiple judges on a given court, and persuasion can be a challenge. Asked what percentage of a court's judges would constitute sufficient participation, Judge Grimm responded that 50 to 60 percent would provide a "center of gravity." A judge member requested clarification as to the term, "firm trial date," which Judge Grimm acknowledged had been an "area of concern" for some. He further acknowledged that the goal of disposing of 90 percent of cases within 14 months of either 90 days from service or 60 days from the entry of an appearance was "ambitious" by design.

Judge Fogel argued that "a culture change" is "quite difficult," but is necessary to drive up recruitment. Although the FJC has engaged in education methods such as webinars, receptivity to pilot project participation has largely been confined to so-called "baby judges," while "longer-tenured judges" seem "more comfortable with the status quo." Judge Fogel anticipated this topic would be discussed at the upcoming Chief District Judges meeting in March 2017. The FJC hopes to use adult education principles (specifically, by focusing training on certain areas of knowledge, skills, and abilities) to encourage judges to adopt active case management practices (*see* Agenda Book Tab 3B, Attachment 6). A judge member suggested the FJC consider

including a chambers staff member in the training, along with his or her judge. Judge Campbell also suggested including in the training process state judges who have experience with similar rules provisions.

Emery Lee then addressed the topic of data collection. He reviewed his November 29, 2016 memorandum to the Standing Committee, which addressed potential problems (*see* Agenda Book Tab 3B, Attachment 7). The first issue is whether and when to set the firm trial date. Available data from eight districts and 3,000 civil cases previously addressing this topic shows significant variance among district courts. In approximately forty-nine percent of cases, no trial date could be found. Second, the two pilot projects are very different from one another in terms of measures. The Expedited Procedures Pilot, which will require the tracking of motion practice and discovery disputes, is the easier of the two, although the lack of a definitive and consistent starting point for the "fourteen-month clock" is problematic.

Dr. Lee expressed interest in obtaining feedback through attorney surveys, which could be automated via the district's CM/ECF system. When a "case-closing event" occurs in CM/ECF, it can trigger another "CM/ECF case event" directing attorneys to be noticed to a survey conducted by an outside vendor. Automation of the surveys in this manner will save significant time, but will require assistance from clerks' offices.

A judge member asked whether, in addition to comparison among districts, the data collected would allow for a "before-and-after" comparison within a single district. The answer is yes by district and for individual judges, but the usefulness of the data can hinge on many factors over the next four to five years. Another judge member wondered whether "within-court data [was] *more* helpful" than data from a number of diverse districts, in that the former controls for more variables. Two other judges responded that the "self-selection bias" becomes an issue in that situation, as the judges opting in might already be using expedited procedures. In closing, another judge member pointed out the need to define the metrics: "What are we comparing?"

Information Items

Rules Published for Public Comment – Proposed amendments to Rules 5, 23, 62, and 65.1 were published for public comment in August 2016, and will be the subject of three hearings. The changes to Rule 23, which largely concern class-action settlements, have generated the most interest. Eleven witnesses testified at the November 3, 2016 hearing held in conjunction with the advisory committee's fall 2016 meeting, and eleven more were scheduled to testify at the January 4, 2017 hearing. More than a dozen were already scheduled to testify at the February 16, 2017 hearing, which will be held by telephone.

Rule 30(b)(6) Subcommittee – The Civil Rules Committee has decided to explore whether it is feasible and useful to address some of the problems that bar groups have regularly identified with depositions of entities under Rule 30(b)(6). The Civil Rules Committee studied this issue ten years ago, but concluded that any problems were attributable to behavior that could not be effectively addressed by rule. When the question was reassessed a few years later, the advisory committee reached the same conclusion. Recently, certain members of the American Bar Association Section of Litigation submitted a suggestion reviving these concerns.

Judge Bates advised that a subcommittee has been formed, chaired by Judge Joan Ericksen, to consider possible amendments to Rule 30(b)(6). The Rule 30(b)(6) Subcommittee has begun to develop a tentative initial draft of a potential amendment to help to make the challenges of the process concrete, but it has not yet decided whether to recommend any amendments to the rule.

Redacting Improper Filings: Rule 5.2 – Court filings frequently include personal information that should have been redacted. Rule 5.2 (Privacy Protections for Filings Made with the Court) was designed to protect litigants' privacy by permitting court filings to "include only: (1) the last four digits of the social-security number and taxpayer identification number; (2) the year of the individual's birth; (3) the minor's initials; and (4) the last four digits of the financial-account number." The rule resulted from a coordinated process that led to the adoption of parallel provisions in the Appellate, Bankruptcy, and Criminal Rules.

The Bankruptcy Rules Committee intends to publish proposed new Bankruptcy Rule 9037(h), which would establish a procedure for replacing an improper filing with a properly-redacted filing, for public comment.

The Civil Rules Committee considered a parallel amendment to the Civil Rules that would have added a specific provision to Rule 5.2 for correcting papers that are filed without redacting personal identifying information in the manner that the rule requires. During its consideration of the proposed amendment at its fall 2016 meeting, the Civil Rules Committee determined that the district courts seem to be managing the problem well when it arises and, therefore, determined that there is no independent need for a national rule to correct improperly-redacted filings. The advisory committee decided to remove this item from its agenda.

Jury Trial Demand: Rules 38, 39, and 81(c)(3)(A) – Rule 81(c)(3) sets forth the procedure for demanding a jury trial in actions removed from state court. Specifically, Rule 81(c)(3)(A) provides that a party who demanded a jury trial in accordance with state law does not need to renew the demand after removal. Before the 2007 Style Project amendments, the rule provided that the party need not make a demand if state law "*does* not" require a demand (emphasis added). Recognizing that the Style Project amendments did not affect the substantive meaning of the rules, most courts continue to read Rule 81(c)(3)(A) as excusing a demand after removal only if state law does not require a demand at any point. However, as pointed out in a suggestion submitted in 2015 by Mark Wray, Esq. (Suggestion 15-CV-A), replacing "does" with "did" inadvertently created an ambiguity that may mislead a party who wants a jury trial to forgo a demand because state law, although requiring a demand at some point after the time of removal, did not require that the demand be made by the time of removal.

Discussion of this issue at the Standing Committee's June 2016 meeting led Judges Gorsuch and Graber to suggest that the demand requirement in civil cases be reconsidered altogether (Suggestion 16-CV-F). Specifically, the suggestion would adopt the procedure currently used in criminal cases: a jury trial should be the default; a case would be tried without a jury only if all parties waive a jury trial, and the court must approve any waiver. The Civil Rules Committee has begun follow-up work on this suggestion. Preliminarily, the advisory committee surveyed local and state court rules and case law to determine how often parties who want a jury trial do not get one due to the failure to make a timely demand.

Service of Subpoenas: Rule 45(b)(1) – Under Rule 45(b)(1), a subpoena is served by "delivering a copy to the named person." The majority of courts interpret this provision to require personal service, while some courts have recognized other means of delivery, most often by mail. The advisory committee will discuss at future meetings whether Rule 45 should expressly recognize other means of delivery.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Gorsuch and Professor Maggs provided the report on behalf of the Appellate Rules Committee, which met on October 18, 2016, in Washington, D.C. Judge Gorsuch succeeded Judge Steven M. Colloton as chair of the Appellate Rules Committee at the beginning of October 2016.

Judge Gorsuch reported that the Appellate Rules Committee had one action item, a proposed technical amendment, for which it sought the approval of the Standing Committee. The agenda also included five information items.

Action Item

Technical Amendment to Rule 4(a)(4)(B)(iii) – On December 14, 2016, OLRC informed the Appellate Rules Committee through RCSO that the published version of Appellate Rule 4 should not include subdivision (a)(4)(B)(iii), as that subsection had been inadvertently deleted in 2009. In 2009, Rules 4(a)(4)(B)(ii) and 4(a)(5) were amended as part of the Time Computation Project, but subsection (iii) was not amended. The redlined version of the proposed amendments, used during committee deliberations and published for public comment, included asterisks between subdivisions 4(a)(4)(B)(ii) and 4(a)(5) to show that the material between them—subdivision 4(a)(4)(B)(iii)—was not to be changed. However, the "clean version" combining the changes inadvertently omitted those asterisks, making it appear that subdivision 4(a)(4)(B)(iii) had been deleted. The Supreme Court's order adopting the amendments to Rule 4(a) incorporated this version.

Accordingly, the OLRC deleted subdivision (iii) from its official document in 2009, but nonetheless the version from which the rules are printed did not include that change. For that reason, Rule 4(a)(4)(B)(iii) has continued to appear in the published version of the Appellate Rules. It was only recently that a publisher noticed the omission of subdivision (iii) from the 2009 Supreme Court order and inquired with the OLRC as to whether it was actually part of the Rule. The OLRC intends to publish Rule 4(a)(4)(B) without subdivision (iii), but include a footnote stating that the deletion was inadvertent.

Judge Gorsuch consulted with the members of the Appellate Rules Committee, who decided that the error was best remedied by a technical amendment restoring subdivision (a)(4)(B)(iii) to Rule 4. Because the change is non-substantive, publication is unnecessary. No member expressed objection or concern.

Judge Campbell added that if the Standing Committee approved the amendment, it could be approved by the Judicial Conference in March and transmitted to the Supreme Court, and

submitted to Congress by the first of May. It would then go into effect on December 1, 2017, assuming no action by Congress. There will be one year in which subdivision (a)(4)(B)(iii) will not be printed as part of Rule 4, but OLRC's explanatory footnote will appear during that period.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the technical amendment to restore Rule 4(a)(4)(B)(iii).**

Information Items

Judge Gorsuch presented the Appellate Rules Committee's information items: (1) Appellate Rule 3(d)'s references to "mailing" in the context of electronic filing; (2) the references to security instruments in Appellate Rule 8(b); (3) possible conforming amendments to Rule 26.1's corporate disclosure requirements; (4) possible conforming amendments in light of the Civil Rules amendments regarding class action objectors, and (5) possible amendments to Rule 25 regarding electronic filing and pro se litigants.

Rule 3(d) – Rule 3(d) governs service of the notice of appeal. After proposed amendments to Rule 25 were published in August 2016, the Appellate Rules Committee realized that Rule 3 still contained references to "mail," and that the term "mail" appears throughout the Appellate Rules. The Appellate Rules Committee has discussed using the term "send" in place of "mail," but those discussions are preliminary. Judge Gorsuch noted that the term "mail" is used in other federal rules as well, particularly the Civil and Bankruptcy Rules. As such, any terminology change may require coordination with the other committees, and he solicited input on these points.

One member cautioned that the effort could be a big undertaking, particularly for the Civil Rules. A reporter agreed the project would be substantial in scope, as there are words used in addition to "mailing" (e.g., "sending" and "delivering") that would need to be examined as well. These instances might require a case-by-case determination as to whether electronic service is acceptable under the circumstances. To date, the Civil Rules Committee has not determined to replace these types of phrases throughout the Civil Rules. This issue had been explored by the Subcommittee on Electronic Filing two years ago, and the Subcommittee had decided not to take action due to the complexity of the problem and the potential for unintended consequences. Judge Gorsuch concluded that the Appellate Rules Committee will continue to pursue how to avoid confusion in the Appellate Rules between the references to electronic filing and references to mail.

Rule 8(b) – The Appellate Rules Committee is considering an amendment to clarify the recently-published draft of Rule 8(b) regarding security instruments. The proposed amendments initially came to the attention of the advisory committee as a result of the proposed amendment to Civil Rule 62, which clarifies that an appellant may post a security other than a bond in order to obtain a stay of proceedings to enforce a judgment. In June 2016, the Standing Committee approved for publication amendments to Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) to conform to the amendment to Civil Rule 62 by replacing the term "supersedeas bond."

After the publication of these proposed amendments in August 2016, the Appellate Rules Committee became aware of an internal inconsistency in the language of the published draft of Rule 8(b). While the first clause of the first sentence of the proposed text includes four forms of security—"a bond, other security, a stipulation, or other undertaking"—the second clause mentions only two: "a bond or undertaking." At the October 2016 meeting, the advisory committee tentatively decided to replace the first clause in Rule 8(b) with "a bond, a stipulation, an undertaking, or other security," and the second clause in the rule with the term "security," to encompass all prior iterations, explanations, or alternatives without repetition.

The Appellate Rules Committee also discussed the possibility of eliminating the reference to "stipulation," which appears in the Appellate Rules but not in the Civil Rules. Although no published case touches upon the subject, the Appellate Rules Committee determined to retain the reference, and have consulted with the reporter for the Civil Rules Committee. The Appellate Rules Committee will wait to receive all public comments on the published version of Rule 8(b) before taking further action.

A reporter asked whether the suggested parallel amendments to Rule 8(b)'s language create an obligation on the part of the other committees to similarly conform. For example, the word "stipulation" is in the Appellate Rule but not in the corresponding Civil or Bankruptcy Rule. A member proposed that "stipulators" be treated as "other security providers," as stipulations to the form and amount of security are routinely approved at the district court level, but expressly declined to suggest that the term be removed from Appellate Rule 8(b).

Judge Campbell noted that Appellate Rule 8 describes the person who provides the security in two different ways: once as "sureties or other security provider," and twice as a "security provider," and suggested a stylistic change from "surety" to "security provider." Another member noticed that this would require amending the subsection's title ("Proceeding Against a Surety") as well. Professor Maggs explained that the Appellate Rules Committee had retained the term surety because the amendments to Civil Rule 62 retained the term "bond or other security," and the "surety" referred to the security provider for the bond.

Judge Gorsuch thanked the other members for their comments, and reported that the Appellate Rules Committee expects to finalize the new text of Rule 8(b) before its next meeting.

Rule 26.1 and Corporate Disclosure Statements – Appellate Rule 26.1(a) currently provides that corporate parties must disclose their subsidiaries and affiliates so that judges can make assessments of their recusal obligations. For several years, the Appellate Rules Committee has discussed the possibility of expanding disclosure obligations to publicly-held non-corporate entities, and to require the disclosure, in addition to the information currently required by Rule 26.1(a), of the entity's involvement in related federal, state, and administrative proceedings.

A careful study, including a memorandum by Professor Capra, revealed substantial variation among the circuits' disclosure requirements. Despite the significant costs on counsel who must understand the different sets of rules in different jurisdictions, the Appellate Rules Committee concluded that it was not inclined to act because it was unable to devise a satisfying solution. Two major problems led to this decision: (1) the amount of information that is necessary and

helpful in evaluating recusal decisions varies significantly among judges, and (2) efforts to delineate which entities would be subject to the disclosure requirements were unsuccessful. Given these complicated issues, the Appellate Rules Committee decided to not go forward with a rule amendment.

The Appellate Rules Committee did, however, tentatively decide to recommend conforming amendments to Appellate Rule 26.1 in light of the proposed amendments to Criminal Rule 12.4, which requires the disclosure of nongovernmental corporate parties and organizational victims. These proposed changes to subdivisions (b) and (d) are more limited in scope. Rule 26.1(b) would be modified to replace the references to "supplemental" filings to "later" filings. This term is more precise and would include a party that was unaware of the need to make a disclosure at the time it filed its principal brief. Subdivision (d) would also be added to mirror the proposed revision of Criminal Rule 12.4(a)(2), which requires the government to "file a statement identifying any organizational victim of the alleged criminal activity" absent a showing of good cause.

The Appellate Rules Committee also tentatively approved a proposal to add a new subdivision (f) to Rule 26.1, which would impose a disclosure requirement on intervenors. Although it is rare to see a party intervene on appeal, most circuits have local rules similar to the proposed change. Judge Campbell pointed out that if the Appellate Rules Committee moves forward with the proposal to impose disclosure requirements upon intervenors, it should also consider amending Rule 15(d), which sets forth the requirements for a motion for leave to intervene. He suggested that Rule 15(d) could be amended to add procedures for making disclosures. Judge Gorsuch agreed to take this good point under consideration.

A more complicated issue is whether to expand the disclosure requirements in bankruptcy appeals. Bankruptcy cases tend to involve a much higher number of corporate entities because of the creditor entities. An ethics opinion indicates that, ideally, more detailed disclosure obligations would be required. The Appellate Rules Committee decided to consult with the Bankruptcy Rules Committee before proceeding further. Judge Ikuta confirmed that the Bankruptcy Rules do not contain a disclosure requirement, and that the Bankruptcy Rules Committee has referred the matter of corporate disclosures in bankruptcy cases to a subcommittee.

Class Action Settlement Objectors – In August 2016, a proposed amendment to Civil Rule 23 was published that intended to address perceived problems with objections to class action settlements. Specifically, revised Civil Rule 23(e)(5) would require objectors to state to whom the objection applies, require court approval for any payment for withdrawing an objection or dismissing an appeal, and require the indicative ruling procedure to be used in the event that an objector seeks approval of a payment for dismissing an appeal after the appeal has already been docketed. At its October 2016 meeting, the Appellate Rules Committee considered whether conforming amendments to the Appellate Rules are necessary in light of the proposed changes to Civil Rule 23. The Appellate Rules Committee concluded that the Civil Rules amendments currently out for publication adequately address the objector problem, and complementary Appellate Rules are unnecessary.

Electronic Filing by Pro Se Litigants – In August 2016, a proposed amendment to Rule 25 was published that addressed the prevalent use of electronic service and filing. Proposed subdivision (a)(2)(B)(ii) leaves in place the current requirement that *pro se* parties may file papers electronically only if allowed by court order or local rule. In response to several suggestions submitted by members of the public, at its October 2016 meeting the Appellate Rules Committee considered whether to reconsider the current rule on electronic filing by *pro se* parties. After discussion, the Appellate Rules Committee determined that it would not recommend any additional changes; however, no action will be taken as to the published revised version of Rule 25 until all public comments have been received.

Additional Issues – Judge Gorsuch also raised the topic of efficiency in the appellate process, an issue that has garnered increased attention in recent years. The 2016 amendments reducing Rule 32(a)(7)(B)'s presumptive word-count limit from 14,000 to 13,000 has led some to question whether all of the brief sections required under Rule 28(a), such as the summary of the argument and the components of the statement of the case, should continue to be mandatory. In addition, the Appellate Rules Committee is considering the issue of the publication of *en banc* appeals. It will continue to explore these issues in addition to the other information items discussed above.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta and Professors Gibson and Harner presented the report on behalf of the Bankruptcy Rules Committee, which met on November 14, 2016, in Washington, D.C. The Bankruptcy Rules Committee had three action items for which it sought approval, including technical amendments and the new Chapter 13 package. There were also two information items.

Action Items

Chapter 13 Official Plan Form and Related Rules Amendments – The Bankruptcy Rules Committee submitted proposed amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, new Rule 3015.1, and new Official Form 113, with a recommendation that they be approved and transmitted to the Judicial Conference.

The Bankruptcy Rules Committee first discussed the possibility of a national form for Chapter 13 plans at its spring 2011 meeting in response to two suggestions which criticized the variance among districts' plans and argued that a uniform plan structure would streamline the process for both creditors and judges. A working group was formed to draft an official form for Chapter 13 plans and any related rule amendments.

In August 2013, the proposed Chapter 13 plan form and proposed amendments to nine related rules were published for public comment. The Bankruptcy Rules Committee made significant changes to the rules and the form in response to the comments and republished the full package in August 2014. Because many of these comments from the second publication period strongly opposed a mandatory national form for Chapter 13 plans, the Bankruptcy Rules Committee explored the possibility of adding provisions that would allow districts to opt out under certain conditions. At its fall 2015 meeting, the advisory committee approved the proposed Chapter 13 plan form (Official Form 113) and related amendments to Rules 2002, 3002, 3007, 3012, 4003,

5009, 7001, and 9009, but deferred further action in order to continue to develop the opt-out "compromise proposal."

At its spring 2016 meeting, the Bankruptcy Rules Committee decided to recommended publication of two rules that would implement the opt-out proposal, an amendment to Rule 3015 and proposed new Rule 3015.1. It also recommended a shortened comment period of three rather than six months, due to the two prior publications and the narrow focus of the revised rules. The Standing Committee approved this recommendation, and Rules 3015 and 3015.1 were published for public comment in July 2016. Despite some comments arguing that the form should be mandatory or, at the opposite end of the spectrum, opposing the requirement of any mandatory form, whether national or local, the advisory committee unanimously approved with minor changes Rules 3015 and 3015.1 at its fall 2016 meeting.

The Bankruptcy Rules Committee submitted Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009; new Rule 3015.1; and new Official Form 113 to the Standing Committee for approval. The Bankruptcy Rules Committee recommended that the entire package of rules and the Chapter 13 Official Plan Form be submitted to the Judicial Conference at its March 2017 session and, if approved, be sent to the Supreme Court immediately thereafter. The Court is expecting the early submission, and if it approves and sends the package to Congress by May 1, it would take effect on December 1, 2017 absent Congressional action.

A judge member proposed a minor change to the first sentence of amended Rule 3002(a), which states, "A secured creditor, unsecured creditor, or an equity security holder must file a proof of claim . . . ." The judge member suggested that indefinite articles be used consistently throughout that clause, either by deleting the word "an" before "equity security holder," or inserting "an" before "unsecured creditor." The Standing Committee agreed to remove "an."

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the following for submission to the Judicial Conference for approval: Rules 2002, 3002 (subject to the removal of "an" from subdivision (a)), 3007, 3012, 3015, 4003, 5009, 7001, and 9009; new Rule 3015.1; and new Official Form 113.**

Technical and Conforming Amendments to Rule 7004(a)(1) and Official Form 101 – Judge Ikuta introduced two technical and conforming amendments not requiring publication: (1) updating Rule 7004's cross-reference to a subsection of Civil Rule 4(d), and (2) correcting an error in Question 11 of Official Form 101.

Rule 7004(a) was amended in 1996 to incorporate by reference then-Civil Rule 4(d)(1), which provided, "A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant." In 2007, a number of amendments to Civil Rule 4(d) changed the former Rule 4(d)(1), renumbering it as subsection (d)(5) and altering its language to read, "**Jurisdiction and Venue Not Waived.** Waiving service of a summons does not waive any objection to personal jurisdiction or to venue."

The cross-reference to Civil Rule 4(d)(1) in Bankruptcy Rule 7004(a) was not changed at that time. Accordingly, the Bankruptcy Rules Committee recommended to the Standing Committee an amendment to Rule 7004(a) to correct the cross-reference to Civil Rule 4(d)(5). Because the amendment is technical and conforming, the Bankruptcy Rules Committee recommended submitting it to the Judicial Conference for approval without prior publication.

The second proposed amendment involved a correction to Question 11 of Official Form 101, the form for voluntary petitions for individuals filing for bankruptcy. Under § 362(b)(22) of the Bankruptcy Code, the automatic stay will generally not halt an eviction where a landlord obtained a judgment of possession against a tenant before the tenant filed a bankruptcy petition. However, that exception is subject to § 362(*l*), which permits the automatic stay if a debtor meets certain procedural requirements. Under § 362(*l*)(5)(A), the debtor must indicate whether a landlord has obtained a judgment for possession and provide that landlord's name and address. Section 362(*l*)(1) also requires the debtor to file a certification requesting the bankruptcy court to stay the judgment.

As currently written, Official Form 101 requires only *debtors who wish to remain in their residences* to provide information about an eviction judgment. As such, it is inconsistent with the Code, which requires *all* debtors who have an eviction judgment against them to indicate that fact on the petition and to provide the landlord's name and address. To address this inconsistency, the Bankruptcy Rules Committee recommended changing Question 11 on the form to clarify that, whether or not a debtor wants to stay in the residence, he or she must provide the required information if the landlord obtained an eviction judgment before the petition was filed.

A judge member asked whether, even though the question whether the tenant wishes to stay in the residence is being removed from Question 11, that information would still be apparent from the certification, Official Form 101A (Initial Statement About an Eviction Judgment Against You), that the tenant would also file. Judge Ikuta responded that it would. No other questions or comments were offered.

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the proposed technical and conforming amendments to Rule 7004(a)(1) and Official Form 101 for submission to the Judicial Conference for final approval.**

Judge Campbell said the Supreme Court had been alerted that the Chapter 13 package will be transmitted after the Judicial Conference in March, as the Court will have "only a short time"—until May 1—to approve it if it is to stay on track to become effective on December 1, 2017. The Court has agreed to this expedited timeline. The March 2017 submission to the Court will not include the technical amendments to Rules 7004(a)(1) and Official Form 101, which are unrelated to the Chapter 13 materials. Those technical amendments will be submitted in September 2017, which will minimize the amount of material the Court would be asked to consider on an expedited basis. No member expressed disagreement.

Information Items

Conforming Amendments to Rule 8011 – As part of the coordinated inter-committee effort to account for electronic filing, signatures, service, and proof of service, the Bankruptcy Rules Committee intends to recommend an amendment to Rule 8011. Rule 8011 is the bankruptcy appellate rule that tracks Rule 25 of the Federal Rules of Appellate Procedure. Amendments to Appellate Rule 25 published for comment in August 2016 would address electronic filing (FRAP 25(a)), electronic signatures, (FRAP 25(a)(2)(B)(iii)), electronic service (FRAP 25(c)(2)), and electronic proof of service (FRAP 25(d)). The proposed amendment to Bankruptcy Rule 8011 would add provisions to mirror the new electronic procedures proposed for Appellate Rule 25.

The Bankruptcy Rules Committee recommends that this amendment be considered without publication for a number of reasons. First, publication would delay approval, resulting in a one-year "gap period" between the effective dates of the parallel amendments to Appellate Rule 25 and Bankruptcy Rule 8011. This would result in inconsistent treatment of electronic filing, service, and proof of service in the bankruptcy and appellate arenas. Second, the proposed amendments to Rule 8011 are materially identical to the proposed amendments to Appellate Rule 25 and do not raise bankruptcy-specific issues. The comments on the amendments to Appellate Rule 25 are therefore sufficient to identify any concerns as to the amendments to Rule 8011. Judge Gorsuch noted that the Appellate Rules Committee had received no comments so far on the amendment to Appellate Rule 25. A judge member asked whether the bankruptcy community would have an adequate opportunity to consider the impact of these proposed changes to electronic procedures if there was no publication. Professor Gibson responded that a related proposed amendment to Bankruptcy Rule 5005(a) regarding electronic procedures for filing is out for public comment at this time; so the basic issue is currently before the bankruptcy community. She added that the proposed changes to Rule 5005(a) had so far not received any comments.

Judge Ikuta said that Bankruptcy Rules Committee will review the proposed amendments to Rule 8011 at its April 2017 meeting in light of any public comments to Appellate Rule 25 and any feedback from the Appellate Rules Committee. Because the Standing Committee is authorized to eliminate the comment period for technical amendments, she said that the Bankruptcy Rules Committee will request approval of Rule 8011 without publication at the Standing Committee's June 2017 meeting. No member objected to this proposal.

Noticing project and electronic noticing issues – The Bankruptcy Rules Committee has been asked on a number of occasions spanning many years to review noticing issues in bankruptcy cases, i.e., how noticing and service (other than service of process) are effectuated, and which of the numerous parties often involved in bankruptcy cases are entitled to receive notices or service. Approximately 145 Bankruptcy Rules address noticing or service.

In the fall of 2015, the Bankruptcy Rules Committee approved a work plan to study these issues, but an extensive overhaul of the Bankruptcy Rules' noticing provisions was deferred pending further study of specific suggestions. The advisory committee decided to focus on a specific suggestion aimed at businesses, financial institutions, and other non-individual parties holding claims or other rights against the debtor. Because these parties, such as credit reporting agencies

and utilities, are likely to receive numerous notices and papers in multiple bankruptcy cases, permitting them to be electronically noticed and served has the potential to avoid significant expenditures. These funds would then be more likely to be available for distribution to creditors. The advisory committee is currently exploring an amendment to the Bankruptcy Rules that would allow such non-individual parties who are not registered CM/ECF users to opt into electronic noticing and service. The Standing Committee had no questions or comments regarding the noticing project.

Coordination – The subject of coordination arose with respect to Bankruptcy Rule 9037(h), which governs the redaction of private information. Judge Bates reported that the Civil Rules Committee has decided not to propose an amendment to the Civil Rules that would impose privacy-redaction requirements similar to those of Rule 9037(h).

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Professor Capra delivered the report on behalf of the Evidence Rules Committee, which last met on October 21, 2016, at Pepperdine University School of Law. A symposium was held in conjunction with the meeting. Professor Capra presented several information items.

Information Items

Fall Symposium – The fall 2016 symposium focused the Evidence Rules Committee's working drafts of possible amendments to Rules 801(d)(1)(A) and 807, and the developing case law regarding Rule 404(b). In addition to the members of the Evidence Rules Committee, attendees included prominent judges, practitioners, and professors. A transcript of the symposium will be included in the Fordham Law Review.

The Third and Seventh Circuits have issued several opinions interpreting Rule 404(b) in a non-traditional way. Among the symposium participants was Judge David Hamilton of the U.S. Court of Appeals for the Seventh Circuit, which in recent years has decided a number of important Rule 404(b) cases. After the symposium, the Evidence Rules Committee discussed several proposals for amendments to Rule 404(b). The potential changes to the rule include that: (1) courts find the probative value of evidence of uncharged misconduct to be independent of any propensity inference, (2) notice be provided earlier in the proceedings to give the court an opportunity to focus on whether the purpose is permissible and whether the path of inferences linking the purpose and the act is independent of any propensity for misconduct, (3) the government's description of the evidence to be more specific than the "general nature," and (4) the government to state in the notice the permissible purpose and also to state how—without relying on a propensity inference—the evidence is probative of that purpose. The application of Rule 404(b) is a controversial topic, and the DOJ has an interest in how the rule is applied as several of the suggestions would require a change in noticing practices by the government. Professor Capra stressed that any proposed amendments to Rule 404(b) are in very early stages of consideration, and will be considered further at the spring 2017 meeting.

One member asked about the application of Rule 404(b) to civil cases, and whether Rule 609 was implicated. Professor Capra responded that most of the recent case law developments have

been in criminal cases, but the impact on civil cases is under consideration as well. Another member asked whether some of the issues under consideration might be part of case management. The group also discussed the first of the proposed changes and the standard of "independent of any propensity inference" and the noticing requirements.

Rule 807 ("Residual Exception") – A comprehensive review of Rule 807 case law over past decade shows that reliable hearsay has been excluded, leading the Evidence Rules Committee to consider possible amendments to expand Rule 807's "residual exception" to the rule against hearsay. Discussion of this issue began with the symposium held in 2015. At that time, the practitioners in attendance opposed the idea of eliminating the categorical hearsay exceptions (e.g., excited utterances, dying declarations, etc.) in favor of expanding the residual hearsay exception. The Evidence Rules Committee agreed that the exceptions should not be eliminated. Instead, it has developed a working draft of amendments intended to refine and expand Rule 807 to admit reliable hearsay even absent "exceptional circumstances," as well as streamline the court's task of assessing trustworthiness.

In developing the draft amendments, the Evidence Rules Committee is studying the equivalence standard; i.e., that the court find trustworthiness "equivalent" to the circumstantial guarantees of the Rule 803 and 804 exceptions. This "equivalence standard" is problematic because it requires the court to make a comparison of other exceptions that share no common indicator of trustworthiness, and it does not seem to be working as it should. The idea would be to permit the court to use a totality of circumstances standard in place of the equivalence standard. Also, the Evidence Rules Committee suggests deleting the language referring to materiality and the interests of justice because both terms are repetitive of other rules. Finally, the Evidence Rules Committee determined that the requirement that the hearsay be "more probative" than any other evidence that the proponent can obtain should be retained in order to prevent overuse of the residual exception. Discussion of the working draft will continue.

A Standing Committee member asked whether a "presumption of trustworthiness" could be associated with statements admissible under Rule 807. Professor Capra responded that the Evidence Rules Committee considered this idea, but considered it unworkable because of the shifting of the burden of proof for trustworthiness. He compared Rule 807 and Rules 803 and 804 as an example of this issue.

Rule 801(d)(1)(A) (Testifying Witness's Prior Inconsistent Statement) – The Evidence Rules Committee is considering an expansion beyond what Rule 801(d)(1)(A) currently allows: prior inconsistent statements made under oath during a formal proceeding. The expansion under consideration would permit the substantive use of video-recorded prior inconsistent statements. This proposal was received favorably at the symposium.

A member asked whether, under this potential amended version of Rule 801(d)(1)(A), the videotaped statement would need to have been made under oath in order to be admissible, and Professor Capra explained that it would not, and added that the advisory committee is considering a suggestion that the rule would include statements that the witness concedes were made in addition to videotaped statements. A reporter asked whether these statements should properly fall under Rule 803 rather than Rule 801. Professor Capra responded that such a

reclassification would not be appropriate because, unlike the Rule 803 exceptions, these prior inconsistent statements were not made under circumstances more likely to make them reliable. Judge Campbell noted that what constitutes a videotaped statement was discussed at the symposium, and advised that this question will need to be resolved in developing any rule amendments.

Professor Capra next presented updates on several ongoing projects, including a possible exception for "e-hearsay." Professor Capra, Judge Grimm, and Gregory Joseph have authored an article that courts and litigants could reference in negotiating the difficulties of authenticating electronic evidence. The pamphlet, entitled "Best Practices for Authenticating Digital Evidence," was published by West Academic, and will be included as an appendix to its yearly publication.

Rule 702 (Testimony by Expert Witness) – There have been suggestions to revisit Rule 702 based on developments in case law. The issue of whether weight or credibility should be examined is one of the things that the Evidence Rules Committee will consider. There are several other issues that have been raised, particularly regarding forensic science and language in the committee note. A symposium will be held regarding Rule 702 in connection with its fall 2017 meeting, bringing together judges, practitioners, and experts in the sciences. One member noted the fact that Rule 702 is very broad, sometimes making application of the rule difficult, particularly in cases involving analysis under *Daubert*. Another member raised the issue of the impact of disputed facts on the analysis.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King provided the report for the Criminal Rules Committee, which met on September 19, 2016, in Missoula, Montana. Judge Molloy reviewed three pending items under consideration.

Information Items

Section 2255 Rule 5 Subcommittee – The Criminal Rules Committee has formed a subcommittee to consider a suggestion made by a member to amend Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply). That rule—as well as Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts—provides that the petitioner/moving party "may submit a reply . . . within a time fixed by the judge." While the committee note and history of the amendment demonstrate that this language was intended to give the inmate a right to file a reply, and courts have recognized this right, other courts have interpreted the rule as allowing a reply only if permitted by the court. The subcommittee presented its report to the Criminal Rules Committee at its fall 2016 meeting. The phrase "within a time fixed by the judge" was identified as the source of the ambiguity; several members read it to imply judicial discretion.

One factor weighing in favor of a rules-based solution is the limited reviewability of rulings denying reply briefs. Judge Molloy identified this scenario as an example of one "capable of repetition, but evading review." Because appellate review is unlikely to address the issue—

most habeas petitioners are unrepresented and do not advance the argument, and a number of decisions denying the right to file a reply are several years old—the Criminal Rules Committee decided to consider an amendment. To assuage concerns that new language might add to rather than resolve the confusion, the reporters suggested language clarifying the rule's intent that breaks the current text into two sentences.

The Criminal Rules Committee also discussed whether to add a time for filing. A RCSO survey of local rules and orders addressing this issue revealed significant variance among districts. No consensus has been reached as to whether to set a presumptive time limit or require judges or local rules to fix a time period. The subcommittee will discuss the issue further. The subcommittee will collaborate with the style consultants to draft an amendment, and aims to deliver the proposed text to the Criminal Rules Committee for consideration at the April 2017 meeting.

Rule 16 Subcommittee – The Criminal Rules Committee has also formed a subcommittee chaired by Judge Raymond Kethledge to consider two bar groups' suggested amendments to Criminal Rule 16 (Discovery and Inspection), which would impose additional disclosure obligations upon the government in complex criminal cases. Although the subcommittee concluded that the groups' proposed standard for defining a "complex case" and steps for creating reciprocal discovery were too broad, it decided to move forward with discussion of the problem and formulation of a possible solution. The subcommittee's initial impression, however, was that the problems associated with complex discovery in criminal cases "were attributable to inexperience or indifference" that could not be addressed appropriately by rule.

The DOJ and members of the defense bar have developed a protocol for dealing with the discovery of electronically stored information, but practitioners still report problems, particularly when the judge has little experience handling discovery in complex criminal cases. The members of the Criminal Rules Committee agreed that judicial education and training materials would help to supplement an amendment, but would be insufficient on their own.

The subcommittee will hold a mini-conference on February 7, 2016 in Washington, D.C. to discuss whether an amendment to Rule 16 is warranted. Invited participants include criminal defense attorneys from large and small firms, public defenders, prosecutors, DOJ attorneys, discovery experts, and judges.

Cooperator Subcommittee – The Criminal Rules Committee's Cooperator Subcommittee, chaired by Judge Lewis Kaplan, continues to consider rules amendments to address concerns regarding dangers to cooperating witnesses posed by access to information in case files. The subcommittee is currently studying several proposals, including the CACM proposal, and work is ongoing.

More recently, the Director of the Administrative Office has formed a Task Force on Protecting Cooperators to consider the CACM and Rules Committees' conclusion that any rules amendments would be just one part of any solution to the cooperator problem. The Task Force is comprised of seven district judge members—including Judge Kaplan, who is serving as Chair of the Task Force, and Judge St. Eve of the Standing Committee—and will also

include key stakeholders from the DOJ, Bureau of Prisons (BOP), Sentencing Commission, Federal Public Defender, clerks of court, and U.S. Marshals Service. The Task Force is charged with taking a broad look at the issue of protecting cooperators and possible solutions, including possible rules amendments. It has held initial teleconferences and is developing working groups and a schedule. Judge St. Eve added that four working groups have been formed to address specific issues.

Judge Molloy emphasized his view that a problem exists. Because the BOP does not track the specific causes of harm to cooperators, further investigation is necessary to determine precisely what aspects of the system must be fixed and why. The Task Force's role is to determine *how* to address the issue. A national solution, uniformly applied in all districts and combining both rules and non-rules approaches, will be required.

The Criminal Rules Committee will complement the Task Force's work by drafting a proposed rule or rules to protect the privacy of cooperator information.

REPORT OF THE ADMINISTRATIVE OFFICE

Task Force on Protecting Cooperators

Julie Wilson of the RCSO provided additional information about the administrative status of the Task Force. The Task Force will report to the Director of the Administrative Office, and its charter is being drafted.

A judge member volunteered that his district court has already implemented its own local policy to protect cooperator information and is awaiting a uniform national policy. Judge St. Eve replied that local courts will play an important role in the Task Force's work; the Task Force is interested in learning more about local courts' practices with respect to cooperator information, and receiving feedback as to their experiences implementing the guidelines the Task Force develops.

A reporter raised two related issues with the potential to complicate the Task Force's efforts: "technological issues" and "First Amendment issues." The reporter explained that technology truly *is* the issue, as the availability of criminal docket documents online has given rise to both the cooperator problem and First Amendment implications regarding access to those documents. The reporter wondered whether, assuming the media would be affected by limitations on access to cooperator information, the Task Force might consider involving the media in the process of formulating the guidance. Judge Molloy noted that the reporters' analysis of the applicable First Amendment principles and the constitutional right to access by the media is already before the Task Force.

Another reporter suggested that data related to the cooperator problem be made available in the aggregate, as an objective showing of the extent of cooperator harm might mitigate the concerns of members of the criminal defense bar who oppose restrictions on access to cooperation information. Judge Molloy acknowledged that the bar's tendency to wear "two hats" as to this issue complicates matters: keeping the information away from those who would use it to harm a

cooperating defendant but having access for the purpose of evaluating the fairness of a given plea deal.

The Task Force will continue to work toward the development of a uniform, national approach to protecting cooperator information.

Legislative Report

Ms. Womeldorf reported that approximately twenty pieces of legislation introduced during the two years of the 114th Congress were very pertinent to the work of the rules committees in that they would have directly amended various rules. Discussion of specific legislation followed, including legislation introduced in the fall of 2016 that would have delayed the implementation of the 2016 amendments to Criminal Rule 41.

Judge Campbell discussed that direct channels of communication between the RCSO and Capitol Hill staff sometimes allow for opportunities to explain how legislation could have unintended consequences for the operation of the rules. Judge Campbell welcomed suggestions to preserve informed decision-making pursuant to the Rules Enabling Act process designated by Congress.

CONCLUDING REMARKS

Judge Campbell concluded the meeting by thanking the members and other attendees for their participation. The Standing Committee will next meet on June 13, 2017 in Washington, D.C.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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Agenda E-19 (Summary)
Rules
March 2017

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendment to Appellate Rule 4(a)(4)(B) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 2–3

2. a. Approve the proposed amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and new Rule 3015.1 and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

   b. Approve the proposed new Official Form 113 to take effect at the same time as the above listed rules.....pp. 4–8

3. Approve the proposed amendment to Civil Rule 4(m) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 8–9

The remainder of this report is submitted for the record and includes the following items for the information of the Judicial Conference:

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee) met in Phoenix, Arizona on January 3, 2017. All members participated except Deputy Attorney General Sally Q. Yates.

Representing the advisory rules committees were: Judge Neil M. Gorsuch, Chair, and Professor Gregory E. Maggs, Reporter, of the Advisory Committee on Appellate Rules; Judge Sandra Segal Ikuta, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Michelle M. Harner, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter (by telephone), and Professor Nancy J. King, Associate Reporter (by telephone), of the Advisory Committee on Criminal Rules; and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were: Professor Daniel R. Coquillette, the Standing Committee's Reporter; Professor R. Joseph Kimble and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy (by telephone), Scott Myers, Derek Webb (by telephone), and Julie Wilson, Attorneys on the Rules Committee Support Staff; Lauren Gailey, Law Clerk to the Standing Committee; Judge Jeremy D. Fogel, Director, Dr. Tim Reagan, and Dr. Emery G. Lee III, of the

Federal Judicial Center; Zachary A. Porianda, Attorney Advisor, Judicial Conference Committee on Court Administration and Case Management (CACM Committee); Judge Robert Michael Dow, Jr., Chair of the Rule 23 Subcommittee, Advisory Committee on Civil Rules; and Judge Paul W. Grimm, former member of the Advisory Committee on Civil Rules. Elizabeth J. Shapiro attended on behalf of the Department of Justice.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted a proposed technical amendment to Rule 4(a)(4)(B) to restore a subsection which had been inadvertently deleted in 2009, with a recommendation that the amendment be approved and transmitted to the Judicial Conference.

On December 14, 2016, the Office of the Law Revision Counsel (OLRC) in the U.S. House of Representatives advised that Rule 4(a)(4)(B)(iii) had been deleted by a 2009 amendment to Rule 4. Subdivision (iii), which concerns amended notices of appeal, states: "No additional fee is required to file an amended notice." The deletion of this subdivision in 2009 was inadvertent due to an omission of ellipses in the version submitted to the Supreme Court. The OLRC deleted subdivision (iii) from its official document as a result, but the document from which the rules are printed was not updated to show deletion of subdivision (iii). As a result, Rule 4(a)(4)(B) was published with subdivision (iii) in place that year and every year since.

The proposed technical amendment restores subdivision (iii) to Rule 4(a)(4)(B). The advisory committee did not believe publication was necessary given the technical, non-substantive nature of this correction.

The Standing Committee voted unanimously to support the recommendation of the Advisory Committee on Appellate Rules.

Recommendation: That the Judicial Conference approve the proposed amendment to Appellate Rule 4(a)(4)(B) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to the Federal Rules of Appellate Procedure is set forth in Appendix A, with a December 22, 2016 memorandum submitted to the Standing Committee detailing the proposed amendment.

Information Items

The advisory committee met on October 18, 2016 in Washington, D.C. In light of proposed changes to Appellate Rule 25 regarding electronic filing and service, the advisory committee considered whether Appellate Rules 3(a) and (d) should also be amended to eliminate references to mailing. The advisory committee will continue to review any proposed changes at its next meeting. It also discussed possible changes to Appellate Rule 8(b), which is currently out for public comment. The rule concerns proceedings to enforce the liability of a surety or other security provider who provides security for a stay or injunction pending appeal. The advisory committee learned of a problem in the published draft with the references to forms of security, but determined to postpone acting on the proposed changes until it receives all public comments on the published version of Rule 8(b).

The advisory committee discussed possible changes to Appellate Rule 26.1 regarding disclosure statements given the published proposed changes to Criminal Rule 12.4, also concerning disclosure statements. The advisory committee tentatively decided to recommend conforming amendments to Appellate Rule 26.1, but remains open to a more targeted approach to amending Rule 26.1(a). The advisory committee decided not to create special disclosure rules for bankruptcy cases, absent a recommendation from the Advisory Committee on Bankruptcy Rules.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Form Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, new Rule 3015.1, and new Official Form 113, with a recommendation that they be approved and transmitted to the Judicial Conference.

Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and a proposed official form for chapter 13 plans, Official Form 113, were circulated to the bench, bar, and public for comment in August 2013, and again in August 2014. Rule 3015 was published for comment for a third time, along with new Rule 3015.1, for a shortened three-month period in July 2016. The proposed amendments summarized below are more fully explained in the report from the chair of the advisory committee, attached as Appendix B.

Consideration of a National Chapter 13 Plan Form

The advisory committee began to consider the possibility of an official form for chapter 13 plans at its spring 2011 meeting. At that meeting, the advisory committee discussed two suggestions for the promulgation of a national plan form. Judge Margaret Mahoney (Bankr. S.D. Ala.), who submitted one of the suggestions, noted that "[c]urrently, every district's plan is very different and it makes it difficult for creditors to know where to look for their treatment from district to district." The States' Association of Bankruptcy Attorneys (SABA), which submitted the other suggestion, stressed the impact of the Supreme Court's then-recent decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010). Because the Court held that an order confirming a plan is binding on all parties who receive notice, even if some of the plan provisions are inconsistent with the Bankruptcy Code or rules, SABA explained that creditors must carefully scrutinize plans prior to confirmation. Moreover, SABA noted that the Court

imposed the obligation on bankruptcy judges to ensure that plan provisions comply with the Code, and thus uniformity of plan structure would aid not only creditors, but also bankruptcy judges in carrying out their responsibilities. Following discussion of the suggestions, the advisory committee approved the creation of a working group to draft an official form for chapter 13 plans and any related rule amendments.

A proposed chapter 13 plan form and proposed amendments to nine related rules were published for public comment in August 2013. Because the advisory committee made significant changes to the form in response to comments, the revised form and rules were published again in August 2014.

At its spring 2015 meeting, the advisory committee considered the approximately 120 comments that were submitted in response to the August 2014 publication, many of which—including the joint comments of 144 bankruptcy judges—strongly opposed a mandatory national form for chapter 13 plans. Although there was widespread agreement regarding the benefit of having a national plan form, advisory committee members generally did not want to proceed with a mandatory official form in the face of substantial opposition by bankruptcy judges and other bankruptcy constituencies. Accordingly, the advisory committee decided to explore the possibility of a proposal that would involve promulgating a national plan form and related rules, but that would allow districts to opt out of the use of the official form if certain conditions were met.

At its fall 2015 meeting, the advisory committee approved the proposed chapter 13 plan form (Official Form 113) and related amendments to Rules 2002, 3002, 3007, 3012, 4003, 5009, 7001, and 9009—with some technical changes made in response to comments. The advisory committee deferred submitting those items to the Standing Committee, however, in order to allow further development of the opt-out proposal. The advisory committee directed its forms

subcommittee to continue to obtain feedback on the opt-out proposal from a broad range of bankruptcy constituencies and to make a recommendation at the spring 2016 meeting regarding the need for additional publication.

At its spring 2016 meeting, the advisory committee unanimously recommended publication of the two rules that would implement the opt-out proposal, an amendment to Rule 3015 and proposed new Rule 3015.1. The advisory committee also unanimously recommended a shortened publication period of three rather than the usual six months, consistent with Judicial Conference policy, which provides that "[t]he Standing Committee may shorten the public comment period or eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained." *Guide to Judiciary Policy*, Vol. 1, § 440.20.40(d). Because of the two prior publications and the narrow focus of the revised rules, the advisory committee concluded that a shortened public comment period would provide appropriate public notice and time to comment, and could possibly eliminate an entire year from the period leading up to the effective date of the proposed chapter 13 plan package.

The Standing Committee accepted the advisory committee's recommendation and Rules 3015 and 3015.1 were published for public comment on July 1, 2016. The comment period ended on October 3. Eighteen written comments were submitted. In addition, five witnesses testified at an advisory committee hearing conducted telephonically on September 27.

A majority of the comments were supportive of the proposal for an official form for chapter 13 plans with the option for districts to use a single local form instead. Some of those comments suggested specific changes to particular rule provisions, which the advisory committee considered. The strongest opposition to the opt-out procedure came from the National Association of Consumer Bankruptcy Attorneys (NACBA), and from three consumer

debtor attorneys who testified at the September 27 hearing. They favored a mandatory national plan because of their concern that in some districts only certain plan provisions are allowed, and plans with nonstandard provisions are not confirmed. In addition, the bankruptcy judges of the Southern District of Indiana stated that they unanimously opposed Rule 3015(c) and (e) and Rule 3015.1 because they said that mandating the use of a "form chapter 13 plan," whether national or local, exceeds rulemaking authority.

At its fall 2016 meeting, the advisory committee unanimously approved Rules 3015 and 3015.1 with some minor changes in response to comments. In addition, it made minor formatting revisions to Official Form 113 (the official plan form previously approved by the advisory committee) and reapproved it.

Finally, the advisory committee recommended that the entire package of rules and the form be submitted to the Judicial Conference at its March 2017 session and, if approved, that the rules be sent to the Supreme Court immediately thereafter so that, if promulgated by the Supreme Court by May 1, they can take effect on December 1, 2017. The advisory committee concluded that promulgating a form for chapter 13 plans and related rules that require debtors to format their plans in a certain manner, but do not mandate the content of such plans, was consistent with the Rules Enabling Act. Further, given the significant opposition expressed to the original proposal of a mandatory national plan form, the advisory committee concluded that it was prudent to give districts the ability to opt out of using it, subject to certain conditions that would still achieve many of the goals sought in the original proposal. Finally, the advisory committee concluded it did not have the ability to address concerns that bankruptcy judges in some districts consistently refuse to confirm plans that are permissible under the Bankruptcy Code. Rather, litigants affected by such improper rulings should seek redress through an appeal.

The Standing Committee voted unanimously to support the recommendations of the Advisory Committee on Bankruptcy Rules.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and new Rule 3015.1 and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approve the proposed new Official Form 113 to take effect at the same time as the above listed rules.

The proposed amendments to the Federal Rules of Bankruptcy Procedure and the Official Bankruptcy Forms are set forth in Appendix B, with excerpts from the Advisory Committee's reports.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted a proposed technical amendment to restore the 2015 amendment to Rule 4(m), with a recommendation that it be approved and transmitted to the Judicial Conference.

Civil Rule 4(m) (Summons–Time Limit for Service) was amended on December 1, 2015, and again on December 1, 2016. In addition to shortening the presumptive time for service from 120 days to 90 days, the 2015 amendment added, as an exemption to that time limit, Rule 71.1(d)(3)(A) notices of a condemnation action. The 2016 amendment added to the list of exemptions Rule 4(h)(2) service on a corporation, partnership, or association at a place not within any judicial district of the United States.

The 2016 amendment exempting Rule 4(h)(2) was prepared in 2014 before the 2015 amendment adding Rule 71.1(d)(3)(A) to the list of exemptions was in effect. Once the 2015 amendment became effective, it should have been incorporated into the proposed 2016

amendment then making its way through the Rules Enabling Act process. It was not, and, as a result, Rule 71.1(d)(3)(A) was omitted from the list of exemptions in Rule 4(m) when the 2016 amendment became effective. The proposed amendment restores Rule 71.1(d)(3)(A) to the list of exemptions in Rule 4(m). The proposed amendment is technical in nature—it is identical to the amendment published for public comment in 2013, approved by the Judicial Conference, and adopted by the Court. Accordingly, re-publication for public comment is not required.

The Standing Committee voted unanimously to support the recommendation of the Advisory Committee on Civil Rules.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Civil Rule 4(m) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to the Federal Rules of Civil Procedure is set forth in Appendix C with an excerpt from the Advisory Committee's report.

Information Items

Rules Published for Public Comment

On August 12, 2016, proposed amendments to Rules 5 (Serving and Filing Pleadings and Other Papers); 23 (Class Actions); 62 (Stay of Proceedings to Enforce a Judgment); and 65.1 (Proceedings Against a Surety) were published for public comment. The comment period closes February 15, 2017. Public hearings were held in Washington, D.C. on November 3, 2016, and in Phoenix, Arizona on January 4, 2017. Twenty-one witnesses presented testimony, primarily on the proposed amendments to Rule 23. A third telephonic hearing is scheduled for February 16, 2017.

Pilot Projects

At its September 2016 session, the Judicial Conference approved two pilot projects developed by the advisory committee and approved by the Standing Committee—the Expedited

Procedures Pilot Project and the Mandatory Initial Discovery Pilot Project—each for a period of approximately three years, and delegated authority to the Standing Committee to develop guidelines to implement the pilot projects.

Both pilot projects are aimed at reducing the cost and delay of civil litigation, but do so in different ways. The goal of the Expedited Procedures Pilot Project (EPP) is to promote a change in culture among federal judges generally by confirming the benefits of active case management through the use of the existing rules of procedure. The chief features of the EPP are: (1) holding a scheduling conference and issuing a scheduling order as soon as practicable, but not later than the earlier of 90 days after any defendant is served or 60 days after any defendant appears; (2) setting a definite period for discovery of no more than 180 days and allowing no more than one extension, only for good cause; (3) informal and expeditious disposition of discovery disputes by the judge; (4) ruling on dispositive motions within 60 days of the reply brief; and (5) setting a firm trial date that can be changed only for exceptional circumstances, while allowing flexibility as to the point in the proceedings when the date is set. The aim is to set trial at 14 months from service or the first appearance in 90 percent of cases, and within 18 months of service or first appearance in the remaining cases. Under the pilot project, judges would have some flexibility to determine exactly how to informally resolve most discovery disputes, and to determine the point at which to set a firm trial date.

In addition to finalizing the details of the EPP, work has commenced on developing supporting materials, including a "user's manual" to give guidance to EPP judges, model forms and orders, and additional educational materials. Mentor judges will also be made available to support implementation among the participating judges.

The goal of the Mandatory Initial Discovery Pilot Project (MIDP) is to measure whether court-ordered, robust, mandatory discovery that must be produced before traditional discovery

will reduce cost, burden, and delay in civil litigation. Under the MIDP, the mandatory initial discovery will supersede the initial disclosures otherwise required by Rule 26(a)(1), the parties may not opt out, favorable as well as unfavorable information must be produced, compliance will be monitored and enforced, and the court will discuss the initial discovery with the parties at the initial Rule 16 case management conference and resolve any disputes regarding compliance.

To maximize the effectiveness of the initial discovery, responses must address all claims and defenses that will be raised by any party. Hence, answers, counterclaims, crossclaims, and replies must be filed within the time required by the civil rules, even if a responding party intends to file a preliminary motion to dismiss or for summary judgment, unless the court finds good cause to defer the time to respond in order to consider a motion based on lack of subject matter jurisdiction, lack of personal jurisdiction, sovereign immunity, absolute immunity, or qualified immunity. The MIDP will be implemented through a standing order issued in each of the participating districts. As with the EPP, a "user's manual" and other educational materials are being developed to assist participating judges.

Now that the details of each pilot project are close to being finalized, recruitment of participating districts continues in earnest, with a goal of recruiting districts varying by size as well as geographic location. Although it is preferable to have participation by every judge in a participating district, there is some flexibility to use districts where only a majority of judges participate. The target for implementation of the MIDP is spring 2017, and for the EPP it is fall 2017.

Other Projects

Among the other projects on the advisory committee's agenda is the consideration of the procedure for demanding a jury trial. This undertaking was prompted by a concern expressed to the advisory committee about a possible ambiguity in Rule 81(c)(3), the rule that governs

demands for jury trials in actions removed from state court. Rule 81(c)(3)(A) provides that a party who demanded a jury trial in accordance with state law need not renew the demand after removal. It further provides that a party need not make a demand "[i]f the state law *did* not require an express demand" (emphasis added). Before the 2007 Style Project amendments, this provision excused the need to make a demand if state law *does* not require a demand. Recognizing that the Style Project amendments did not affect the substantive meaning of the rules, most courts continue to read Rule 81(c)(3)(A) as excusing a demand after removal only if state law does not require a demand at any point. However, as expressed to the advisory committee, replacing "does" with "did" created an ambiguity that may mislead a party who wants a jury trial to forgo a demand because state law, although requiring a demand at some point after the time of removal, did not require that the demand be made by the time of removal.

Robust discussion of this issue at the June 2016 meeting of the Standing Committee prompted a suggestion by some that the demand requirement be dropped and that jury trials be available in civil cases unless expressly waived, as in criminal cases. The advisory committee has undertaken some preliminary research of local federal rules and state court rules to compare various approaches to implementing the right to jury trial and to see whether local federal rules reflect uneasiness with the present up-front demand procedure. An effort also will be made to get some sense of how often parties who want a jury trial fail to get one for failing to make a timely demand.

The advisory committee is also reviewing Rule 30(b)(6) (Notice or Subpoena Directed to an Organization). A subcommittee has been formed to consider whether it is feasible and useful to address by rule amendment some of the problems that bar groups have regularly identified with depositions of entities. This is the third time in twelve years that Rule 30(b)(6) has been on the advisory committee's agenda. It was studied carefully a decade ago. The conclusion then

was that the problems involve behavior that cannot be effectively addressed by a court rule. The question was reassessed a few years later with a similar conclusion. The issue has been raised again by 31 members of the American Bar Association Section of Litigation. The subcommittee has not yet formed any recommendation as to whether the time has come to amend the rule, but it has begun working on initial drafts of possible amendments in an effort to evaluate the challenges presented.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Information Items

On August 12, 2016, proposed amendments to Rules 12.4 (Disclosure Statement); 45(c) (Additional Time After Certain Kinds of Service); and 49 (Serving and Filing Papers) were published for public comment. The comment period closes February 15, 2017.

At its spring 2016 meeting, the advisory committee formed a subcommittee to consider a suggestion that Rule 16 (Discovery and Inspection) be amended to address discovery in complex cases. The original proposal submitted by the National Association of Criminal Defense Lawyers and the New York Council of Defense Lawyers provided a standard for defining a "complex case" and steps to create reciprocal discovery. The subcommittee determined that this proposal was too broad, but determined that there might be a need for a narrower, targeted amendment. After much discussion at the fall 2016 meeting, the advisory committee determined that it would be useful to hold a mini-conference to obtain feedback on the threshold question of whether an amendment is warranted, gather input about the problems an amendment might address, and get focused comments and critiques of specific proposals. Invited participants include a diverse cross-section of stakeholders, including criminal defense attorneys from both

large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. The mini-conference will be held on February 7, 2017, in Washington, D.C.

Another subcommittee was formed to consider a conflict in the case law regarding Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply). That rule—as well as Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts—provides that the petitioner/moving party "*may* submit a reply . . . within a time period fixed by the judge" (emphasis added). The conflict involves the use of the word "may." Some courts have interpreted the rule as affording a petitioner the absolute right to file a reply. Other courts have interpreted the rule as allowing a reply only if permitted by the court.

The subcommittee presented its preliminary report at the fall 2016 meeting. Discussion concluded with a request that the subcommittee draft a proposed amendment to be presented to the advisory committee at its next meeting.

As previously reported, the Standing Committee referred to the advisory committee a request by the CACM Committee to consider rules amendments to address concerns regarding dangers to cooperating witnesses posed by access to information in case files. A subcommittee was formed to consider the suggested amendments. In its preliminary consideration of the CACM Committee's suggestions, the subcommittee concluded that any rules amendments would be just one part of any solution to the cooperator issue. This feeling was shared by others and, as a result, the Administrative Office Director created a task force to take a broad look at the issue and possible solutions. While the task force is charged with taking a broad view, the subcommittee will continue its work to develop possible rules-based solutions.

The task force is comprised of members of the rules committees and the CACM Committee and will also include participation of key stakeholders from the Criminal Law

Committee, the Department of Justice, the Bureau of Prisons, the Sentencing Commission, a Federal Public Defender, and a clerk of court. The Task Force held its first meeting on November 16, 2016. It anticipates issuing a final report, including any rules amendments developed and endorsed by the rules committees, in January 2018.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no action items.

Information Items

The Advisory Committee on Evidence Rules met on October 21, 2016 at Pepperdine University School of Law in Los Angeles. On the day of the meeting, the advisory committee held a symposium to review case law developments on Rule 404(b), possible amendments to Rule 807 (the residual exception to the hearsay rule), and the advisory committee's working draft of possible amendments to Rule 801(d)(1)(A) to provide for broader substantive use of prior inconsistent statements.

At the meeting, the advisory committee discussed the comments made at the symposium, including proposals for amending Rule 404(b). The advisory committee will consider the specific proposals for amending Rule 404(b) at its next meeting.

The advisory committee also discussed possible amendments to Rule 801(d)(1)(A). It decided against implementing the "California rule," under which all prior inconsistent statements are substantively admissible, as it was concerned that there will be cases in which there is a dispute about whether the statement was ever made, making the admissibility determination costly and distracting. The advisory committee is considering whether the rule should be amended to allow substantive admissibility of a prior inconsistent statement so long as it was videotaped. The advisory committee will continue to deliberate on whether to amend Rule 801(d)(1)(A).

Over the past year, the advisory committee has been considering whether to propose an amendment to Rule 807, the residual exception to the hearsay rule. It has developed a working draft of an amendment to Rule 807, and that working draft was reviewed at the symposium. The advisory committee will continue to review and discuss the working draft with a focus on changes that could be made to improve the trustworthiness clause, and deletion of the superfluous provisions regarding material fact and interest of justice.

Also on the advisory committee's agenda are possible amendments to Rule 702 (Testimony by Expert Witnesses). A symposium will be held in conjunction with the Advisory Committee's fall 2017 meeting to consider possible changes to Rule 702 in light of recent challenges to forensic evidence, concerns that the rule is not being properly applied, and problems that courts have had in applying the rule to non-scientific and "soft" science experts.

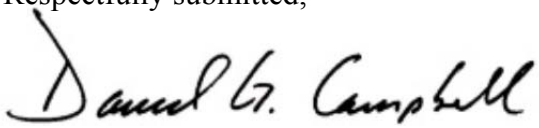
OTHER MATTERS

In 1987, the Judicial Conference established a policy that "[e]very five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished." A committee's recommendations are presented to the Executive Committee in the form of responses to a Committee Self-Evaluation Questionnaire commonly referred to as the "Five Year Review." Among other things, the Five Year Review asks committees to examine not only the need for their continued existence but also their jurisdiction, workload, composition, and operating processes.

The Standing Committee discussed a version of the Five Year Review that had been completed by the Advisory Committee on Bankruptcy Rules and concluded that the answers to most questions applied across all the rules committees. Accordingly, the Standing Committee decided to complete and submit a single combined Five Year Review for all the rules

committees. Because the existence of the Standing Committee is required by statute, it recommended its continued existence. It also recommended the continued existence of each of the advisory committees as their work promotes the orderly examination and amendment of federal rules in their respective areas. With some elaboration, the Standing Committee also recommended maintaining the jurisdiction, workload, composition, and operating processes of all of the rules committees.

Respectfully submitted,



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Susan P. Graber	Sally Q. Yates
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Peter D. Keisler	Jack Zouhary
William K. Kelley	

Appendix A – Proposed Amendment to the Federal Rules of Appellate Procedure
Appendix B – Proposed Amendments to the Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms
Appendix C – Proposed Amendment to the Federal Rules of Civil Procedure

TAB 2

TAB 2A

FORDHAM

University School of Law

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

Daniel J. Capra
Philip Reed Professor of Law

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

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Consideration of possible amendments to Rule 807, the residual exception to the hearsay rule.
Date: April 1, 2017

For the last three meetings the Committee has been considering possible amendments to Rule 807, the residual exception to the hearsay rule. In its current form, Rule 807 provides as follows:

> **Rule 807. Residual Exception**
>
> **(a) In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:
>
> **(1)** the statement has equivalent circumstantial guarantees of trustworthiness;
>
> **(2)** it is offered as evidence of a material fact;
>
> **(3)** it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
>
> **(4)** admitting it will best serve the purposes of these rules and the interests of justice.
>
> **(b) Notice.** The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

The Committee's work began in response to a recommendation made by Judge Posner at the Advisory Committee's symposium on hearsay reform in October, 2015. Judge Posner suggested that the residual exception be expanded to allow the trial judge more discretion to admit reliable hearsay. (The second part of the Posner proposal was to eliminate the hearsay exceptions for excited utterances, present sense impressions, and dying declarations --- suggestions which have been rejected by the Committee). Over time the Committee has considered not only whether the residual exception should be expanded but also (and instead) whether certain changes to the residual exception should be made to make it easier for courts to apply, and to resolve some conflicts in the courts about its application.

This memo on the possible amendments to Rule 807 is in eight parts. Part One discusses the Committee's considerations to date, and includes comments on the proposed amendment to Rule 807 that were made at the Pepperdine Conference. Part Two discusses the case law on the residual exception from 2006 to date, evaluating the two case digests that are included in the agenda book (thus updating the research set forth in the last agenda book); the purpose of the case law review is to determine whether the rule is working well, and (a different question) whether it needs to be expanded. Part Three is an evaluation of state variations on the residual exception --- a section that has been changed only slightly from the section on state rules that was included in the memo submitted for the last meeting. Part Four discusses the proposed amendments to Rule 807's notice provision, which have already been approved by the Committee, and have been held back while the Committee is considering other possible amendments to Rule 807. Part Five considers and addresses a number of challenges that have been raised to the proposed amendments to Rule 807. Part Six sets out the working draft of proposed changes to the text of Rule 807 --- revised in light of the Conference and Committee discussion. Part Seven sets forth a Committee Note to an amendment that would be proposed for the limited purpose of resolving problems in the operation of the rule and making it easier for the court to apply the trustworthiness provision (i.e., the "good rulemaking" intent). Then it sets forth an alternative Committee Note, to an amendment that would expand the coverage of Rule 807. Part Eight sets forth the amendments to the notice provision as a freestanding amendment, in the event that the Committee decides not to proceed with any amendments to the substantive provisions of Rule 807.

The question for the Committee at this meeting will be whether to propose an amendment to Rule 807 to the Standing Committee, with the recommendation that it be issued for public comment. If the Rule is submitted for public comment, then the projected date of enactment would be December 1, 2019. If the Committee for whatever reason decides not to act on an amendment at this meeting, it would delay any amendment for a year. That is, even if the Committee were to agree on an amendment at its next meeting in the fall, the date of enactment for that amendment would be December 1, 2020.

I. Introduction

Congress intended that the residual exception would be used "very rarely, and only in exceptional circumstances."[1] The reason for that limitation was a concern that an unfettered residual exception would provide courts with too much discretion, "injecting too much uncertainty in the law of evidence and impairing the ability of practitioners to prepare for trial."[2] There was also a concern that a broad residual exception would erode the limitations provided in the standard hearsay exceptions.[3]

On the other hand, Congress recognized a need for the residual exception, for at least two reasons: 1) there will be trustworthy statements that won't fit under the standard exceptions, and it would hurt the search for truth to exclude a reliable statement simply because it did not fit into a standard exception; and 2) without a residual exception, courts might seek to shoehorn such reliable statements into the standard exceptions --- which would improperly change the meaning and breadth of those exceptions. *See United States v. Popenas*, 780 F.2d 545, 547 (6th Cir.1985) (Congress ultimately included the residual exceptions "fearing that without these provisions the more established exceptions would be unduly expanded in order to allow otherwise reliable evidence to be introduced.").

The minutes of the Fall 2016 meeting recount the Committee's latest deliberations regarding any amendment to the residual exception. The minutes show the following observations made during the Pepperdine Conference and the subsequent meeting, as well as some points of preliminary agreement within the Committee:

● Committee members and Conference participants addressed the requirement that the court find trustworthiness "equivalent" to the circumstantial guarantees in the Rule 803 and 804 exceptions. There appears to be agreement that the "equivalence" standard is problematic, and contentions were made that the standard is subject to improvement without regard to expansion of the residual exception. The "equivalence" standard is difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. The exceptions cover a wide spectrum of reliability so there is no consistent point of comparison over the run of cases. Moreover, one of the exceptions subject to "equivalence" review --- Rule 804(b)(6) forfeiture --- is not based on reliability at all. In addition, several courts have compared the proffered hearsay to the reliability supposedly inherent in party-opponent statements such as coconspirator hearsay --- even

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

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

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

though party-opponent statements are not covered by Rule 803 or 804 and so are not proper points of comparison.

A review of the case law indicates that the "equivalence" standard has not fulfilled the intent of the drafters to limit the discretion of the trial court. The cases indicate that instead of limiting a court's discretion, the equivalence standard can be used to *expand* the court's discretion, because of the wide range of choices provided for comparison with the proffered hearsay.

Given the difficulty and inadequacy of the "equivalence" standard, a better approach may be to require the judge to find that the hearsay offered under Rule 807 is trustworthy under the circumstances. At the Pepperdine Conference, a number of speakers spoke in favor of replacing the current "equivalence" standard with an analysis geared directly toward trustworthiness.

● Trustworthiness can best be defined in the rule as requiring an evaluation of both circumstantial guarantees surrounding the making of the statement, and corroborating evidence. Most courts find corroborating evidence to be relevant to the trustworthiness enquiry, but some do not. An amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception --- and substantively, that amendment should specifically allow the court to consider corroborating evidence, as corroboration is a typical source for assuring that a statement is reliable. Adding a requirement that the court consider corroboration is an improvement to the rule independent of any decision to expand the residual exception.

At the Conference, one speaker suggested that any reference to corroboration should instruct the court that both the existence and the *absence* of corroboration are relevant to the trustworthiness inquiry, i.e., that the lack of corroboration could cut against admissibility. Committee members agreed to consider this point at the next meeting.

● At the Conference, one speaker suggested that it would be helpful to include a reference in the trustworthiness clause to "the totality of circumstances." This is a well-known standard that is applied in other contexts, and would emphasize that the trial court's review of trustworthiness should be flexible and case-dependent. Committee members agreed that the working draft of a proposed amendment to Rule 807 should be changed to incorporate the "totality of circumstances" standard.

● The requirements in Rule 807 that the residual hearsay must be proof of a "material fact" and that admission of residual hearsay be in "the interests of justice" have not served any good purpose. The inclusion of the language "material fact" is in conflict with the studious avoidance of the term "materiality" in Rule 403 --- and that avoidance was well-reasoned, because the term "material" is so fuzzy and used in so many different contexts. The courts have essentially held that "material" means "relevant" --- and so nothing is added to Rule 807 by including a materiality requirement there. Likewise nothing is added to Rule 807 by referring to the interests of justice because that guidance

is already provided by Rule 102. These provisions were added to the residual exception to emphasize that the exception was to be used only in truly exceptional situations. But they have ended up to be unnecessary distractions --- and the interests of justice language has sometimes been used to expand the trial court's discretion.

At the Conference, every participant who spoke on the subject advocated the deletion of the "materiality" and "interests of justice" requirements.

● The Committee has determined that the residual exception's requirement that the hearsay statement must be "more probative than any other evidence that the proponent can obtain through reasonable efforts" should be retained. That requirement enforces the original intent that proponents should not be able to use the residual exception unless they need it. And it will send a signal that the changes proposed are modest --- there is no attempt to allow the residual exception to swallow the categorical exceptions, or even to permit the use of the residual exception if the categorical exceptions are available. The Committee concluded that the residual exception should be crafted to allow admission of reliable hearsay, while also prohibiting overuse and unbridled judicial discretion. While that balance might be obtained by tweaking the trustworthiness language, it would not be obtained by the overuse that would be invited in changing or eliminating the "more probative" requirement.

● Some concern was expressed about changes that could allow more judicial discretion in admitting hearsay. Though there was substantial response to this concern on a number of counts. First, the residual exception already allows a largely unregulated discretion for courts so inclined to exercise it. Second, the proposed changes are simply good rulemaking --- they will make the rule easier to use. Third, the Committee is retaining the most important limitation on the overuse of the residual exception --- the "more probative" requirement.

● Some concern was expressed that Congress might object to any change to language that it had added to the residual exceptions in 1975. Though it should be noted that the Committee has already unanimously approved an amendment to the notice provision of Rule 807 --- a provision that was added by Congress. That amendment is necessary because Congress, in enacting a notice provision, forgot to add language that would excuse pretrial notice if good cause is shown (thus creating an inconsistency with other notice provisions). This oversight has led to a conflict in the courts about whether a good cause exception should be read into the rule.

● Some Committee members suggested that most if not all of the proposed changes to Rule 807 could be justified simply as improvements to the rule, without regard to whether the residual exception should be expanded or not. For example, the proposed changes to the trustworthiness clause make it easier to use --- alleviating the difficult-to-apply requirement that the court find guarantees equivalent to the exceptions in Rules 803 and 804. Moreover, specifying that the court must consider corroborating evidence is an improvement because it resolves a conflict among the circuits, and helps to assure that the court will consider all relevant information in determining whether the hearsay is

trustworthy. Deleting the superfluous clauses (material fact and interests of justice) will eliminate confusion, as well as the need for the court to say, in every case, that the standards are either met or not met when that decision is predetermined by other factors that the court has already considered. Finally, the changes to the notice provisions are required in order to better describe the content of the notice and to provide for a good cause exception --- these changes are not related to any expansion of the residual exception.

The result of the last meeting was that the Committee resolved to continue to consider the proposal to amend Rule 807, focusing on changes that could be made to improve the trustworthiness clause, deletion of the superfluous provisions regarding material fact and interest of justice and changes to the notice provision. Continued consideration includes whether these changes can be supported as part of a good rulemaking effort, even if they do not result in expanding the residual exception.

II. Case Law on the Residual Exception --- Is There a Problem Worth Addressing?

For the last meeting, the Reporter evaluated all cases since 2006 in which the court made a ruling on whether proffered hearsay was admissible under Rule 807. The result was two case digests, one for cases in which the evidence was excluded, and one for cases in which the evidence was admitted. There was a twofold purpose in reviewing the cases: 1) to determine whether reliable hearsay is being excluded under the existing exception; and 2) to determine whether courts are having trouble in applying any of the existing language and requirements of the exception.

Those digests have been updated with all cases decided since October 1, 2016 --- about 20 new cases, almost all of them in which the court excluded the proffered hearsay. The digests are set forth in the agenda book after this memorandum.

It is fair to state that of the two purposes discussed above, the case law provides a strong case for the second point, and a milder case for the first. That is to say, the digest is rife with examples of the rule working poorly. These examples include 1) inconsistencies and problematic exercise of discretion in applying the "equivalence" standard; 2) conflicts over the use of corroborating evidence; 3) unjust applications of the "more probative" standard; 3) clear evidence that the "material" requirement is nothing but a bureaucratic checkoff; and 4) evidence that the interests of justice requirement is just a checkoff in most courts, but in some courts it is used as another source of discretion to admit or exclude hearsay.

On the other hand, it is more difficult to get a handle on whether there has been a large-scale exclusion of reliable hearsay. As the previous memo pointed out, reported cases are not necessarily a reliable indicator for how a rule is being applied. The set of reported cases is of course far smaller than that of all the cases in which a court ruled on the residual exception. Moreover, determining whether hearsay that is being excluded is "reliable" is difficult because the reader of a case can't see the evidence. The reader must rely on the court's description. In many cases, there is little or no description at all of the statement (e.g., "a bystander's statement made to the police an hour after the accident"). And even when there is a description, it must be placed in the context that the court has already decided to admit or exclude it, and it is not unreasonable to conclude that the description is made in that light.[4]

Despite all these reservations, there are some important takeaways from the review of the case law --- and they have been fortified by the cases decided since the last meeting.

[4] Cf. the Supreme Court death penalty cases, where the majority recounts the facts in one way while the minority recounts them in another.

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

1. That's a lot of cases: It's surprising how many times Rule 807 has been invoked. There are 124 reported cases in which the court seriously addressed a Rule 807 question and excluded the evidence. There are 72 cases in which the hearsay was found admissible under Rule 807. The fairly high volume of cases in which Rule 807 has been invoked indicates that it is an important rule, and so raises the level of necessity for an amendment if the Rule is not operating properly. It's not like a backwater rule for which error might be tolerated.[5]

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

As the Reporter's notes to the cases indicate, there are a number of exclusions in which the courts impose very high standards: *clear* trustworthiness, *significantly* more probative, *truly exceptional, must compare favorably to a standard exception*, etc. There are a number of cases where the evidence as described looks quite trustworthy and yet the court, applying these strict and sometimes undefinable standards, excludes the evidence. So while more can be learned in public comment, it might at least be tentatively concluded that the residual exception in some courts is applied in such a way as to exclude reliable and necessary hearsay. What can surely be said is that there is no evidence that the residual exception is being used widely to undermine the standard hearsay exceptions on a regular basis.

3. The equivalence standard is troublesome: The cases indicate that the Committee was correct in tentatively agreeing to scrap the equivalence language in Rule 807. As seen in the case digest, the equivalence standard has resulted in serious problems of application, and has taken many courts away from the task of determining whether the proffered hearsay is *actually* trustworthy. And it is outcome-determinative. A court that wants to admit the hearsay can and does compare it with a weak exception, while a court that wants to exclude the hearsay can and

[5] It should be noted that there are actually well more than 200 reported cases since 2006 that cite or apply Rule 807. The real number is over 300. The survey excludes: 1) cases in which the question involved notice (as those cases have already been evaluated in previous memos on the notice requirement); 2) cases in which the court cited or applied the rule but gave no analysis for doing so (such as a throwaway sentence that the hearsay "might have been admissible under Rule 807" after the court had already found it admissible under another exception); and 3) procedural orders discussing questions such as an order discussing when an in limine motion will be heard.

does compare it with a strong one. Thus, the equivalence test complicates and obfuscates the enterprise, which is to determine whether the proffered hearsay is actually trustworthy.

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

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

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

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

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

At the last meeting, it was asked whether the court should (or even must) review the reliability of the witness, at least in extreme cases. If the judge is convinced that the witness is lying about the hearsay statement having been made, shouldn't the judge intervene and exclude the hearsay, on the ground that the statement was never made? To answer that question, consider a related hypothetical. What if that same witness is called to testify to a *fact*, such as that the defendant was with the witness out of town at the time of the charged crime. What if the judge is convinced that this testimony is a lie --- say, because the witness has a reason to lie, and the testimony is inconsistent with the other evidence and is completely implausible. Would a judge prohibit the witness from testifying to the underlying fact? The answer should be no, because the credibility of that witness's testimony is for the jury alone. If that is so, then the same result must occur if the witness is testifying that a hearsay statement was made. In that instance, the witness is a *fact* witness, just like the witness who presented an alibi. The fact to be proved is that the declarant made the hearsay statement. As to that fact, it is for the jury to determine whether the witness is telling the truth. That is why courts have said that a trial judge's assessment "of the in-court witness's credibility would, in our judgment, be a usurpation of the jury function." *United States v. Katsougrakis*, 715 F.2d 759, 777 (2nd Cir. 1983).

If Rule 807 is to be amended, it might be useful to address the conflict in the courts about whether the reliability of the witness should be considered in the trustworthiness enquiry. It would of course be useful to have a uniform approach in the courts --- and it would be also useful on the merits to correct the Third Circuit's misconception that the trustworthiness of the witness is part of the hearsay analysis.

If such a change is to be made, it might be made by way of the Committee Note. Adding a sentence of text ("But the trustworthiness of a witness relating the hearsay statement is not to be considered.") might be problematic because the same question arises under *any* hearsay exception, and the same answer is given for every one --- the trustworthiness of the witness is a question for the jury, the trustworthiness of the declarant is the hearsay question for the court.

But another way to address the question, indirectly but effectively, is to define the trustworthiness requirement in a way that would exclude the consideration of the credibility of the witness. The language in the revised working draft does just that, because it requires the court to consider the following:

> the court determines that it is trustworthy, after considering the totality of circumstances *under which it was made*, and the existence [or absence] of corroborating evidence

That definition of trustworthiness is arguably useful in at least two ways: 1. It distinguishes circumstantial guarantees of trustworthiness attendant to the making of the statement from the existence of corroboration (thus directing the courts to two separate inquiries); and 2. It tells the court *not* to consider the reliability of the witness, because that factor is not a circumstance that is relevant to the trustworthiness of the declarant's statement, and it does not serve as corroboration of the truth of that statement. And it does so in a way that does not raise questions about the absence of such language in other exceptions.

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

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

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

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

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

It has been argued that relying on corroboration to find a statement trustworthy is nonsensical, because if the hearsay is corroborated it is unlikely to be more probative than any other evidence reasonably available --- the corroborating evidence would be equally probative as the hearsay. But surely this is too simplistic. It is more likely that the hearsay statement is fortified by (rather than replaced by) the corroboration, and that the corroboration becomes stronger because of the hearsay statement. That is precisely what occurred in *Bourjaily v. United States,* 483 U.S. 171 (1987): a hearsay statement gave color to corroborating evidence and the corroborating evidence supported the reliability of the hearsay statement. As the Court put it: "The sum of an evidentiary presentation may well be greater than its constituent parts."

Moreover, it could well be that while corroborating evidence exists, the hearsay is in fact more probative than that corroboration. For example, assume a child reports an act of sexual abuse and identifies her father as the perpetrator. This statement is corroborated by medical evidence indicating that the child was abused. The medical evidence supports the truthfulness of the child's statement, but the child's statement is more probative on the point for which it is offered: that the father sexually abused the child. The corroboration is only partial; under these facts it is just silly to say that because you have corroboration, you don't need the residual hearsay. And it is equally wrong to say that the corroboration should not be considered in the reliability inquiry --- the simple fact is that because we found out she is right about one fact, it makes it more likely that she is right about other asserted facts. Thus, the use and necessity of corroborating evidence is not affected by the "more probative" requirement in Rule 807.

7. The materiality requirement is useless: The case review validates the Committee's tentative decision to delete the materiality requirement of Rule 807. Out of the almost 200 cases reviewed, there wasn't a single one in which the materiality requirement made a difference. Rather, the materiality requirement is nothing but a bureaucratic check-off, and it tracks the relevance requirement exactly. There is no reason at all why a court should have to write an opinion in which it analyzes two admissibility requirements in exactly the same way.

8. The interests of justice requirement is either useless or pernicious: The case digest indicates that for the most part, the interest of justice requirement is superfluous, because it is found to be met when another requirement in the rule has been met: for instance, admission is found to be within the interests of justice because the hearsay is trustworthy, or is more probative

than any other evidence. See, e.g., *Royal & Sun Alliance Ins. PLC v. UPS Supply Chain Solutions*, 2011 WL 3874878 (S.D.N.Y.) ("The inclusion of the statement best serves the interest of justice, as the unfortunate fact that Crews succumbed to his injuries should not preclude IMSCO from introducing statements from the only available eyewitness." --- but this is only to say that the statement is more probative than any other available evidence). Or, admission is contrary to the interests of justice because the hearsay is unreliable and the opponent never got a chance to cross-examine.

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

III. *State Variations*[6]

At the outset it should be noted that the most predominant state variation is a complete rejection of a residual hearsay exception. Nineteen states have refused to adopt a residual exception to the hearsay rule: Alabama, California,[7] Florida,[8] Illinois, Indiana, Kansas,

[6] These are the same state variations that were set forth in the memo on Rule 807 provided to the Committee for the last meeting. The Reporter's comments are updated to reflect developments in the Committee's determinations on Rule 807.

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

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

Kentucky, Maine, Massachusetts, Missouri, New Jersey, Ohio,[9] Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia and Washington.

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

> There is a serious risk that trial judges would differ greatly in applying the elastic standard of equivalent trustworthiness. The result would be a lack of uniformity which would make preparation for trial difficult. Nor would it be likely that an appellate court could effectively apply corrective measures. There would be doubt about whether an affirmance or admission of evidence under the catchall provision amounted to the creation of a new exception with the force of precedent or merely a refusal to rule that the trial court had abused its discretion.

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

Let's proceed to state variations on, as opposed to rejection of, the residual exception.[10]

1. Connecticut Code of Evidence §8-9

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

Reporter's Comments:

● Language is added to elaborate on the equivalence requirement: the equivalence comparison is to the *essential guarantees* of the standard exceptions. This wouldn't seem to help much though, because the basic problem with the equivalence standard is that there are so many exceptions that can be used for the reliability comparison.

● Reference to "traditional exceptions to the hearsay rule" is confusing. Which ones are those? It is especially problematic because the rule has already referred to the "foregoing exceptions." So is there a difference between the foregoing exceptions and traditional ones?

[9] Ohio has a tender years exception like Florida's. Ohio R.Evid. 807(A).
[10] Only variations that make a difference are considered here.

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

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

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

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

Reporter's Comments:

● It eschews the "equivalent circumstances of trustworthiness" language that can't easily or predictably be applied given the varied circumstances supporting admissibility under the categorical exceptions. The focus on the "particular case" and "all pertinent circumstances" seems useful to indicate that the enquiry is both wide and specific. It is similar to the "totality of circumstances" language that the Committee appeared to favor when it was raised at the Conference.

● The requirement that the proponent make an effort to "adduce all other admissible evidence" is a stricter requirement than even that imposed by Rule 807. Rule 807 requires an attempt to obtain evidence that is equally or more probative than the hearsay. Louisiana requires an attempt to obtain all "admissible" evidence even if it is less probative than the hearsay.

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

> A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.[11]

Reporter's Comment:

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

This is identical to the Advisory Committee's original version of the residual exceptions that was submitted to Congress.

The Montana drafters rejected the requirement of materiality on the ground that it was "redundant in requiring relevance as defined in Rule 401." And it rejected the interests of justice requirement because it was "unnecessarily repetitive in view of Rule 102." Both criticisms are right on.

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

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

4. Nevada Stat. Ann. 51.075 and 51.315:

Availability Immaterial Exception:

1. A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though the declarant is available.

2. The provisions of [the categorical hearsay exceptions for which availability is irrelevant] are illustrative and not restrictive of the exception provided by this section.

Unavailability Exception:

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

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

Reporter's Comments:

● Nevada still uses the "Rule 803(24)/Rule 804(b)(5)" dual residual exception. Also, the Nevada provision is less tethered to the standard exceptions than the federal model. There is no

requirement of finding "equivalent" circumstantial guarantees of trustworthiness. The standard hearsay exceptions are merely "illustrations." Arguably this can lead to a more flexible use of the residual exception. Experience under the Nevada residual exception does not appear to indicate overuse --- there are only a handful of reported cases in which a Nevada court found a statement admissible under the exception. But there are some interesting cases in which the residual exception is used to admit hearsay that cannot be admitted under other exceptions. See, e.g., *McDermott v. State*, 2015 WL 1879764 (Nev. App.) (inventory list not admissible as a business record because it was prepared for purposes of litigation; but it was admissible as residual hearsay because it was reliable and corroborated).

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

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

Hearsay Exception --- Exceptional Circumstances

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

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

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

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

Reporter's comment:

● Oklahoma tries to make it clear in the text that the rule is to be used only in exceptional circumstances --- unlike the federal model, where the courts rely on legislative history for a narrow application of the residual exception. If anything, this is worse than the Federal Rule

because it actually requires the court, by the text of the rule, to figure out whether, say, a bystander's statement, or a report to a police officer, or a consumer complaint, is "exceptional." Does "exceptional" mean it rarely happens? Does it mean that the statement must be amazing? It seems to be content-free except for a general caution to construe the exception narrowly. If "exceptionalism" is for some reason to be a guideline, it is better placed in a Committee Note than the text of the rule, because it is essentially too fuzzy for the text.

● The Oklahoma notice requirement specifically provides for a good cause exception.[12]

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

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

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

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

Reporter's Comments:

● The Puerto Rico rule has the virtue of rejecting the equivalence analysis and simply requiring circumstantial guarantees of trustworthiness. But it is a bit vague because it doesn't actually say that the court must find the hearsay to be trustworthy. It seems to say that the court must find two circumstantial guarantees, and when it does, the trustworthiness standard is satisfied. But surely it is not a counting exercise. And surely some circumstantial guarantees do more to guarantee reliability than others. So the text of the language is problematic. Compare it to the language in the Committee's working draft:

> the court determines, after considering the totality of circumstances and any corroborating evidence, *that the statement is trustworthy*

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

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

What is to be learned from the states?

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

1. There is a concern in many states that *any* allowance of residual hearsay will lead to unwarranted discretion, unpredictability, and erosion of the standard exceptions. Similar concerns may well arise at the Federal level in response to any attempt to expand the use of residual hearsay. But the contrary concern is that without a residual exception, courts may end up shoehorning reliable hearsay into the standard exceptions, and that will have a negative effect on those exceptions. For example, the excited utterances exception could end up covering hearsay that, while reliable, was not made under the influence of a startling event. The "shoehorning" phenomenon has in fact happened in some of the states that do not have a residual exception.

2. Some states have rejected the comparison-based language in the Federal Rule's trustworthiness clause. The Advisory Committee's working draft makes a similar departure. The benefit of rejecting an "equivalence" standard is that the court can proceed directly to what should be the fundamental inquiry --- whether the hearsay statement is trustworthy --- and not get distracted by having to refer to and compare standard exceptions that are not only varied in reliability but often are in no way comparable to the proffered hearsay statement.

3. Several states appear to be doing quite nicely without provisions requiring that the hearsay be "material" and that admission of the hearsay be consistent with "the interests of justice." And that is no surprise.

IV. Amending the Notice Requirement

The Committee has already unanimously approved an amendment to the notice requirement of Rule 807. This amendment is independent of any proposed change to the rest of the rule. The most important part of the amendment is that it adds a good cause exception. The two other notable changes are: 1) it requires notice to be in writing; and 2) it changes the vague term "particulars" to the more standard term "substance", and it deletes the requirement that the declarant's address must be disclosed.

Submission to the Standing Committee has been delayed to determine whether the changes to the notice provision would be coupled with any change to the other provisions of the residual exception.

The change to the notice provision, approved unanimously by the Committee at the Spring 2016 meeting, provides as follows:

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

The Committee Note for the change to the notice provision provides as follows:

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

- First, the Rule requires the proponent to disclose the "substance" of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the "substance" of the evidence). Prior case law on the obligation to disclose the "particulars" of the hearsay statement may be instructive, but not dispositive, of the proponent's obligation to disclose the "substance" of the statement under the Rule as amended.

● Second, the prior requirement that the declarant's address must be disclosed has been deleted. That requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant's address was known or easily obtainable. If prior disclosure of the declarant's address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.

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

● Finally, the pretrial notice provision has been amended to provide for a good cause exception --- the same exception found in Rule 404(b). Most courts applied a good cause exception under Rule 807 even though it was not specifically provided in the original Rule, while some courts had not. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent must then resort to residual hearsay. Where notice is provided during the trial, the general requirement that notice must be in writing need not be met.

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

V. Addressing Suggestions, Questions and Concerns Raised at the Conference and at the Last Meeting.

This section discusses all of the new ideas about amending the residual exception that were so helpfully and forcefully raised at the Conference and at the last Committee meeting. These new ideas do not really form an integrated whole; rather they are helpful, useful or challenging in different ways. The section starts with the comments about particular aspects of the residual exception, such as suggestions for language to add to the trustworthiness requirement. (Some of these comments have been discussed above, and reiterated here). The section ends with the broader questions, such as concerns about public comment if the exception is expanded, concerns about changing congressional language, and so forth.

A. Adding "totality of circumstances" to the trustworthiness requirement

As discussed above, a Conference participant suggested that the trustworthiness requirement be stated in terms of a "totality of circumstances" --- as opposed to the "pertinent circumstances" used in the working draft. Committee members appeared to think this was a good change. The term "totality of the circumstances" is certainly more widely used in the law than the term "pertinent circumstances." See, e.g., *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (probable cause determined by the "totality of the circumstances"); 24 C.F.R. § 100.600 (whether hostile work environment exists is determined by a totality of the circumstances); *In re Witcher*, 702 F.3d 619 (11th Cir. 2012) (debtor's ability to pay debts may be taken into account under § 707(b)(3)(B)'s "totality of the circumstances" test); *Pierce v. Cannon*, 508 F.2d 197 (7th Cir. 1974) (totality of the circumstances test applied to determine whether a pretrial identification was reliable); *United States v. Bey*, 825 F.3d 75 (1st Cir. 2016) (whether a search was consensual is dependent on the totality of the circumstances). The language seems especially apt when evaluating whether a statement offered as residual hearsay is sufficiently trustworthy. By definition these statements are unusual and call for an analysis broader than the inquiry into the specific reliability (and unreliability) factors found in the standard exceptions. For these reasons, the updated working draft of an amended Rule 807 --- set forth below --- requires the court to analyze trustworthiness in light of "the totality of the circumstances."

But adding that language probably requires a change to the introductory clause of the rule: "Under the following circumstances . . ." It is odd to say that one of the "circumstances" is a totality of the circumstances. So the updated working draft changes the introductory "circumstances" to "conditions" --- which is probably a better word for referring to admissibility requirements anyway.

Another possible problem is that "totality of the circumstances" does not tell the court or the parties *what* circumstances are part of the totality. It would probably be a good idea to further define what circumstances make up the totality. The relevant inquiry is whether there are circumstances that exist at the time the statement was made that tend to guarantee that the statement is trustworthy. Accordingly, the updated working draft, set forth infra, uses the term "totality of the circumstances *under which the statement was made*."

B. Adding a reference to the existence *or absence* of corroborating evidence

Several Conference participants applauded the Committee's preliminary decision to specifically include corroboration as part of the trustworthiness inquiry. As discussed above, including a reference to corroboration will remedy a conflict in the courts, and makes eminent sense because the existence of corroborating evidence --- independently of any circumstances surrounding the making of the statement --- is a standard factor in determining whether another piece of evidence is reliable.

One participant suggested that the reference to corroboration should specify that while the existence of corroboration is a factor supporting trustworthiness, the absence of corroboration is a factor cutting against trustworthiness. That point is surely correct on the merits --- a court should think twice about admitting hearsay under Rule 807 if there is absolutely no extrinsic information supporting the truth of the statement. The question is whether it is necessary to specify that point. The working draft (changed to include the reference to "totality of the circumstances") currently provides as follows:

> the court determines that it is trustworthy, after considering the totality of circumstances under which the statement was made, and any corroborating evidence

A good argument can be made that the reference to "any" corroborating evidence necessarily implies that if there *isn't* any corroborating evidence, the court should look more skeptically on the hearsay. It probably does not need to be clarified. But if the Committee finds that it needs to be clarified, a fix might look like this:

> the court determines that it is trustworthy, after considering the totality of circumstances under which the statement was made, and the existence or absence of ~~any~~ corroborating evidence

The problem with "existence or absence" however is that it sounds binary. Either corroboration. The question is not only about existence or absence, however. The question for the court is about the strength and quality of the corroborating evidence if it does exist. So the language "existence or absence" might not be ideal.

Another solution is simply to retain the existing language in the working draft and add something to the Committee Note to elaborate on what might be thought to be a pretty obvious point. Committee Note language might look like this:

> The evaluation of "any corroborating evidence" under subdivision (a)(1) requires the court to consider both the existence and the absence of corroborating evidence. While the presence of corroboration will be a factor cutting in favor of a finding of trustworthiness, the absence of any corroboration should make the court more skeptical of the statement's trustworthiness. Of course, the court must not only consider the existence of corroborating evidence but also the strength and quality of that evidence.

It is for the Committee to determine whether the absence of corroboration needs to be addressed. The draft set forth below contains the above textual change in brackets, and also contains a bracketed addition to the Committee Note. The third alternative is to make no change on this point in the working draft, on the ground that the existing language provides a sufficient indication that the absence of corroboration cuts against a finding of trustworthiness.

C. Adding a reference in the trustworthiness clause to the opponent's inability to cross-examine the declarant

At the Conference, Judge Hamilton suggested that the trustworthiness clause should emphasize that trustworthiness must be evaluated in light of the fact that the opponent will not be able to cross-examine the person who made the statement offered as residual hearsay. The record shows that the Committee was in agreement with this suggestion. While it was not specifically stated at the Conference, the rationale for the suggestion would appear to be that the trustworthiness analysis will be improved if the court keeps in mind that the factors showing trustworthiness must be sufficient to substitute for the in-court guarantees provided by cross-examination. There is also the possibility that if the court is directed to keep in mind the opponent's inability to cross-examine, it may be more careful and less likely to use the residual exception expansively.

There are two possible arguments against including this provision. First it describes the analysis that should be taken with *any* hearsay statement. The problem with hearsay is that it is not cross-examined, and so admitting a hearsay statement for its truth should be dependent on a finding of some substitute for cross-examination. That said, the standard hearsay exceptions do not require the court to consider whether a statement fitting within that exception carries testimonial substitutes for cross-examination. Rather, that judgment has already been made by the drafters of the exception. So when a case-by-case analysis is called for under Rule 807, it may be helpful to remind the court that the goal is to find substitutes for cross-examination.

The second argument against including the provision is more substantial. There have been a number of cases in which the declarant is produced and a prior statement is offered (and admitted) as residual hearsay. The leading example is *United States v. Valdez-Soto,* 31 F.3d 1467 (9th Cir. 1994), where the witness's prior inconsistent statement was admitted as substantive evidence under the residual exception. (It did not fit under Rule 801(d)(1)(A) because it had not been made under oath). As applied to *Valdez-Soto,* any reference to the opponent's inability to cross-examine the declarant would make no sense, because the witness is in fact subject to cross-examination. Maybe that is not such a big deal, because the instances of the residual exception being used when the declarant is actually testifying are relatively rare. But see *United States v. White Bull,* 646 F.3d 1082 (8th Cir. 2011) (child-witness's prior statements to social worker found admissible under the residual exception).

Perhaps the solution is to modify Judge Hamilton's suggestion in a way that would also cover the situation in which the declarant testifies. In that situation, the ability to cross-

examination should be a factor that cuts *in favor* of admissibility --- as the court emphasized in *White Bull.* Id.
That modification might look something like this:

> the court determines --- after considering the totality of circumstances, any corroborating evidence, and the opponent's ability or inability to cross-examine the declarant --- that the statement is trustworthy;

But a major problem with this phrasing is that the possibility of cross-examination does not make the hearsay more *trustworthy*. Rather it makes the hearsay a better candidate for admissibility because any untrustworthiness can be rooted out by cross-examination. Thus a textual fix to cover both the absence and existence of cross-examination appears difficult.

The alternative might be a reference in the Committee Note. Something like this:

> In considering whether proffered hearsay is admissible under Rule 807, the court should take account of the fact that the opponent either will or will not have the ability to cross-examine the declarant. If the declarant is not present for cross-examination, then the trustworthiness requirement requires an analysis of whether there the proponent has presented a showing that is sufficient to substitute for cross-examination. In contrast, the declarant's presence for cross-examination is a factor cutting in favor of admissibility --- assuming that the "more probative" requirement of subdivision (b)(2) is met.

The working draft of the proposed amendment, set forth below, includes Judge Hamilton's original suggestion in brackets. Any fix to include the relevance of the possibility to cross-examine doesn't seem to work. The possibility of addressing the relevance of cross-examination or its lack by way of Committee Note is included in brackets.

D. Will an Amendment Lead to Parties Bypassing the Standard Exceptions and Going Straight to the Residual Exception?

One commentator at the Conference suggested that if the "equivalence" language is dropped in favor of a totality of circumstances approach, proponents might proceed directly to the residual exception, without stopping to see whether the hearsay statement can be admitted under a standard exception. That would surely be a negative consequence. But there are a number of reasons to think that it won't happen.

First, there is nothing about a shift from equivalence to totality of circumstances that would lead a proponent to think that the text of the amendment is authorizing a bypass. As one of the Committee members at the Conference stated, the proposed amendment does not touch the introductory language to Rule 807 --- the language that says the exception is applicable to a statement that "is not specifically covered by a hearsay exception in Rule 803 or 804." This language indicates that the rule does not even apply unless the statement is one that is not

covered by the standard exceptions. And courts do currently rely on this language to hold that Rule 807 is not applicable if the hearsay is covered by a Rule 803 or 804 exception. *See, e.g., Bryndle v. Boulevard Towers, II, LLC,* 132 F.Supp.3d 486 (W.D.N.Y. 2015) ("Rule 807 is not intended to address situations already covered by Rules 803 or 804, such as the business record exception to hearsay recognized by Rule 803(6)"); *Glowczenski v. Taser Int'l Inc.,* 928 F.Supp.2d 564, 573 (E.D.N.Y.2013) (Rule 807 inapplicable where the hearsay is specifically covered by Rule 803(18)). So it seems quite a stretch to argue that the change to the trustworthiness provision will lead parties and courts to bypass the standard exceptions.

More importantly, there is little incentive to bypass the standard exceptions in favor of the residual exception. In general it is easier to qualify a statement under a standard hearsay exception, rather than the residual exception, where either exception would work. The residual exception is simply harder to satisfy, for at least three reasons:

● The proponent must provide pretrial notice --- a requirement not found in any other hearsay exception.

● Most exceptions have a defined list of admissibility requirements, whereas the residual exception requires a farflung, case-by-case explication of trustworthiness --- especially under a totality of circumstances test. It would seem in most cases to be much easier to prove, for example, that a declarant was excited by a startling event than it would be to make a case about the totality of the circumstances.

● Most importantly, the residual exception will still require the proponent to show that the hearsay is more probative than any other reasonably available evidence. No such requirement applies for any other exception. The Rule 803 exceptions require no showing at all of any alternative source of evidence. The Rule 804 exceptions do require a showing of unavailability, but that showing is not as stringent as the more probative requirement --- as indicated by the cases which hold that the requirement is not satisfied simply because the declarant is unavailable.

In sum, it appears that there is little risk that implementation of the working draft will cause parties and courts to bypass the standard exceptions. But if the Committee is concerned about such a consequence, then it can't hurt to add a paragraph to the Committee Note. That might look like this:

> The change to the trustworthiness clause does not mean that parties may proceed directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. Rule 807 still requires that the proffered hearsay must be a statement that "is not specifically covered by a hearsay exception in Rule 803 or 804." Thus Rule 807 remains an exception to be invoked only when necessary.

This paragraph is added to the draft Committee Notes, below.

More broadly, the relationship between the residual exceptions and the other exceptions can be clarified by shifting the language from the introductory provision to an admissibility requirement. That would look like this:

(a) In General. Under the following conditions ~~circumstances,~~ a hearsay statement is not excluded by the rule against hearsay: ~~even if~~

(1) the statement is not specifically covered by a hearsay exception in Rule 803 or 804~~:~~;

(~~1~~ 2) ~~the statement has equivalent circumstantial guarantees of trustworthiness~~ the court determines that it is trustworthy, after considering the totality of circumstances under which the statement was made, and the presence [or absence] of corroborating evidence; and

This language will assure that a party cannot go to the residual exception until it has been determined that none of the Rule 803/804 exceptions apply. Under this change, inadmissibility under the other exceptions does not just describe the statements that are covered; rather it is itself an admissibility requirement to be met, because it has been dropped down into the list of admissibility requirements. In addition, it may be that the change would send a signal that the amendment is not intended to expand Rule 807 dramatically --- and it is definitely not intended to undermine or erode the standard hearsay exceptions. The revised working draft in the next section includes this change for the consideration of the Committee.

E. Changing Language Added by Congress

At the last meeting, a concern was expressed that there might be a problem with Congress if an amendment changes language that Congress itself added. There is a strong argument to be made, however, that judicious changes to Congressionally-added language is more than justified --- it is and has been a critical part of the rulemaking process.

1. What Congressional language is being changed?

For context, here is the Congressionally-enacted language that would be affected by the changes in the working draft:

● *Trustworthiness clause:* The Advisory Committee draft of the residual exception called for a comparison between residual hearsay and the standard exceptions. It required the court to find "comparable" guarantees of trustworthiness in the proffered hearsay. Congress substituted "equivalent" for "comparable." The working draft abandons the comparison requirement in favor of an evaluation of the totality of the circumstances, including the existence or absence of corroboration. So the change to Congressional language comes down to one word, "equivalent" --- a word that is not all that different from the one chosen by the Advisory Committee. And the word would be rejected not because it is a bad *word*, but rather because the Advisory Committee's idea of requiring a comparison with the standard exceptions has been problematic. It cannot credibly be argued that Congressional "language" includes the whole notion of requiring a comparison of the residual hearsay with the standard exceptions. If Congressional

agreement with the Advisory Committee constitutes Congressional language that can't be changed, then we might as well go home as there would be nothing to do.

● *Material fact requirement:* This requirement was added by Congress --- there is nothing like it in the Advisory Committee proposal. The working draft would delete this requirement on the ground that it is superfluous. While Congressional reaction to a rule change is of course hard to predict, it seems to be a stretch to think that much will be heard about the deletion of language that is demonstrably superfluous.

● *Interests of justice and purpose of the rules requirement:* This provision was added by Congress, again nothing in this provision stemmed from the Advisory Committee. But as demonstrated by the case law, this provision is at best superfluous, and at worst it is used as a source for result-oriented judicial discretion --- which is the opposite of what Congress intended. So it would seem to be a change that is unlikely to raise Congressional hackles.

● *The notice provision:* Congress added a notice provision; there was no such requirement in the Advisory Committee proposal. The proposed changes to the notice requirement are: 1) adding a good cause exception; 2) adding a requirement that notice be written; 3) changing the word "particulars" to the word "substance"; and 4) deleting the requirement that the declarant's address be disclosed. It is hard to see how these proposals will be the subject of Congressional pushback. Adding a good cause exception --- found in other notice provisions, *including Congress's own Rules 413-415*--- is simply good rulemaking. More specifically, it is fixing a Congressional oversight. The change also remedies a conflict in the case law. Adding the requirement that the notice be in writing is hardly controversial. Changing to the word "substance" seems very minor and provides a useful clarification. And deleting the requirement of address disclosure can be explained as a recognition that in the vast majority of cases, the declarant is unavailable and so has no address.

In sum, the proposed changes to Congressional language in Rule 807 do not appear offensive to any legitimate claim of Congressional purview or deference. They can all be explained as part of good rulemaking, especially in light of 40-plus years of experience with the rule --- experience that the Congress adopting the language did not have.

2. Have there been any other examples of Rules Committee changes to Congressionally-enacted language?

There are a number of examples of Congressionally-enacted language in Evidence Rules that have been amended in the rulemaking process. Here is a list:

1. Rule 609: Rule 609 was the Rule that received the most attention from Congress during the process of enacting the Federal Rules. Almost all of the language of the original Rule 609 came from Congress. And yet Rule 609 has been amended four times since its enactment:

● In 1987, the rule was changed to make it gender-neutral.[13]

● In 1990, Rule 609(a)(1) was changed because the Supreme Court, in *Green v. Bock Laundry*, 490 U.S. 504 (1989), held that the Congressional language led to an absurd result and so would not be enforced. To explain: Congress had focused on giving criminal defendants some mild protection from impeachment with certain convictions --- but the language Congress chose for that protection was to regulate "prejudice to the defendant." Thus, civil defendants were included in the protection --- but not civil plaintiffs --- and that imbalance made no sense at all in civil cases. The 1990 amendment changed the language to refer to criminal defendants only. This 1990 change can be likened to the change to the Rule 807 notice provision that would add a good cause requirement: it fixes a Congressional oversight.

● In 2006, Rule 609(a)(2) was changed because the courts had been having trouble figuring out just what convictions involved dishonesty and false statement, and so were automatically admissible to impeach. The amendment provided narrowing and clarifying language to what Congress had enacted.

●In 2011, the Rule was restyled from top to toe, and there were at least 10 changes to the language that Congress had initially adopted. The changes were so extensive that the rule could not be blacklined. New subdivisions were added --- all in the name of making the Rule better and easier to use.

2. Rule 804(b)(3): The Advisory Committee draft of the rule contained no corroborating circumstances requirement. Congress demanded that the proposal be changed to require that an "accused" establish corroborating circumstances before a declaration against penal interest could be admitted in his favor. The Advisory Committee acceded to this demand --- so this corroborating circumstances requirement is something that Congress initiated and proposed. The problem was that it was a one-way requirement. It required the accused to establish corroborating circumstances, but not the government. In 2010 the rule was amended to extend the corroborating circumstances requirement to government-proffered declarations against penal interest. This corrected an imbalance in the rule that Congress had mandated. It was, without doubt, a substantive change but it was justified by fairness.

3. Restyling changes to Congressionally-enacted language: In addition to Rule 609, the Restyling effort contained countless changes to the rules that were either enacted directly by Congress or were changed by Congress from the Advisory Committee proposal. Just a couple of examples in addition to Rule 609 should suffice.

[13] It might be argued that gender-neutralizing is just a style thing, but really it is policy-based. And moreover, the change, while arguably minor, is on a par with at least the proposed changes that would deleted the superfluous language from Rule 807.

● Congress added language to Rules 402, and 802, specifying that rules prescribed by the Supreme Court that would exclude evidence had to be "pursuant to statutory authority." The Restyling *eliminated* this language because it was superfluous. All the relevant Supreme Court rules would by definition be established pursuant to statutory authority, i.e., the Enabling Act. It bears noting that the language added by Congress was superfluous *when it was added.*

● Rule 301 was written by Congress. The restyling makes more than a dozen changes, including a change from "the burden of going forward" to the burden of "producing".

● Rules 413-415 were written by Congress. The restyling makes more than 20 changes to each of these rules, including deleting language that was considered superfluous. For example, in Rule 413, "offense or offenses of sexual assault" was changed to "sexual assault" because such acts are by definition offenses.

● Rule 704(b) was written by Congress. The Restyling made 10 changes to a two-sentence rule.

4. Amendments to the notice provisions of Rule 807: In 2016, the Committee unanimously approved changes to the notice provision of Rule 807 itself. The notice provision was added to Rule 807 by Congress.

Many of the changes to Congressional language described above are analogous to those proposed in the working draft. That is particularly true with the proposals to delete the "materiality" and "interests of justice" requirements. They are superfluous in the same way as the language that was deleted in the Restyling.[14] The other changes --- to the trustworthiness and notice requirements---are comparable to the changes made to Rule 609 and 804(b)(3). Those are changes that are arguably needed to make the rule work sensibly and fairly.[15]

Finally, it is important to note that the Committee has already agreed on a policy of deference to Congressional language --- but one not nearly as drastic as a "don't change anything" model. At the Spring 2016 meeting, the Committee considered a suggestion from a member of the public that Rule 704(b) should be eliminated. The Minutes of the meeting describe the Committee's resolution:

[14] In fact, looking back, those changes to Rule 807 probably should have been *made* in the Restyling.

[15] It should be noted that at least one Civil Rule that was drafted by Congress was subsequently amended by rulemaking. Ed Cooper describes it in an email:

> The classic example is Civil Rule 4. A proposed revision was sent to Congress some time in the early 80s. Congress balked -- dark stories of the British Embassy protesting parts of it -- and Congress eventually wrote its own Rule 4. Not very well. A few years later a revised Rule 4 went through the full rulemaking process and was adopted, I think without incident. All of that, except for the final step directed by Sam Pointer and Paul Carrington, happened before my time.

The amazing thing about this story is not that language written by Congress was changed by rulemaking, but that it was done before Ed's time. I thought rulemaking began with Ed Cooper.

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

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

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

So the Committee determined that proposals to *eliminate* a Congressionally-enacted rule should not be considered, out of deference to Congress. But a proposal to *improve* a Congressionally-enacted provision is a different matter. This would seem to be a reasonable line in the sand for deference to Congress.

F. Concerns About Expanding the Residual Exception

At the Conference it is fair to state that there was much concern about any proposal that would "expand the residual exception" --- meaning any proposal that would give judges more discretion than they already have to admit reliable hearsay. Of course, expanding the coverage of the residual exception does not necessarily mean that judicial discretion will be expanded. If the substantive standard of trustworthiness were reduced, for example, the coverage of the exception would be expanded even without any change in discretion exercised by judges. But it is undeniable that any expansion at all could be interpreted (even if perhaps incorrectly) as an attempt to expand judicial discretion --- and that expanded judicial discretion is anathema to lawyers, as they want rules in this area.

In terms of expansion, the history of the Committee's consideration of Rule 807 is relevant. The project to amend the residual exception began in earnest as an outgrowth of the decision to abrogate the ancient documents exception to the hearsay rule. The Committee Note to the proposal sent out for public comment stated that if old documents were reliable, they could be admitted under the residual exception --- so Rule 803(16) did not need to be preserved in order to cover such old reliable statements. But there was a lot of public comment to the effect

that the residual exception was no guarantee of admissibility, because many courts limited its use to "rare and exceptional" cases. The comment led to research on residual exception cases, which as stated above can be read to support the proposition that the residual exception may be too narrow, because reliable hearsay offered under that exception has been excluded by a fair number of courts.

In considering the possibility of expanding the residual exception, the Committee has never embraced a proposal that would *dramatically* expand its coverage. For example, the Committee unanimously rejected Judge Posner's proposal to expand the residual exception to the extent that it would substitute for many of the standard exceptions, such as for present sense impressions and excited utterances. And even the much more limited proposal to reduce the bar imposed by the "more probative" requirement was rejected --- twice --- for fear that loosening that requirement would unduly expand the potential for using the residual exception. Yet even a more modest attempt to expand the residual exception was met with some skepticism at the Conference.

It is interesting to note, though, that while the concept of expanding the residual exception raised concerns, virtually all of the commentary at the Conference about the changes proposed in the working draft was *positive*. Which leads to the question whether any of the proposed changes in the text would really end up expanding the residual exception. To answer this question, we need to consider the textual changes, as well as the relevance of a Committee Note.

1. Text changes as expanding the exception

It is pretty clear that most of the proposed changes don't have much to do with expanding the exception. For example, the proposed changes to the notice provisions obviously have nothing to do with expansion. It might be argued that adding a good cause exception for pretrial notice would mean that the rule can be used in more cases (i.e., the cases where the proponent failed to provide pretrial notice). But as noted in previous memos, most courts already apply a good cause exception, so the actual effect in practice will be limited to a couple of circuits; and even in those circuits that do not apply the exception, more frequent use does not mean "expansion" in the sense that the exception is more broadly covering reliable hearsay and allowing more judicial discretion.

The proposals to eliminate the "materiality" and "interest of justice" requirements would not appear to lead to much if any expansion of the residual exception --- because they are duplicative of requirements that are already in the Evidence Rules. But there is a contrary argument, discussed in previous memos. Congress added these provisions as part of an effort to emphasize that the residual exception was to be interpreted narrowly. They might be called "tonesetters." And deleting them may be thought to lighten the tone and encourage broader admissibility. That said, in practice these provisions have not really been used for "tone." The "tone" has been set by the legislative history, which states that the residual exception should be limited to "rare and exceptional" cases. The materiality and interest of justice requirements have largely been relegated to clerical checkoffs for a court working its way through the provisions of

the rule. Thus it is arguable whether deleting these provisions will contribute to an expansion of the residual exception.

The changes that might be considered to have the most potential for expanding the coverage of the exception are those made to the trustworthiness provision. Those changes would: 1) eliminate the equivalence standard in favor of a totality of circumstances test, and 2) require the court to consider the presence or absence of corroborating circumstances. The second change, regarding corroboration, seems easier to assess. The change will not have a major impact, because most courts already consider corroboration as part of the trustworthiness inquiry. But of course it will have an impact on those courts that do not consider corroboration. It will mean that more statements will be found admissible --- specifically, those statements where the circumstantial guarantees are not sufficient to establish trustworthiness, but where consideration of corroboration will get the proponent "over the top." An example is *United States v. Stoney End of Horn,* 829 F.3d 681 (8th Cir. 2016), where the court found that the circumstantial guarantees of trustworthiness supporting a statement about an assault were insufficient, and the court refused to consider the fact that other testimony at trial corroborated the hearsay statement. But the bottom line is that the "expansion" of the exception attributable to the reference to corroboration is by definition limited given the law in most circuits.

The most difficult task is to determine whether, and to what extent, the residual exception would be expanded if the equivalence standard is replaced by a totality of circumstances test. One possibility has already been addressed: that the elimination of the equivalence standard will lead parties and courts to bypass the standard exceptions entirely and proceed directly to the residual exception. While that consequence would result in a (problematic) expansion of the residual exception, it is extremely unlikely to occur, given the retention of the requirement that the hearsay must be inadmissible under the standard exceptions before it is considered under the residual exception. And it is even less likely to occur if that requirement is formally placed as an admissibility provision, as discussed above.

Another possibility would be that the equivalence standard has served to control judicial discretion, and to eliminate that standard in favor of a totality of circumstances test would lead to fewer constraints on judicial discretion --- and so possibly to an expansion of the exception. It is not obvious that this is the case, however. It is true that the equivalence standard was designed to cabin judicial discretion, by requiring the court to limit itself to the kind of reliability factors already found in the standard exceptions. The problem, though, is that the Rule 803 and 804 exceptions are so varied --- both in types and strength of guarantees --- that courts applying the equivalence standard can do pretty much what they want. The case digest provides evidence that the equivalence standard has done little to cabin discretion.

The presumed advantage of a totality of circumstances test is that it will allow the court to proceed directly to the pertinent inquiry --- trustworthiness --- without being distracted by doing an equivalence analysis that does not limit its discretion anyway. It could be said that the major benefit of a totality of circumstances test is that it will be more *accurate*. The court is more likely to accurately determine whether the statement is trustworthy or not because it will be focusing on the factors that actually bear on the trustworthiness of particular statements. Arguably, if the test employed leads to more accurate results, the consequence will be an

expansion --- the statements that are currently reliable but excluded will be more likely to be admitted. But of course it is hard to test this proposition. And it is also hard to say that that result would be a bad thing.[16]

One thing is clear --- there is nothing in the totality of circumstances test which indicates that the trustworthiness standards are being *diminished.* In other words, any expansion that will occur is likely to occur because the rule is improved. It is not because a door has been opened to allow the admission of less reliable hearsay than is currently permitted.

In sum, one way to look at the proposed changes is that they would mildly expand the residual exception, but without expanding judicial discretion and without lowering the standards of trustworthiness. Another way to look at the proposed changes is that they simply make the rule better: more direct, easier to apply, less saddled by needless distractions, and (because resolving a conflict in the courts) more uniform in its application. Any "expansion" in the exception would be collateral.

2. Committee Note and expansion of the exception

While the proposed changes in text do not directly point to much expansion of the residual exception, it could be asked whether the Committee Note might provide a signal for courts to take a more liberal view of Rule 807. Such a Committee Note might: 1. Suggest that courts not rely on the "rare and exceptional" language that is in the legislative history but not in the text of the rule; and 2. Describe the proposed amendment as an expansion, and indicate that the intent of the amendment is to allow more liberal admission of hearsay offered under the residual exception.

In the memo for the last meeting, an "expansion" Committee Note was included for the Committee's consideration. It is set forth, with some adjustments, in section VII, infra.

G. The proposed amendments as good rulemaking rather than an intentional expansion

The memo for the last meeting raised the possibility that the proposed changes to the residual exception could be considered as grounded in good rulemaking rather than as an attempt to expand the coverage of Rule 807. To summarize:

> (1) Deleting the equivalence requirement is good rulemaking because it allows courts to tackle the trustworthiness question head-on, without trying to compare what is often incomparable.

[16] It should also be noted that amending the trustworthiness clause to explicitly require the court to consider the absence of cross-examination would put a damper on any risk of expansion. Whether such language can and should be added to the text is discussed supra.

(2) Amending the trustworthiness requirement to specify that corroboration (as well as its absence) must be considered would rectify a conflict among the courts and would require consideration of information that in fact is quite relevant to the trustworthiness inquiry.

(3) Deleting the requirements of materiality and interests of justice eliminates superfluous language and, in the case of the interests of justice requirement, limits the use of unwarranted judicial discretion that would impair a meaningful review of the hearsay's trustworthiness.

(4) Amending the notice provision rectifies a conflict in the courts, recognizes the need for a good cause exception, and clarifies some important details about notice.

Thus, all the proposed changes in the text can be supported as good rulemaking independent of any need to expand the residual exception. That is a particularly important point, because as discussed above it is not crystal clear that those changes, if implemented, will actually expand the coverage of the residual exception.

At the Conference, one Committee member suggested that the Committee should be honest with itself. The suggestion was that if the original intent of an amendment is to expand the residual exception, those changes should not later be characterized as simply an effort for good rulemaking. The rest of this section responds to that point.

It is of course true that a Committee should not be disingenuous about the intent of any amendment. But it is also the case that a Committee's objectives can change over time. The rulemaking process is lengthy, and subject to much input, and objectives thought to dominate at one time may be overtaken by other objectives. It is certainly not unprecedented for a Committee proposal to start off as one thing and end as another. Such changes are hardly unlikely, given the depth of deliberation that the Committee undertakes, and the range of voices it hears from. Turnover in personnel can also affect the trajectory of an amendment.

Many Evidence Rules amendments started out with one objective and ended with another. Here are some examples:

● The 1996 amendment to Rule 801(d)(2) was originally intended to reject the holding in *Bourjaily v. United States*, 483 U.S. 171 (1987), and would have provided that the government has to show by a preponderance of independent evidence that the defendant and the declarant were members of the same conspiracy. The amendment eventually enacted reached the *exact opposite result*. It codified *Bourjaily.*

● The 2000 amendment to Rule 702 was initially intended only to clarify that the *Daubert* standards applied to non-scientific as well as scientific expert testimony. The rule ultimately enacted went much further, for example by adding the admissibility requirements of sufficient basis and reliable application.

● The proposal to amend Rule 609, in 2006, was originally designed to limit automatic admissibility of prior convictions for impeachment purposes to those convictions in which false statement was an element of the crime. But eventually (because of DOJ objections) the proposal was narrowed to allow automatic impeachment if it could be "readily determined" that a finding was made that the witness had lied in committing the crime.

●The original proposal for Rule 502, enacted in 2008, included a provision that would have provided for selective waiver --- disclosure of privileged material to the government would not constitute a waiver to private parties. Indeed establishing selective waiver protection was one of the two main goals of the amendment. But after public comment, selective waiver was dropped. Also, the rule was originally intended to provide protection against waiver only if the parties agreed to a court order to that effect. But the proposal was changed to allow the court to enter a protective order over the objection of any party. Finally, when the process started, there was no thought of covering questions of subject matter waiver. But midway through the process, a limitation on subject matter waiver was added.

● The original proposal for amending Rule 801(d)(1)(B), to allow for substantive admissibility of prior consistent statements, would have deleted the original rule language and simply provide that if a consistent statement would be otherwise admissible to rehabilitate the witness, then it would be admissible for its truth. After a survey of judges and public comment, the proposal was changed to retain the original language and to provide for substantive admissibility of other consistent statements if admissible under any other ground not provided for in the original rule.

● The proposal to amend Rule 803(16) went through several twists and turns. It started out as directed toward ESI. Then the proposal was changed to call for elimination of the exception entirely. After substantial public comment, the proposal went back to the concern over ESI.

This history shows that the objectives of an amendment can change over time. And in that light, here is a very plausible story to tell regarding Rule 807:

> After the public comment on the ancient documents exception, the Committee resolved to explore ways in which the residual exception could be expanded, but not in a way that would overtake the standard exceptions or give rise to unbridled judicial discretion. That is obviously a challenging assignment, in effect a tightrope walk. Part of the project was to review case law, and that review indicated among other things that many provisions in the rule had created problems for courts and litigants. After substantial consideration and a Conference of experts in the field, the Committee decided to propose changes that would resolve some of the current difficulties, that would make the rule easier to apply, and that would, at the margins, allow more hearsay to be admitted than is the case under the existing rule. But none of the changes are designed to "expand" the coverage of the exception in any dramatic way.

It is for the Committee to determine whether the proposed rule changes, if approved, would best be characterized as expanding the exception or simply efforts at good rulemaking.

VI. The Working Draft of the Proposed Amendments to Rule 807

What follows is the text of the working draft as modified in light of the Committee's determinations as well as developments at the Conference.

Rule 807. Residual Exception

(a) In General. Under the following conditions,[17] ~~circumstances,~~ a hearsay statement is not excluded by the rule against hearsay: ~~even if~~

(1) the statement is not specifically covered by a hearsay exception in Rule 803 or 804~~:~~;

(1 2) ~~the statement has equivalent circumstantial guarantees of trustworthiness~~ the court determines that it is trustworthy, after considering the totality of circumstances under which it was made, [the presence or absence of] any corroborating evidence, [and the opponent's ability or inability to cross-examine the declarant]; and

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

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

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

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

[17] As discussed earlier, the change from "circumstances" to "conditions" is proposed because the trustworthiness requirement is now set forth in terms of "totality of circumstances". So retaining the original introduction would mean that the totality of circumstances is one of the circumstances.

VII. Two Possible Committee Notes

As stated above, it is at least arguably possible to give an expansionist spin to the rule through some language in the Committee Note. Of course it goes without saying that a Committee Note cannot establish a rule that is not in the text. But Committee Notes are useful for describing the goal of an amendment and the intent of the Committee.

Below are two possible Committee Notes. One is described as a "good rulemaking note." The other describes a more expansionist intent. Both of them address the relevance of the presence or absence of cross-examination, i.e., the point raised by Judge Hamilton at the Conference.

Model Note 1: The Good Rulemaking Committee Note

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

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

The amendment specifically allows the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. This provision provides for a uniform approach, and recognizes that the existence or absence of corroboration is relevant to whether a statement is accurate. Of course, the court must not only consider the existence of corroborating evidence but also the strength and quality of that evidence. [While the presence of corroboration will be a factor cutting in favor of a finding of trustworthiness, the absence of any corroboration should make the court more skeptical of the statement's trustworthiness.]

[In considering whether proffered hearsay is trustworthy under Rule 807, the court should take account of the fact that the opponent either will or will not have the ability to cross-examine the declarant. If the declarant is not present for cross-

examination, then the trustworthiness requirement requires an analysis of whether the proponent has presented a showing that is sufficient to substitute for cross-examination. In contrast, the declarant's presence for cross-examination is a factor cutting in favor of admissibility --- assuming that the "more probative" requirement of subdivision (b)(3) is met.]

The change to the trustworthiness clause does not mean that parties may proceed directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. Indeed Rule 807(a)(1) now requires the proponent to establish that the proffered hearsay is a statement that "is not specifically covered by a hearsay exception in Rule 803 or 804." Thus Rule 807 remains an exception to be invoked only when necessary. It is not intended to be a device to erode or evade the standard exceptions.

The rule requires the court to determine whether the hearsay statement is trustworthy. In doing so, the court should not consider the credibility of a witness who relates the declarant's hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses. The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement --- the credibility of the witness relating the statement is not pertinent to either inquiry.

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

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

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

- First, the Rule requires the proponent to disclose the "substance" of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the "substance" of the evidence). Prior case law on the obligation to disclose the "particulars" of the hearsay statement may be instructive, but not dispositive, of the proponent's obligation to disclose the "substance" of the statement under the Rule as amended. The prior requirement that the declarant's address must be disclosed has been deleted; that requirement

was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant's address was known or easily obtainable. If prior disclosure of the declarant's address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.

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

● Finally, the pretrial notice provision has been amended to provide for a good cause exception --- the same exception found in Rule 404(b). Most courts have applied a good cause exception under Rule 807 even though it was not specifically provided in the original Rule, while some courts have not. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent must then resort to residual hearsay. Where notice is provided during the trial, the general requirement that notice must be in writing need not be met.

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

Model Note 2: The Expansionist Intent Committee Note[18]

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

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

- Untethering the reliability inquiry from a comparison with the categorical exceptions, which had been required by the original rule's reference to "equivalent" circumstantial guarantees of trustworthiness. The "equivalence" standard is unduly constraining, as well as difficult to apply, given the varied and different guarantees of reliability found among the categorical exceptions (and given the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). Experience has shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Under the amendment, the court is to proceed directly to a determination of whether the hearsay is trustworthy.

- Specifically allowing the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. This provision provides for a uniform and flexible approach, and recognizes that the existence or absence of corroboration is relevant to whether a statement is accurate. Of course, the court must not only consider the existence of corroborating evidence but also the strength and quality of that evidence. [While the presence of corroboration will be a factor cutting in favor of a finding of trustworthiness, the absence of any corroboration should make the court more skeptical of the statement's trustworthiness.]

- Deleting the requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of the rules and the interests of justice. These requirements are superfluous in that they are also found in other rules (e.g., 102, 401). They have served, if anything, as tone setters to indicate that the rule is to be employed only in rare and exceptional circumstances. The amendment is intended to allow the use of the exception somewhat more frequently.

The legislative history of the original rule indicated that use of the residual exception should be left for "rare and exceptional" cases. That phrase in the legislative history has led some courts to exclude proffered hearsay because it is not "exceptional." The word "exceptional' is not in the text of the rule, and it should not be a word that is

[18] The language designed explicitly to indicate an expansion is underlined.

used to exclude otherwise trustworthy and necessary hearsay. At any rate, the "rare and exceptional" language is no longer descriptive of the rule as amended.

[In considering whether proffered hearsay is trustworthy under Rule 807, the court should take account of the fact that the opponent either will or will not have the ability to cross-examine the declarant. If the declarant is not present for cross-examination, then the trustworthiness requirement requires an analysis of whether the proponent has presented a showing that is sufficient to substitute for cross-examination. In contrast, the declarant's presence for cross-examination is a factor cutting in favor of admissibility --- assuming that the "more probative" requirement of subdivision (b)(3) is met.]

The change to the trustworthiness clause does not mean that parties may proceed directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. Indeed Rule 807(a)(1) now requires the proponent to establish that the proffered hearsay is a statement that "is not specifically covered by a hearsay exception in Rule 803 or 804." Thus Rule 807 remains an exception to be invoked only when necessary. It is not intended to be a device to erode or evade the standard exceptions.

The rule requires the court to determine whether the hearsay statement is trustworthy. In doing so, the court should not consider the credibility of a witness who relates the declarant's hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses. The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement --- the credibility of the witness relating the statement is not pertinent to either inquiry.

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

[The section of the Note on the notice provisions would be the same as in Model Note 1]

VIII. A Freestanding Amendment to the Notice Provision

If the Committee decides not to proceed with the changes proposed to the substantive provisions of Rule 807, there will remain the question of the amendments to the notice provision. Those proposed amendments were approved for referral to the Standing Committee by a unanimous vote of the Committee taken at the Spring 2016 meeting. The proposed amendments were held back because the Committee was still in the process of considering substantive changes.

The question for the Committee, if it rejects the substantive amendments, is whether to forward the amendments to the notice provision to the Standing Committee with the recommendation that they be issued for public comment. For ease of reference for the Committee, what is set forth below is the proposed amendment and Committee Note specific to the notice provision of 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 written notice of ~~the~~ an intent to offer the statement and its particulars, including the declarant's name and address, -- including its substance and the declarant's name -- so that the party has a fair opportunity to meet it. The notice must be provided before the trial or hearing -- or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Committee Note

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

● First, the Rule requires the proponent to disclose the "substance" of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the "substance" of the evidence). Prior case law on the obligation to disclose the "particulars" of the hearsay statement may be instructive, but not dispositive, of the proponent's obligation to disclose the "substance" of the statement under the Rule as amended. The prior requirement

that the declarant's address must be disclosed has been deleted; that requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant's address was known or easily obtainable. If prior disclosure of the declarant's address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.

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

● Finally, the pretrial notice provision has been amended to provide for a good cause exception --- the same exception found in Rule 404(b). Most courts have applied a good cause exception under Rule 807 even though it was not specifically provided in the original Rule, while some courts have not. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent must then resort to residual hearsay. Where notice is provided during the trial, the general requirement that notice must be in writing need not be met.

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

TAB 2B

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

By Daniel J. Capra

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

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

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

I. TRUSTWORTHINESS

Trustworthiness: Affidavit of a coconspirator absolving the defendant of any responsibility'

United States v. Davis, 2016 WL 5746369 (M.D.Pa.): In a narcotics case, the defendant moved in limine to admit an affidavit signed by his coconspirator, in which the coconspirator accepted complete responsibility for the offense conduct and denied that defendant was ever complicit in the alleged drug enterprise. The court found that the letter was insufficiently trustworthy to be admissible as residual hearsay. The affidavit was prepared in the jailhouse in the presence of the defendant. Subsequently the coconspirator stated in his plea quality that the letter was false and that he was forced to prepare it by the defendant.

Trustworthiness: Letter describing an accident

Williams v. Manitowoc Cranes, LLC, 2016 WL 7666154 (S. D.Miss): In a case involving a crane accident, the court excluded a letter that the plaintiffs argued was a statement from a witness describing the accident. The court found it insufficiently trustworthy essentially because it was not the witness's own statement --- he had signed the letter but the letter was prepared by another person. The court stated that for admissibility under the residual exception, a proponent "bears a heavy burden to come forward with indicia of both trustworthiness and probative force."

Trustworthiness: Statement to police

Estate of Naharro v. County of Santa Clara, 2016 WL 6248957 (N.D.Ca.): In a section 1983 action alleging the use of excessive force, the defendants sought to submit on summary judgment a bystander's statement that was made to police the day after the shooting. The statement was offered in lieu of a deposition, because the bystander died before he could be deposed. The court found the statement to the police insufficiently trustworthy to be admissible as residual hearsay. The court stated that "Defendants have not cited, and the Court has not discovered, any authority for the proposition that Gionet's account of Naharro's conduct is trustworthy simply because it was made in the course of a police interview."

Trustworthiness: Tax preparer's statement

United States v. Lowe, 2016 WL 6494742 (2nd Cir.): In a tax fraud prosecution, the defendant sought to admit statements from his tax preparer that tended to explain the conduct. The court found that the trial court did not err in excluding the statements because there was an insufficient showing of trustworthiness. The court noted that the tax prepare made the statements after pleading guilty and in order to avoid a sentencing enhancement. "Accordingly, the district court did not abuse its discretion in declining to admit such statements, which were designed to mitigate—not enhance—the preparer's criminal liability."

Trustworthiness: Deposition where opponent was not noticed

Ponzini v. County of Monroe, 2016 WL 4500775 (M.D.Pa.) (deposition inadmissible under Rule 807 because it was prepared in anticipation of litigation and the party against whom it is offered was not given notice of the deposition).

Trustworthiness: Notations on a police report

Flournoy v. City of Chicago, 829 F.3d 869 (7th Cir. 2016): The plaintiff alleged that officers used excessive force in executing a search warrant. Among other things, he contended that two flashbang devices were deployed. As proof on this point, the plaintiffs offered a handwritten notation found on one of the copies of an officer's typed report: the notation was that two flashbangs deployed. The court found that this notation was properly found not admissible under the residual exception. The court stated that the handwriting "plainly lacks circumstantial guarantees of trustworthiness: there is no indication of who made it, or when and how it was made; it appears on only one of the copies of the report; and it conflicts with the report's official typed narrative" as well as testimony of the officers.

The court also found that because the notation was not trustworthy, admitting it did not serve the interests of justice --- meaning that factor was superfluous.

Trustworthiness: Corroboration irrelevant

United States v. Stoney End of Horn, 829 F.3d 681 (8th Cir. 2016): In an aggravated assault prosecution, the trial court allowed the victim's former husband to testify that the victim had to her that the defendant had beat her up. The court held that the hearsay statement was admissible under Rule 807, but the court of appeals disagreed, concluding that the trial court had not sufficiently explained what guarantees of trustworthiness supported the statement. The government defended the ruling by arguing that other evidence at trial corroborated the hearsay statement, but the court contended that corroboration has no place in the Rule 807 trustworthiness enquiry. It argued as follows:

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

Reporter's comment: Most courts *do* consider corroboration as relevant to trustworthiness under Rule 807, and for good reason. Corroboration tends to assure that the declarant is telling the truth, which is the basic enquiry for residual hearsay (indeed any hearsay). The Court's reliance on *Idaho v. Wright* is questionable because *Wright* dealt with the Confrontation Clause and not Rule 807. Finally, to the extent the court is concerned about "equivalence" with the standard exceptions, there are in fact other exceptions that rely on corroboration for admissibility --- most importantly Rule 804(b)(3). This is not to say that a statement can or should be admitted under Rule 807 *solely* on the basis of corroboration --- a largely academic question because if corroboration is the sole support of the statement it is likely to be excluded as not being more probative than any other evidence anyway.

Trustworthiness: Product tests by consultants made in anticipation of litigation

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

Trustworthiness: Litigation affidavit

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

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

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

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

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

In short, Batoh has failed to identify any circumstances in the record that make the statements Kimball made to Batoh and Timothy Kimball especially trustworthy. And when the statements are measured against the factors that some courts have considered to determine trustworthiness under Rule 807, they do not fare well. Those factors include whether the declarant was under oath; the voluntariness of the statement; whether the statement was based on personal knowledge; whether the statement contradicted any previous statement; whether the statement was preserved on videotape to provide the jury an opportunity to evaluate the declarant's demeanor; the declarant's availability for cross-examination; the statement's proximity in time to the events described; whether the statement is corroborated; the declarant's motivation to fabricate; whether the statement was prepared in anticipation of litigation; the statement's spontaneity; and whether the declarant's memory or perception was faulty. In this case, when the scant evidence about the statements is viewed in the light most favorable to Batoh, it would permit a finding that the statements were voluntary, based on personal knowledge, and not contradictory. But virtually none of the other factors cited would support their admission. The statements were not under oath or video-taped; they were made either "several months" or at some other unspecified time after the events described; they are not corroborated; there was at least a motivation to shape the statements, if not to fabricate; there was no opportunity to cross-examine; and there is some suggestion that the statements were made in anticipation of litigation.

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

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

statement was not under oath, and it was made in an investigation that was initiated by the county itself.

Trustworthiness: Business records not qualified by a foundation witness

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

> Rule 807 is not intended to address situations already covered by Rules 803 or 804, such as the business record exception to hearsay recognized by Rule 803(6). *See, e.g., Glowczenski v. Taser Int'l Inc.*, 928 F.Supp.2d 564, 573 (E.D.N.Y.2013) (Rule 807 inapplicable where evidence specifically covered by Rule 803(18)). Rather, as indicated by the express language of Rule 807, it pertains to statements that are "not specifically covered by a hearsay exception in Rule 803 or 804." * * *
>
> Here, Plaintiff could have sought to establish the admissibility of the invoices through a certification from an employee of K.J. Contracting or testimony at a deposition through the use of a third-party subpoena. Furthermore, Plaintiff could have questioned Defendant's representatives at their depositions about the invoices and Defendant's representatives may have been able to fulfill the requirements of Rule 803(6). * * * In other words, Plaintiff had a variety of tools at his disposal to authenticate and lay the foundation for these invoices, but he failed to avail himself of these opportunities. Plaintiff offers no argument in response to Defendant's motion to strike as to why he did not, through discovery, establish the admissibility of the K.J. Contracting invoices. As a result, the court will not consider them.

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

Trustworthiness: Statements from patients regarding business dispute

Southern Home Care Services, Inc. v. Visiting Nurse Services, Inc. of Southern Connecticut, 2015 WL 4509425 (D.Conn.): In a dispute over whether the defendants (former

employees) were "poaching" patients who were being treated for mental and physical disabilities, the plaintiffs offered statements made by patients who were interviewed by caretakers employed by the plaintiffs. These statements indicated the defendants were soliciting their business. The court found that the patient's statements were insufficiently trustworthy to qualify as residual hearsay:

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

Trustworthiness: Statements made hours after an accident

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

> Importantly, Mead's statements were not made under oath and he was never deposed or subject to cross-examination concerning his statements. Instead, the hearsay statements were made during a phone conversation several hours after the accident. While the conversations * * * occurred during the morning following the accident, Mead had an opportunity during that interval of time to reflect on what he had observed. It is this interval of time and opportunity to reflect and fabricate that render the excited utterance and present sense impression exceptions inapplicable. For the same reason, the residual exception should not apply.

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

Trustworthiness: Plea allocutions

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

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

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

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

United States v. Rivers, 777 F.3d 1306 (11th Cir. 2015): After he was convicted of narcotics offenses, Rivers filed a motion to vacate, alleging ineffective assistance of counsel. The complaint was that the lawyer never discussed the strength of the government's case, or the possibility of plea bargaining or accepting a plea. At an evidentiary hearing, the lawyer for Rivers's codefendant (Rodgriguez) at trial testified to conversations he had with Rivers's trial counsel, in which that counsel stated that he had reviewed the evidence with Rivers and discussed plea agreements with him. That testimony, of what Rivers's counsel said, was admitted under Rule 807. But the court of appeals found this to be error. The court first addressed the fact that the parties and the lower court erroneously focused on the credibility of the *testifying lawyer*: this was incorrect because "a Rule 807 analysis must consider whether the declarant's original statements now being offered in court have guarantees of trustworthiness given the circumstances under which they were first made. The fundamental question, therefore, is not the trustworthiness of the witness reciting the statements in court, but of the declarant who originally made the statements." The court next noted that the only ground asserted for the reliability of the declarant's statement was that it was being made to counsel for one of the declarant's codefendants. The court evaluated this trustworthiness factor as follows:

> Without more, this reasoning is insufficient to establish the equivalent circumstantial guarantees of trustworthiness that Rule 807 requires. Most notably, we do not believe that McComb's statements are believable merely because he uttered them to counsel for his client's codefendant. If McComb was providing constitutionally effective assistance of counsel, we agree with the district court that he would have had every incentive to tell the truth to Rodriguez. But if he was failing as completely as Rivers alleges, he would have had every incentive to dissimulate. In any event, to declare that

> statements made by an attorney to counsel for a codefendant are inherently trustworthy simply because they are made by a lawyer during the course of representing a criminal defendant is to say that even an attorney performing incompetently would not lie about it. Under the circumstances here, this Court will not assume that much. Ultimately, we do not believe that any amount of trustworthiness in the relevant circumstances here is equivalent to that of the specific hearsay exceptions, as required by Rule 807.

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

Trustworthiness: Witness statement clarifying a deposition

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

> The Cleary Statement was prepared while litigation was in full swing and while Emhart was formulating its expert strategy. Additionally, the involvement of Emhart's attorneys—to the exclusion of Defendants—in the preparation of the Cleary Statement undercuts its value; unsurprisingly, the culmination of the back-and-forth dialogue between Cleary and Emhart's attorneys is highly favorable to Emhart. *See Polansky v. CNA Ins. Co.,* 852 F.2d 626, 631 (1st Cir.1988) (finding abuse of discretion in admitting a letter under Rule 807 because, inter alia, it "was merely a self-serving statement written by a representative of the party who seeks its admission to prove the truth of what the letter implicitly asserts").
>
> Most importantly, Emhart elected to perpetuate Cleary's testimony in a manner that deprived Defendants of an opportunity for cross-examination. To be sure, the absence of crossexamination is not determinative in the Rule 807 analysis. But, in this case, Emhart's failure to depose Cleary looms large. When this case commenced in 2006, Cleary was over 90 years old. Emhart knew * * * that he was an important witness, yet it waited nearly two years before reaching out to Cleary. Moreover, when it finally did contact Cleary in late February 2008, Emhart did not promptly notice his deposition, but

> instead spent over a month compiling the Cleary Statement. Even after the Cleary Statement was executed, Emhart waited almost five more months before seeking to depose Cleary. By that point, it was too late. Although Cleary's death was untimely, it was hardly unforeseeable, and Emhart's choice to create the Cleary Statement—a process that excluded Defendants—in lieu of deposing Cleary—which would have afforded Defendants an opportunity for cross-examination—undermines the trustworthiness of the Cleary Statement.

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

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

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

Trustworthiness: Newspaper articles

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

Trustworthiness --- Videotaped statement of a hospital patient

Navedo v. Primecare Medical, Inc., 2014 WL 1451836 (M.D.Pa.): In a suit charging neglect of the medical needs of a prisoner who died prior to trial, the plaintiff sought to admit a

videotaped statement of the decedent while he was in the hospital. The statement was offered under Rule 807. The court found trustworthiness a close question, but concluded that the plaintiff had not met the heavy burden of showing trustworthiness. It elaborated as follows:

> Decedent was not under oath and Defendant was not able to cross-examine her. Additionally, Plaintiff concedes that the testimony was not spontaneous but was made in anticipation of litigation, and Decedent thus had a considerable financial stake in her statements. Moreover, to the extent Decedent commented as to the medical treatment she received at York Hospital, her statements were not contemporaneous but were made in November 2010, six months after the treatment took place. These factors all weigh strongly against trustworthiness.
>
> In contrast, the statement was made voluntarily based on Decedent's personal knowledge, it does not appear to contradict anything in the record, and it was videotaped, thereby allowing a jury to evaluate her demeanor during her testimony. Moreover, to the extent Decedent commented on her current suffering, it was more or less contemporaneous with the testimony at issue. Thus, there are considerable factors that weigh both for and against admission of the videotape. However, because the factors do not clearly favor admission and in consideration of Plaintiff's *heavy burden associated with Rule 807*, the Court finds that "exceptional guarantees of trustworthiness" are not present in this matter and the Court will exclude the evidence on this basis.

Reporter's Comment: Why does the plaintiff have a "heavy burden"? The burden for establishing the admissibility of evidence, under Rule 104(a), is a preponderance. Nothing in Rule 807 changes that. The case is an example of a strict construction of Rule 807 that resulted in the exclusion of what the court conceded was reliable hearsay.

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

United States v. Hill, 2014 WL 198813 (E.D.N.Y): An 11 year-old boy made a statement about a crime to the district attorney, and the boy's account tended to exculpate the defendant who was charged with murder. But the court found the statement to be insufficiently trustworthy to qualify as residual hearsay because of, among other things, the boy's age and the fact that his account conflicted with every other account made by bystanders. The court elaborated as follows:

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

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

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

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

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

Kyeame v. Buchheit, 2011 6151428 (M.D. Pa.): A party sought to admit a statement that an eyewitness gave to the police regarding a disputed event. But the court found that the statement was not sufficiently trustworthy to be admitted as residual hearsay. The court reasoned as follows:

> Although Mr. Fisher is known and named, had no apparent financial interest in the litigation, and was aware of the pending litigation when he made his statements, the Court finds that other factors compel the exclusion of his statements. First, although Mr. Fisher presumably made the statements based on his personal observations, he made the statements over one year after he allegedly witnessed Plaintiff's arrest. Therefore, his recollection of the events was not fresh when he reported them to Captain Watson. Further, although Mr. Fisher voluntarily made the statements, the statements lack specificity: They fail to indicate the distance between Mr. Fisher and the parties at the time of the incident, whether Mr. Fisher had a clear view of the parties, whether he could

> overhear any of the words spoken by the parties, or whether Mr. Fisher had any problems with his vision or hearing. Second, Mr. Fisher's statements were neither made under oath nor subject to cross-examination, the traditional methods used to ensure trustworthiness. * * * Third, the report includes no information regarding Mr. Fisher's professional background and qualifications that would indicate that Mr. Fisher was qualified, in any way, to determine whether Defendant's actions were appropriate. Fourth, Defendant has presented no other witnesses or evidence—apart from the testimony of Defendant, who is inherently biased in this matter—to corroborate Mr. Fisher's statements. * * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

concluded that the jailhouse telephone conversations were insufficiently trustworthy for the following reasons:

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

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

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

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

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

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

Exe v. Fleetwood RV, Inc., 2013 WL 2145595 (N.D. Ind.): The court found that a supplemental affidavit of a party's expert (who was dead by the time of the proceeding) was

inadmissible under the residual exception. It was insufficiently trustworthy, because it was made in anticipation of a sanctions proceeding, and it differed from the testimony that the witness gave at a deposition.

Trustworthiness --- Statement of accident victim

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

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

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

> [T]here is nothing about being a police official that inherently prevents insincerity, faulty perception, faulty memory, or faulty narration. Surely, Defendant is not suggesting that all police officials, by virtue of their employment, are automatically presumed to be sincere, to have particularly accurate perception and memories, or to offer accurate narrations. Indeed, at trial, Defendant aggressively attacked the trustworthiness and credibility of [the arresting officer]. Nor does Defendant explain why the nature and surrounding circumstances of the hearsay statement at issue here, other than the declarant's status as a police officer, guarantee trustworthiness. In fact, the specific circumstances here—a statement by a declarant, who may or may not have personal knowledge as to the presence of a video camera approximately two years earlier, which might not be corroborated by records—do not suggest inherent trustworthiness.

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

> The hearsay rule is generally said to exclude out-of-court statements offered for the truth of the matter asserted because there are four classes of risk peculiar to this kind of evidence: those of (1) insincerity, (2) faulty perception, (3) faulty memory and (4) faulty

> narration, each of which decreases the reliability of the inference from the statement made to the conclusion for which it is offered.... The traditional exceptions to the hearsay rule, in turn, provide the benchmark against which the trustworthiness of evidence must be compared in a residual hearsay analysis.... It is thus important to recognize that the trustworthiness of these exceptions is a function of their ability to minimize some of the four classic hearsay dangers.

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

Trustworthiness: Published articles, "specifically covered" by another exception

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

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

Trustworthiness --- statement inconsistent with the evidence

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

was insufficiently trustworthy --- in addition to being implausible it was unsupported by any evidence and was inconsistent with the evidence that did exist:

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

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

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

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

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

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

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

Trustworthiness ---Consumer reports of injuries averted

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

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

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

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

> The testimony was given under oath, though Kolzoff did not submit to United States' laws which punish perjury. His testimony was subject to Liechtenstein penalties for giving false testimony. Although Windsor notes that Plaintiff had an opportunity to develop questions propounded to Kolzoff, the witness answered only a fraction of the questions in his statement. Therefore, it cannot be said that Kolzoff was subject to cross-examination. This factor weighs against admitting the testimony of the out-of-court declarant.
>
> * * *
>
> Because the residual exception should be narrowly construed and because most of the applicable factors weigh against admitting the testimony, the Court concludes that Kolzoff's testimony is inadmissible pursuant to Rule 807. The most important factors are Kolzoff's admitted limited amount of knowledge, the limited corroborating evidence, and the fact that Kolzoff was not subject to cross-examination. It is also significant that Kolzoff could lose money if the Plaintiff prevails. The Court concludes that Kolzoff's

statement does not have "equivalent circumstantial guarantees of trustworthiness," as other testimony which is admitted pursuant to hearsay exceptions. Accordingly, it would not serve the interests of justice to admit the testimony.

Trustworthiness --- Customer complaints

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

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

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

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

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

created in anticipation of litigation, were created with knowledge that litigation was possible.

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

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

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

See also

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

> In this instance, unlike [other cases], the Commission offers each declaration to establish more than merely the extent of consumer injury, i.e. the price paid for the defendants' service. Rather, the Commission offers the declarations as substantive evidence of the defendants' alleged deceptive statements and marketing material, the defendants' course of dealing with a consumer, and the defendants' failure to deliver promised services. Unlike the letters in [other cases], the declarations proffered by the Commission derive from the Commission's contacting certain consumers and procuring a declaration for the purpose of litigation. Although each declaration reports a similar experience and occurred under oath, no declaration presents the most probative evidence that the Commission could procure with reasonable effort. The fact that the Commission purportedly deposed certain consumers belies the Commission's argument on this point. Furthermore, although corroborated by other evidence, no statement is subject to cross-examination. The Commission shows no exceptional circumstance warranting the admission of an un-

cross-examined declaration into evidence as a substitute for live testimony (either in a deposition or at trial).

Trustworthiness --- Foreign documents

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

> The matters reported in the PA documents have nothing to do with the PA's own activity, but rather describe the activities and financing of Hamas. Therefore, the guarantee of trustworthiness associated with a public agency merely recording its own actions is not present. Moreover, the conclusions stated in the PA documents are not the kind of objective factual matters we have found to be reliable * * * when reported as a matter of course. Instead, the PA documents contain conclusions about Hamas control of the Ramallah Zakat Committee and the sources of Hamas financing that were reached through unknown evaluative means.
>
> This leads to a larger problem with the documents: there is nothing known about the circumstances under which the documents were created, the duty of the authors to prepare such documents, the procedures and methods used to reach the stated conclusions, and, in the case of two of the documents, the identities of the authors.
>
> We know only that the PA documents were found in the possession of the PA. [T]here is nothing in the documents or the record that reveals whether the declarants had firsthand knowledge of the information reported, where or how they obtained the information, and whether there was a legal duty to report the matter. * * *
>
> The Government argues that the PA had a "strong incentive" to report accurate information about Hamas. There is no doubt that may be true, but the Government points to nothing in the record about the PA's practice of record keeping. There is also nothing in the documents or the record showing that the declarants in these documents were especially likely to be telling the truth. We therefore cannot say that there was little to gain from further adversarial testing. Without further information about the circumstances under which the PA documents were created, we are faced with conclusory assertions amounting to classic hearsay and no facts from which to divine the documents' reliability.

Trustworthiness: Improper focus on the witness relating the hearsay:

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

> Some of the factors do weigh in favor of finding trustworthiness: Ms. Williams is known and named, had no financial interest in this litigation, and presumably made the statement based on her personal observation. These factors, however, are outweighed by the factors that compel the statement's exclusion. First, the statement was neither made under oath nor subject to cross-examination, the traditional methods used to ensure trustworthiness. Second, there is no evidence corroborating that Ms. Williams ever made the statement, and, as Defendants contend, the statement fails to actually identify Defendant Boheim as the officer who entered the Kozy Nozes store.
>
> Further, in evaluating a statement's trustworthiness, consideration should be given to factors bearing on the reliability of the reporting of the hearsay by the witness. Ms. Pecorella–Fabrizio, who testified at her deposition that Ms. Williams made this statement, has an inherent bias in favor of admitting the statement, especially considering that it "is the only probative evidence" on this point. * * * Given the inherent bias of Ms. Pecorella–Fabrizio and the lack of any corroborating evidence, the reporting of the hearsay statement by Ms. Pecorella–Fabrizio is not reliable.

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

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

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

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

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

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

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

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

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

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

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

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

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

Trustworthiness: Diary of a claimant

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

Trustworthiness: Hearsay not "exceptional"

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

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

Reporter's comment: The emphasis on "exceptional circumstance" leads to a fuzzy ruling. It would be better for the court to say that the two factors cited do not overcome the high standard of trustworthiness --- while that may not be so, at least it would confront the trustworthiness question head on. Simply because a statement is made under relatively common circumstances should not disentitle it from admissibility if it is actually trustworthy. The "exceptionalist" analysis can result in exclusion of trustworthy statements simply because they are not "unusual" enough.

For other "exceptionalism" analyses, see

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

and then held that the statement was not admissible under Rule 807 either. The entirety of the rationale for exclusion is as follows:

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

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

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

> According to the government, Anderson's statements are admissible under Rule 807. The government maintains that if Anderson refuses to testify, [which he did] the Court will be presented with "exactly the type of scenario that the residual exception was intended to remedy." It is difficult to see how Anderson's anticipated refusal to testify represents an "exceptional" circumstance—the Rules of Evidence provide for precisely the circumstances now before the Court. Rule 804 governs situations when a witness is "unavailable" to testify and provides that one such scenario occurs when the declarant "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so." Fed.R.Evid. 804(a)(2).
>
> In addition, in all of the cases relied on by the government, there were far greater guarantees of trustworthiness than are present in this case. * * * In light of * * * evidence that on occasion BALCO employees tampered with the labels of samples, the Court cannot find that the requisite guarantees of trustworthiness are present in this case. The statements are not therefore admissible under Rule 807.

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

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

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

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

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

More examples of exceptionalism analysis

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

> Rule 807 is reserved for "exceptional circumstances" where the evidence at issue carries a "guarantee of trustworthiness equivalent to or superior to that which underlies the other

> recognized exceptions." *United States v. Thunder Horse*, 370 F.3d 745, 747 (8th Cir.2004). The deposition at issue does not involve exceptional circumstances.

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

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

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

Trustworthiness: Affidavit of deceased claimant

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

Trustworthiness: Absconding declarant

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

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

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

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

Trustworthiness: Verified answer

Reassure America Life Ins. Co. v. Warner, 2010 WL 4782776 (S.D.Fla.): In an interpleader action involving insurance monies, the man whose estate was a claimant had filed a verified answer in a related litigation. The representative of the estate argued that the verified answer was admissible under the residual exception, but the court disagreed:

> In this case, Shomers's Verified Answer * * * weighs heavily in direct support of the charge that Shomers is entitled to the proceeds of the $2,000,000 life insurance policy * * *. The corroborating evidence pointed to by the Shomers Estate does not go to the key assertions in the Verified Answer, specifically regarding the fraud or coercion allegedly used to trick or to force Shomers into signing the change of beneficiary form. Indeed, Shomers seems to assert both that he was tricked into voluntarily signing the form by fraud and that he was coerced into involuntarily signing the form by some unspecified intimidation. [The answer] is internally inconsistent, further undermining its

trustworthiness. Accordingly, the Court finds that the Verified Answer is not admissible at trial under Federal Rule of Evidence 807, and the Court will not consider it in ruling on the motions for summary judgment.

Trustworthiness: Employee declaration

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

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

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

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

Trustworthiness: Self-serving statement of accused

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

> The disputed statement was a declaration by Williams that he did not know anything about the robbery of Jones prior to when it occurred, that he was taken by surprise when McCraney entered the car and pulled out a gun, that after the robbery McCraney instructed him to drive away from the parking lot, and that McCraney then put the gun to Williams's head and told him to keep driving while the police pursued them. Williams suggests that a statement given by an uncounseled arrestee who is under interrogation by

law enforcement officers bears sufficient indicia of trustworthiness to warrant admission under Rule 807, because the very purpose of police interrogation is to obtain truthful statements that can be used to further an investigation.

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

Trustworthiness: "no reason to lie"

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

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

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

Trustworthiness: Declaration prepared for a pretrial proceeding

Leeds LP. v. United States, 2010 WL 2196099 (S.D. Cal.): In a quiet title action involving tax liens, the plaintiff sought to admit declarations of a fact witness that had been

prepared for pretrial proceedings, the witness having become unavailable. The court found that the statements failed the trustworthiness requirements of Rule 807. It reasoned as follows:

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

Trustworthiness: Hearsay in a police report

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

For other cases involving double hearsay, see:

Earhart v. Countrywide Bank, 2009 WL 2998055 (W.D.N.C.): The plaintiff alleged that he was denied a loan because of false statements provided to a lender by Countrywide. He sought to admit records of denial prepared by a mortgage agent indicating that lenders denied the loan. The court held that the records were admissible as business records to prove that a report had been made, but reports by the lenders of the reason that the loan was denied were double hearsay that could not be admitted under Rule 807. The court found that the plaintiff had failed to establish both the trustworthiness and the "more probative" requirements:

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

failed to explain why the testimony from lenders could not be obtained through reasonable efforts.

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

Trustworthiness: Witness required to establish circumstances of the hearsay statement

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

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

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

Note also that the court finds that the witness statement did not satisfy the "more probative" requirement because there were other witnesses to the shooting. Again, this is a

problem with the "more probative" requirement. The hearsay should be compared to other testimony from the declarant that could be presented at trial, not to all the other evidence on point. Comparing the hearsay to other evidence requires significant conjecture and essentially requires a comparison of apples and oranges.

Trustworthiness: Police officer statements denying excessive force

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

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

The court also held that the statements did not satisfy the "more probative" requirement, because there were other witnesses that could be called to testify to the alleged acts of torture and abuse. Finally, the court held that the purposes of the rules and the interests of justice would not be met, because the statements were not sufficiently trustworthy. (Meaning that the "purposes of the rules' interest of justice requirement was completely superfluous).

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

Trustworthiness: Statements made to an investigator

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

Trustworthiness and not more probative: Statement of a target of a criminal investigation

United Technologies Corp. v. Mazer, 556 F.3d 1260 (11th Cir. 2009): The case involved theft of blueprints. The Office of the Inspector General prepared a report that included inculpatory statements from a corporate official involved in the theft. The court held that these hearsay statements were not admissible under Rule 807. First, they were insufficiently trustworthy:

> Congress intended the residual hearsay exception to be used very rarely, and only in exceptional circumstances, and it applies only when certain exceptional guarantees of trustworthiness exist and when high degrees of probativeness and necessity are present. Notwithstanding the proffer agreement under which Mazer submitted to the government interview, Mazer's position as a target in a criminal investigation provided him ample motivation to implicate others (even falsely), including APM, in his misconduct in order to diffuse and mitigate his own culpability. Thus, the statements lack the "equivalent circumstantial guarantees of trustworthiness" that Rule 807 requires.

The court also held that the "more probative" requirement was not met because "UTC could have taken reasonable steps to obtain admissible testimony directly from Mazer prior to the district court's ruling on APM's motion to dismiss, but it failed to do so."

Trustworthiness: Debriefing memoranda

AAMCO Transmissions, Inc. v. Baker, 591 F.Supp.2d 788 (E.D.Pa. 2008): In a trademark infringement suit, a party sought to admit interviews that its investigators conducted with undercover shoppers. The court declared that the interviews were insufficiently trustworthy to be admissible under Rule 807:

> The statements contained on the audio-recordings and in the debriefing and shopping memoranda are not trustworthy because: (1) they were not made under oath; (2) the investigator's statements in the shopping memoranda were not based on personal knowledge; (3) the declarants were not subject to cross-examination; (4) the shoppers' statements were made to the investigators nearly an hour after the shoppers arrived the Center; (5) the statements were not corroborated; and (6) they were not spontaneous.

The court also found that the party had not satisfied the "more probative" requirement because it had made no attempt to locate and procure the testimony of the interviewees.

Trustworthiness: Testimony from another proceeding

New Cingular Wireless v. Zoning Hearing Board, 2008 WL 4978315 (E.D.Pa.): In a dispute about cell towers, the Board sought to admit testimony and evidence from another proceeding involving Verizon. The court found that the evidence was not admissible under the residual exception because "plaintiff was not a party to the Verizon proceeding and had no opportunity to cross-examine or contest any of the evidence presented therein." The court did not do an assessment of whether the evidence was trustworthy, however.

Trustworthiness: Letter written by a party to litigation

Schoolcraft Memorial Hosp. v. Michigan Dep't of Health, 570 F.Supp.2d 949 (W.D.Mich. 2008): In a case involving interpretation of Medicare, a party sought to prove its interpretation by proffering letters written to that party by a Department of Health and Human Services Official. The court found that these letters failed the trustworthiness requirement of the residual exception. It reasoned as follows:

> The letters are the out-of-court statements of a declarant who made the hearsay statements without the solemnity of the oath that would be administered were Mr. Daly to testify in court. * * * Further indicia of the unreliability of the statements of the letters are the facts that the letters were written to one of the parties to this litigation—not to the Court or the parties generally; and they are essentially an adoption of that parties' language—they do not present an independent statement of the declarant and are in that respect elicited by leading questions.

Trustworthiness: Unidentifiable declarant

Pryor v. Hurley, 2008 WL 3307136 (S.D. Ohio): The plaintiff charged that the county clerk refused to timely file a notice of appeal. To prove this point, he would testify that he called the clerk's office and an unidentified person told him that the defendant refused to file the notice. The court found that the unidentified person's statement was not admissible as residual hearsay.

The court was concerned that the plaintiff could not identify the date of the telephone conversation nor the identity of the declarant. So the statement did not have circumstantial guarantees of trustworthiness equivalent to the other exceptions.

Trustworthiness: Statements to a party's investigator

United States v. Vargas, 2008 WL 2180176 (2nd Cir.): In a drug prosecution, the defendant sought to admit a tape of a secretly recorded conversation between a defense investigator and a prisoner, which implicated someone other than the defendant as the leader of the conspiracy. The court found that the tape was not sufficiently trustworthy to be admissible as residual hearsay. The court reasoned that "because the statement was made in jail to an investigator working on behalf of Martinez, the prisoner had reason to exculpate Martinez in order to avoid retribution."

Trustworthiness: Suspect motivation and lack of corroboration

Trade Finance Partners LLC v. AAR Corp., 2008 WL 904885 (N.D. Ill.): In a breach of contract action, the plaintiff sought to admit an email by a corporate official describing the plaintiff's involvement. The court found that the email was not admissible under Rule 807. It failed the trustworthiness requirement: "Cooper's recollection, as reflected in his affidavit and e-mail, may well be biased or inaccurate, and he had every reason to misrepresent the communication with Reidlinger to his client, in order to inspire confidence. That TFP points to no testimony or documents supporting Cooper's recollection is notable." The court also noted that the plaintiff could have introduced other evidence proving its involvement in the transaction, so the email was not the most probative evidence reasonably available.

Trustworthiness: Declaration prepared in anticipation of litigation

Hall v. C.I.A., 538 F.Supp.2d 64 (D.D.C. 2008): In an FOIA litigation, the plaintiff sought consideration of his declaration of events and statements that he had heard from others. The court found that the declaration was not admissible under Rule 807 --- and therefore would not be considered on summary judgment --- because it was nothing more than uncorroborated "bare hearsay" prepared for purposes of the litigation.

Trustworthiness: Taped testimony or affidavit from a deceased witness

Tatum v. PACTIV, 2007 WL 2746647 (M.D. Ala): Taped testimony by a deceased witness was found insufficiently trustworthy to qualify as residual hearsay.

> Jackson's statement is an unsworn statement made in anticipation of litigation, which would be offered to prove the truth of the matter asserted. Defendants had no opportunity to cross-examine or speak with Jackson prior to his death, which occurred shortly after the statement was recorded. Jackson's statement relates to events that happened a number of years earlier, creating the potential for faulty memory or fabrication.

See also:

Phillips v. Irvin, 2007 WL 2156402 (S.D. Ala.): In an excessive force case, the plaintiff sought to admit an affidavit from a purported eyewitness, deceased at the time of trial. The court held that the trustworthiness requirement of the residual exception was not satisfied:

> Plaintiff submits no evidence of any kind concerning the circumstances under which Champion Jackson's Affidavit was prepared or signed. The Jackson Affidavit is separated in time from the date of the incident by more than two years. There is no indication in the Jackson Affidavit or in the record generally that Jackson was aware of his potential liability for perjury, the existence of this lawsuit, or the likelihood that his statements would be subjected to cross-examination. To be sure, the Affidavit reflects that it was "sworn to" before a notary public (who is also plaintiff's counsel), whatever that may mean. An oath alone, however, is an inadequate safeguard to meet the requirement of the residual exception that the statement have "equivalent circumstantial guarantees of trustworthiness." Plaintiff's argument that sufficient guarantees of trustworthiness are provided by corroborating evidence is similarly unavailing. To tip the balance in favor of admissibility, corroborating evidence must be extraordinarily strong. Plaintiff has identified no "extraordinarily strong" corroborating evidence for the Jackson Affidavit, but has instead touted the uniqueness of that affidavit among all of the evidence in this case.

Trustworthiness and not more probative: Customer statements

Western Insulation LP v. Moore, 242 Fed. Appx. 112 (4th Cir. 2007): In an action alleging tortious interference, the plantiff sought to prove that it lost out on bids. To do so it offered a report of customer statements on who won these bids and at what price. The court held that the customer's statements were not admissible as residual hearsay, because they failed both the trustworthiness and "more probative" requirement.

> First, there was no indication regarding the trustworthiness of the information the customers allegedly gave to Western's sales representatives. In fact, the customers may

well have had a motive to mislead Western in order to cause Western to submit lower bids in the future. Second, clearly it would have been more probative to produce the testimony of the customers themselves rather than secondhand accounts of the information the customers provided.

Trustworthiness: Letters submitted in an application for a green card

De Venustas v. Venustas, Intl., 2007 WL 2005560 (S.D.N.Y.): In a trademark dispute the plaintiff sought to admit letters that were submitted in an application for a green card for an executive. The court held that the letters were not sufficiently trustworthy to be admissible as residual hearsay:

> The letters may have been written to present Mr. Bradl in a particularly positive light in order to enable Mr. Bradl to secure his residency status, and could even have been prepared by someone other than the signatory. There is nothing about the letters that suggests they were created under circumstances suggesting that they are inherently trustworthy.

Trustworthiness: Near miss of Rule 804(b)(1)

U.S. ex rel. Miller v. Bill Harbert Intern. Const., Inc., 2007 WL 842079 (D.D.C. 2007): This was a civil case involving conspiracy, brought against a corporation and an individual after a corporate official (Anderson) was tried criminally for conspiracy. The plaintiffs sought to admit testimony from the Anderson trial. The court found that the testimony was not admissible under Rule 804(b)(1) because Anderson was not a "predecessor in interest" of the corporation and individual in this case. Anderson's motive was to show that he was not a member of the conspiracy; that differed from the current parties, whose motive was to show that there was not conspiracy at all. The plaintiffs argued that the testimony was admissible under Rule 807 as a "near miss" of Rule 804(b)(1), but the court disagreed. It reasoned as follows:

> Plaintiffs argue that this evidence is such a near-miss that it should fall under Rule 807. But this testimony fails on almost every prong of that Rule. First, Rule 807 can only apply to a "statement not specifically covered by Rule 803 or 804." This Circuit has made clear that this provision is more residual than catchall, meaning that it is meant to pick up the residue of reliable and probative hearsay evidence not otherwise admissible, and is not meant to catch all of the arguably admissible evidence that rightly does not fit within the existing categories. This evidence is clearly meant to be channeled through Rule 804(b)(1), and clearly fails. This is a strong indication that it is not meant to be admitted via Rule 807.
>
> The residual exception next requires that a statement "hav[e] equivalent circumstantial guarantees of trustworthiness." The testimony here does not have

> equivalent guarantees of trustworthiness. Granted, the testimony was taken under oath, is captured in verbatim transcripts, and was presided over by a federal judge-these are all trappings which suggest trustworthiness. But for all of the hearsay exceptions, there is always some factor or factors that make up, at least in part, for the fact that the party against whom the evidence is offered cannot cross-examine the declarant. Former testimony usually must satisfy the requirements of Rule 804(b)(1) so that the loss of the ability to cross-examine is made up for by the fact that when the former testimony was given, the party against whom it is now offered, or someone with very similar interests, had a chance to develop that testimony. The defendants against whom this testimony is offered in this case did not have that opportunity, and no one who did have that opportunity also had the interests of these defendants at heart. Nothing in this testimony makes up for the inability to cross-examine here, and so it cannot be offered [under Rule 807].

Reporter's comment: The court shows concern that too broad an application of Rule 807 will end up eroding the limitations of the standard exception. That approach is in conflict with the broader approach to the same question of admissibility of testimony outside Rule 804(b)(1) employed by a court in the Western District of Michigan in *Stryker Corp. v. XL Ins. America*, 2007 WL 172401 (W.D.Mich.). The point is that the federal courts are not uniform in their approach to the residual exception.

Trustworthiness --- News reporter's repudiated statement

United States v. Libby, 475 F.Supp.2d 73 (D.D.C. 2007): In the Lewis Libby prosecution, the defendant sought to admit the statement of reporter Andrea Mitchell, made on television, that would tend to show that she informed Tim Russert of NBC about Valerie Plame being a CIA agent --- before Libby made that disclosure. Mitchell subsequently recanted, saying she had made a mistake. The court found that Mitchell's first statement was not admissible as residual hearsay, relying heavily on the legislative history --- and case law in the D.C. Circuit --- indicating that the exception is to be narrowly construed. The court declared as follows:

> Mitchell represented to the Court through counsel and stated publicly that she was mistaken when she had spoken these words on the Capitol Report. And * * * this Court's own review of the statement showed that the way it is worded makes it somewhat ambiguous as to when Mitchell was saying she first heard about Ms. Wilson's affiliation with the CIA. The Court simply could not find any indication that this statement had the requisite level of trustworthiness to qualify as an exception to the hearsay rule under this Circuit's construction of the residual hearsay exception. Because the District of Columbia Circuit commands this Court to strictly construe Rule 807 narrowly, and because Mitchell's October 2003 statement lacks sufficient indicia of reliability, admitting this statement under the residual hearsay exception would have perverted the limitation on the admissibility of hearsay statements.

Trustworthiness --- Law firm's account of a meeting

Barry v. Trustees, 467 F.Supp.2d 91 (D.D.C. 2006): In an ERISA action, the plaintiff sought to admit a law firm's account of a meeting in which structuring transactions were discussed. The court found the law firm's report to be an insufficiently trustworthy record of the statements made at the meeting. The court emphasized that the report contained disclaimers that it was not intended to be a verbatim record but rather a summary, and that the topics in the report were not in the same order as they were taken at the meeting. In the course of the discussion, the court made the following points about Rule 807:

> ● The materiality and interest of justice requirements are meaningless because they simply restate Rules 401 and 102 respectively.
>
> ● The residual exception is "extremely narrow and requires testimony to be very important and very reliable" and because "the exception is to be used sparingly, the proponent of the statement bears a heavy burden to come forward with indicia of both trustworthiness and probative force."

Reporter's comment: This is a good example of a strict construction of Rule 807, relying heavily on the legislative history requiring "exceptional circumstances." A law firm's summary of a meeting would seem to be a very reliable account under the circumstances; and the disclaimers sound like little more than legalese.

Trustworthiness: Statement of claimant made in anticipation of litigation

Boyd v. City of Oakland, 485 F.Supp.2d 1015 (N.D. Cal. 2006): In a section 1983 case, the court found that a hearsay statement from the plaintiff to his mother (who was also his lawyer) about what happened in an encounter with the police was not admissible under Rule 807. The court concluded that "Mr. Boyd's statements are self serving (e.g. made in contemplation of litigation, as established above) and lack corroboration."

Trustworthiness: Statement of patient about medical care

Lentz v. United States, 2006 WL 2811252 (W.D. Mo.): In an FTCA case, the question was whether a veteran was told (incorrectly) by a VA nurse that he was suffering from lung cancer; after speaking to the nurse, the veteran committed suicide the next day. The critical evidence was testimony from the veteran's daughter who would state that her father told her that he had been informed of lung cancer by the nurse. The hearsay statement by the father of what the nurse said was offered as residual hearsay, but the court found it insufficiently trustworthy, reasoning as follows:

> The Court does not find that Ms. Baty's testimony regarding the telephone conversation with her father contains the guarantees of trustworthiness commensurate to the other hearsay exceptions. Mr. Lentz was sixty-nine years old at the time, it is possible that he did not hear what the nurse told him or he might have simply misunderstood. Therefore, the Court does not find that this testimony fits into the residual hearsay exception.

Reporter's comment: This is a harsh ruling. Residual hearsay should not be excluded on the court's mere assumption that a 69 year-old man has difficulty hearing and understanding things. This questionable ruling may have been spurred by the court's attempt to find reliability "commensurate with the other exceptions." It wasn't a dying declaration (because he killed himself the next day) and it wasn't a present sense impression (because it was made an hour after he spoke to the nurse). But it was made fairly soon after the event and the veteran certainly had no reason to falsify. This might be the kind of statement that would be covered by a liberalization of the residual exception.

Trustworthiness: Relationship to business records

Brown v. Crown Equipment Corp., 444 F.Supp.2d 59 (D.Me. 2006): On a motion in limine in a product liability action, the plaintiff sought to admit accident reports of other incidents involving the product. The plaintiff invoked Rule 803(6) but the court found that the plaintiff had not yet shown that the records were prepared by a person with knowledge. The plaintiff then argued that Rule 807 applied, but the court held that before that motion could be considered, the plaintiff was required to try to establish admissibility under Rule 803(6):

> Here, where the plaintiff has invoked a subsection of Rule 803 but has not presented sufficient evidence to allow the court to determine whether it applies to each of the proffered reports, the court cannot proceed to consider Rule 807 until a decision has been made that the reports are "not specifically covered by Rule 803," as Rule 807 requires. I doubt in any event that the circumstances of this case present "exceptional circumstances" that would justify application of Rule 807, but at this time I need not reach that issue.

Reporter's Comment: One of the ways to liberalize Rule 807 would be to delete the requirement that a statement not be admissible under another exception. That would avoid what might be seen as a rigid and inefficient ruling such as the court made here.

Trustworthiness: Statement by a possible suspect

United States v. Chase, 451 F.3d 474 (8th Cir. 2006): The defendant was charged with voluntary manslaughter, stemming from a fight between rival groups. He sought to admit the statement from someone who said that she drove her car into the mob. The court found that this was insufficiently reliable to be admitted under Rule 807: "At the time Fast Horse made the

statement, she was a suspect in an assault case as the result of her use of an automobile to run down an individual of the rival group, and thus she had motive to implicate others and downplay her role in the incident."

Trustworthiness: Gesture by an impaired declarant

United States v. Two Shields, 435 F.Supp.2d 973 (N.D. 2006): A victim of assault was hospitalized and could not speak, but shook his head when asked if the defendant was the perpetrator. Previously the victim indicated that he couldn't remember anything about the assault. The court found that testimony about the head-shake failed the trustworthiness requirement of the residual exception:

> BuffaloBoy's physical and mental health at the time of the statement is seriously in question. The Court finds that his blood alcohol concentration, coupled with his severe head injury, calls into serious question the veracity of the non-verbal statement. BuffaloBoy was unable to recall even his own age. To that end, Dr. Roller indicated that Thomas BuffaloBoy was incoherent and unintelligible. Further, BuffaloBoy's statement to Kathleen BuffaloBoy directly contradicts previous verbal statements he had made to family members and medical professionals. Finally, BuffaloBoy's statement is merely a head gesture. By their very nature, head gestures are far less clear than verbal or hand written responses. A head gesture is susceptible to multiple interpretations or misinterpretations.

Trustworthiness: Letter recounting disputed events

Metropolitan Enterprise Corp v. United Technologies, Int'l, 2006 WL 798870 (D.Conn.): A letter recounting disputed events was excluded:

> The letter was not prepared contemporaneously with the events in question. It was prepared at least in part by a party, David Liu, who has an interest in the outcome of this case. The author of the letter was not under oath and will not be available for cross examination. The testimony of CAL's Charles Peng that the contents of Wei's letter were "not 100 percent correct" because there were other reasons besides price that entered into CAL's decision in awarding the contract, indicates that cross examination of the author as to the accuracy of his letter is important in weighing and considering the significance of this letter, and underscores the precise purpose of hearsay exclusions. The residual hearsay exception is to be "used very rarely, and only in exceptional circumstances." *Id.* (citation omitted). The Wei letter is not "exceptional" in any way; it is an ordinary piece of correspondence that does not meet any of the exceptions to the hearsay rule.

II. MORE PROBATIVE

Not more probative: Other witness statements available

Flournoy v. City of Chicago, 829 F.3d 869 (7th Cir. 2016): The plaintiff alleged that officers used excessive force in executing a search warrant. Among other things, he contended that two flashbang devices were deployed. As proof on this point, the plaintiffs offered a handwritten notation found on one of the copies of an officer's typed report: the notation was that two flashbangs deployed. The court found that this notation was properly found not admissible under the residual exception. The court stated that the notation was not more probative than other evidence reasonably available, because "Flournoy's two sons and the remaining occupant of the apartment all testified that they heard multiple explosions during the search."

Reporter's comment: The analysis shows the fallacy of the "more probative" requirement. It seems clear that the notation would have been quite useful to the plaintiff because it corroborated the testimony of witnesses who the jury may have found biased. Even if the witness statements were equally probative (which is arguable) the point was that the notation *added* to the probative value of those statements. The plaintiff should not have to choose among sources of evidence when the whole of the evidentiary presentation is greater than the sum of its parts.

Not more probative: Other witness statements available

Draper v. Rosario, 836 F.3d 1072 (9th Cir. 2016): A prisoner alleged that he had been beaten up by a prison guard. A witness to the event refused to testify because he feared reprisal. Counsel moved for the witness's prior sworn statement to be admitted under the residual exception. The court of appeals found no error in its exclusion. It concluded that the district court did not err in concluding that the witness's statement was not more probative than the testimony that would be provided by two other prisoners. The court explained as follows:

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

Reporter's comment: The more probative requirement is hard enough to satisfy as written. The court would not appear to be justified in requiring that a proponent show that the hearsay is *significantly* more probative than other reasonably available evidence. Here, where the hearsay statement is more detailed and apparently from a different prospective than the other statements, it should be found to satisfy the more probative requirement.

Not more probative: Other hearsay statements of the declarant available

Ponzini v. Monroe County, 2016 WL 4494173 (M.D. Pa.): A prisoner died in prison and a disputed issue was whether he committed suicide. The defendant offered testimony from a guard that the prisoner told the guard that he was going to buy him a pizza. The court held that this testimony could not be admitted under Rule 807, because it was not more probative than any other evidence that could be offered to prove the prisoner's mental state. The court noted that "Defendants point to numerous statements made by Mr. Barbaros to medical professionals while he was incarcerated in an attempt to demonstrate that he gave no indication that he was suicidal. These statements, made to nurses and mental health professionals, are far more probative of Mr. Barbaros' state of mind than the statement at issue."

Reporter's comment: This is arguably a sound application of the more probative requirement, because the comparison is between the hearsay and other statements from the declarant. It is contrasted to a general "best evidence" search over all the evidence that could be produced in the case. An amendment to Rule 807, discussed in the Reporter's memo, would limit the more probative requirement to a comparison with other statements from the declarant.

Not more probative --- statement of a former employee where a statement of a current employee is found admissible

Nationwide Agribusiness Ins. Co. v. Meller Poultry Equipment, Inc., 2016 WL 2593935 (E.D. Wisc.): An employee fell from a catwalk. Two employees made hearsay statements that the employer, Meller, had weakened the steel on the catwalk. One of the employees, Kreyer, made his statement while still employed so it was admissible against Meller under Rule 801(d)(2)(D). The other was made by a former employee, Schmidt --- so not admissible under Rule 801(d)(2)(D) --- and the plaintiff offered it under Rule 807. But the court excluded the statement, reasoning that "Schmidt's statements about steel quality are not more probative than Kreyer's statements about the same subject. Therefore, Schmidt's hearsay statements are not admissible under Rule 807."

Reporter's comment: This is an unfortunate result of the existing "more probative" test. The hearsay statement from one declarant is inadmissible simply because the hearsay statement of another is found admissible. Surely it is appropriate to try to admit statements from multiple declarants, in the same way as it is appropriate to call more than one eyewitness to an event. The limits on cumulative testimony imposed by Rule 403 are sufficient to protect against overkill. The "more probative" requirement is more rigid. It says "you don't need the hearsay statement if you have another statement from anyone else." But that seems cold comfort to anyone trying a case.

Note that if Schmidt had been employed when he made the statements, they would have been admissible along with Kreyer's statements, as there was no argument that Schmidt's statements were cumulative under Rule 403. If that is so, why should the statements be excluded when offered under Rule 807, assuming that they satisfy the rigorous standard of trustworthiness? A Rule 801(d)(2) statement is admitted without any trustworthiness review; it seems to compare unfavorably with a trustworthy statement offered under Rule 807, but it gets better treatment because of the "more probative" language of Rule 807.

Not more probative – Material Safety Data Sheet

In re C.R. Bard, Inc., MDL. No. 2187, Pelvic Repair System Products Liability Litig., 810 F.3d 913 (4th Cir. 2016): In a product liability action, the district court admitted assertions in a material safety data sheet (MSDS) as proof that polypropylene was potentially dangerous for human implantation. The court noted that an MSDS is "a warning and disclaimer of liability for the self-interested issuing party." The court of appeals held that the trial court erred in admitting the MSDS as proof of dangerousness. It did not analyze trustworthiness, although it is clear from the opinion that if it had, it would have found the MSDS inadmissible. Instead, the court relied solely on its conclusion that the MSDS was not more probative than any other evidence reasonably available:

> The relative dangers of polypropylene in pellet and monofilament form was an issue that received substantial attention from both parties' experts who themselves relied on studies, reports, empirical evidence, and tissue sample slides evidencing Ms. Cisson's particular pathology. The warning in the MSDS, on the other hand, was nothing more than an assertion made by the self-interested manufacturer of polypropylene that the product should not be implanted in humans. The MSDS made no attempt to explain why polypropylene might be dangerous or how Phillips had come to this conclusion. Because there was ample other evidence available to address polypropylene's viability as a material for surgical implants, we find that the district court abused its discretion in finding, again sua sponte, that the MSDS could come in for its truth under Rule 807.

Reporter's comment: Comparing the proffered hearsay with other evidence in the case is fraught with peril; simply because other evidence in the case might prove the point does not mean that the proffered hearsay would be useless. Litigants have every reason to add multiple sources of evidence to prove a point, as the whole can be greater than the sum of its parts. What this court is really saying is that the MSDS was not *reliable*, especially in comparison to the adversarially-tested information presented in the case. Unreliability is a reason on its own to exclude the MSDS, and it seems to be the more straightforward analysis. Put another way, you don't need a "more probative" requirement to exclude the questionable hearsay in this case.

Not more probative --- deceased person's statement could have been proven by testimony from others affected by the statement

Nance v. Ingram, 2015 WL 5719590 (E.D.N.C.): In a case alleging that a sheriff interfered with the plaintiffs' business after the plaintiffs' contributed to the sheriff's opponent in a campaign, the plaintiffs' offered a hearsay statement from an official (now deceased) who attended a department meeting and told one of the plaintiffs about a directive issued by the sheriff that would harm their business. The court held that the hearsay statement was not admissible under Rule 807, because "there are a number of other witnesses from whom plaintiffs could obtain similar evidence with reasonable efforts. For example, plaintiffs could have deposed or sought affidavits from other attendees of the BCSO department meeting or from any one of the former patients who allegedly left plaintiffs' healthcare practice due to defendant Ingram's directive. Instead, plaintiffs have relied upon a statement from a person who is now deceased in order to introduce evidence of a statement which defendant Ingram denies making."

Reporter's comment: One of the problems with the "more probative" requirement is that a court can almost always find some other source of evidence that can plausibly be found and used to prove the point. Here the court hypothesizes, that people *affected* by the directive, not only people who heard the statement, would be an alternative source of the evidence.

Not more probative --- Expert's reports

United States v. Lasley, 2014 WL 6775539 (N.D.Iowa): In an in limine proceeding in a murder prosecution, the defendant argued that his experts' reports should be admitted for their truth at trial. The defendant argued that they were admissible under Rule 807, but the court disagreed, stating that "Defendant's experts are available and intend to testify at trial. Therefore, the reports are not more probative on the point for which they are offered than any other evidence that the proponent can obtain through reasonable efforts. That is, the experts' testimony itself is more probative on the point for which such experts' reports are offered."

See also:

N5 Technologies LLC v. Capitol One, 56 F.Supp.3d 755 (E.D.Va. 2014): In a patent action, the plaintiff sought to admit an expert report prepared in another litigation under Rule 807. The court found the report inadmissible, because "plaintiff, through reasonable efforts, could have retained its own expert and presented testimony on the doctrine of equivalents, but chose not to do so. Plaintiff must now live with the consequences of this choice and may not escape those consequences by seeking to admit defendants' expert report into evidence via * * * Rule 807."

Not more probative --- newspaper articles

Planned Parenthood Southeast v. Strange, 33 F.Supp.3d 1381 (M.D. Ala.2014): In a case challenging abortion regulations, the plaintiffs offered newspaper reports describing

legislative activities. The court held that the newspaper reports were not more probative than any other evidence reasonably available. The court explained as follows:

> In this case, the plaintiffs argued that the court should admit the newspaper articles under Rule 807 in light of the absence of official legislative history. However, even if the articles in question satisfy the requirement of trustworthiness and even if admitting them would serve the interests of justice, the articles would not be admissible because the plaintiffs could have introduced other, equally probative evidence of the reported statements: They could have called the legislators themselves and examined them as to their statements; and, alternatively, they could have elicited testimony from the reporters or other witnesses who observed the statements reflected in the newspaper articles. *See Larez v. City of Los Angeles*, 946 F.2d 630, 641–44 (9th Cir.1991). By attempting to introduce the articles instead, the plaintiffs denied the State the opportunity to cross-examine the observers as to the accuracy of the alleged statements. The plaintiffs did not show that they made reasonable efforts to obtain such testimony or that it would have been futile to do so.

For other cases finding newspaper articles inadmissible because not more probative, see

Adams v. County of Erie, Pa., 2011 WL 4574784 (W.D.Pa.): The plaintiff contended that he was fired from a public job for political reasons. The court held that newspaper articles regarding Erie County Politics were not admissible under Rule 807. The court stated that "no showing has been made, and the Court does not find, that the newspaper articles in question are the best evidence that could be procured through reasonable efforts."

Irvin v. Southern Snow Mfg., Inc., 2011 WL 4833047 (D.Miss.) (newspaper article not admissible under Rule 807 because there was "no evidence that this is truly an exceptional case requiring the article to be admitted.").

Not more probative --- testimony from a prior trial

United States v. Turner, 561 Fed. Appx. 312 (5th Cir. 2014): The defendant was tried after a mistrial, and he sought to admit some testimony that a government witness gave at the original trial. The defendant made no attempt to determine whether the witness was available. The court held that the testimony was properly excluded because it was not as probative as testimony by the witness at the current trial would be. The court explained as follows:

> Although Rule 807 does not contain an explicit requirement that the declarant be unavailable, it still requires the proponent of the hearsay to undertake reasonable efforts to get better evidence, and Rule 807(a) only applies if another exception does not. Here, Turner has not pointed to any reasonable efforts to obtain Ubani's live testimony. Indeed, Turner's counsel argued that because she was relying on the residual exception only, there was no need to even determine whether Ubani was available. That contradicts both the letter and spirit of the residual exception, which is intended to be a last resort. * * *

Turner cannot rely on Rule 807's residual exception to do an end run around Rule 804(b)(1)'s requirement that the witness be unavailable, particularly where she has made no attempt to show that Ubani is unavailable.

Not more probative: Statement about an accident

Rosenbaum v. Freight, Lime and Sand Hauling, Inc., 2013 WL 785481 (N.D. Ind.): Grecco was stopped at a light when he was rear ended by a truck. The dispute was over whether a truck behind that truck was responsible for the accident. Grecco made a taped statement to a representative of the defendant, and the defendant sought to admit it as residual hearsay. The court found that the statement was trustworthy, because Grecco was an innocent party with no motive to falsify; also, he stated that he knew he was being recorded and that his statement could be used at trial. But the court found that Grecco's statement was inadmissible under Rule 807 because it was not more probative than other evidence available. That was because the drivers of the two trucks were in a better position than Grecco to see what happened, because Grecco was hit from behind.

The court also reviewed the interests of justice requirement and noted that while Grecco was dead by the time of trial, the defendant had ample time to depose him and never took the opportunity --- even though the defendant knew the value of Grecco's testimony because it had taken his statement. The court stated that under the interest of justice requirement, "a trial court is not required to remedy the deficiencies of a party's trial preparation when considering the admissibility of hearsay."

Reporter's comment: This case shows the problem with the more probative requirement. The court is holding that the testimony from the two drivers involved is more probative than Grecco's, because they saw the accident directly and he did not. But in fact Grecco's testimony is sure to be important and even necessary, because the two drivers involved in the accident will likely have conflicting accounts. The more probative requirement could be more usefully and predictably applied if the hearsay were compared only to other evidence available from the *declarant* --- as opposed to a comparison with all other evidence in the case.

Not more probative --- prisoner's statement where statements could be generated from other sources

Haynes v. White County, Ark., 2012 WL 460263 (D.Ark.): The plaintiff claimed that a prison was deliberately indifferent to her husband's medical needs, and that he died as a result.

To prove that he hadn't been treated, the plaintiff offered the grievances that the decedent filed with the prison, which indicated that he had not been seen by a doctor. The court held that these filed grievances were not admissible under Rule 807, for two reasons.

> First, they were insufficiently trustworthy because they were biased. Second, they failed the more probative test because "[a]lthough Haynes obviously is unavailable to testify, the plaintiff could through reasonable efforts obtain testimony on the issue of whether Dr. Killough came to the jail from other inmates or from Dr. Killough himself."

Reporter's comment: It goes without saying that any possible testimony from the doctor should not be considered under the "more probative" test. If that were so, the hearsay proffered by a party would never qualify under Rule 807 because the party could just call the adversary for their opinion on the subject.

Not more probative: Testimony reasonably available through letters rogatory

Madison Inv. Trust v. Bank of N.Y. Mellon, 2010 WL 1529436 (D.Colo.): A hearsay statement made by a witness in a foreign country was found inadmissible under Rule 807 because the proponent made no attempt to obtain testimony from the witness pursuant to letters rogatory.

Reporter's comment: The court implicitly made the findings that: 1) Use of a letters rogatory procedure is within the scope of "reasonable efforts" that a proponent must try under Rule 807; and 2) the testimony obtained by letters rogatory from the witness would be at least as probative as the witness's hearsay statement. Query whether either of those findings are sound. The letters rogatory procedure is cumbersome and lengthy. More importantly, the letters rogatory procedure calls for answers to interrogatories --- why would that be any better evidence that an informal statement made closer in time to the event?

Not more probative: Witness statement of a declarant available to testify

United States v. Wilkerson, 656 F.Supp.2d 22 (D.D.C. 2009): A witness to a crime made inconsistent statements to police. The defendant wanted to admit the one that favored his position. The court held that the statement was not admissible as residual hearsay, because the witness was available "since live testimony by Carthens himself was readily available and clearly more probative than his recorded statements."

Reporter's comment: If the defendant knows that the witness's testimony would not be as favorable to his position as a prior statement, it seems harsh to rule that the testimony is "more

probative" than the statement. It would seem that the "more probative" requirement should be assessed by whether the testimony would advance the proponent's case as much as the hearsay would.

Not more probative: State bar determination

Auguste v. Sullivan, 2009 WL 807446 (D.Colo.): In a suit against a prosecutor claiming damages from an illegal search, the plaintiff sought to admit a report of a state bar disciplinary proceeding, imposing discipline on the prosecutor for his conduct in the challenged search. The court found that the report could not be admitted under Rule 807, because the plaintiff had not shown that it was more probative than any other evidence reasonably available:

> Plaintiff has made no showing that she cannot present witnesses and exhibits to substantiate her case without relying on the Bar Court Decision. There is no reason effectively to preempt the duties of the jury in this case to resolve factual disputes by introducing as evidence the findings of a judge in the California disciplinary proceeding.

Reporter's comment: This is an exceedingly harsh application of the more probative requirement. That requirement cannot mean that inefficiency is mandated. As stated throughout, the more probative requirement should be limited to a comparison with other evidence available from the declarant, not to all the other evidence that might be found in the case.

Not more probative: Must seek motion to compel

Tele Atlas NV v. NAVTEQ Corp., 2008 WL 4809441 (N.D.Cal.): In a summary judgment motion, an employee of the plaintiff averred that employees of third parties had told him something (redacted in the opinion) about the defendant. The plaintiffs argued that these statements should be considered under Rule 807, because the plaintiffs were being "thwarted" in obtaining the testimony from the third party in discovery. The court sympathized with the argument, but ultimately held that the hearsay was not more probative than obtaining testimony from the declarants by seeking a motion to compel:

> The court sympathizes with the difficult decision of whether to file a motion to compel against a firm that one wishes to secure as a customer. A motion to compel is easily filed from a legal perspective. However, from a business perspective focused on satisfying customers, winning their business, and keeping them happy, the notion of filing a motion to compel a potential customer to provide additional discovery understandably raises concern. * * * Nevertheless, Tele Atlas has the legal tools to obtain the evidence it believes it needs. Tele Atlas has chosen to forgo those tools to not risk alienating Garmin and losing Garmin's business. The choice to further Tele Atlas' business interests cannot in turn be used to justify admitting hearsay statements against NAVTEQ under Rule 807 and prejudicing NAVTEQ.

Not more probative: Plea agreements of available witnesses

United States v. Hawley, 562 F.Supp.2d 1017 (N.D. Iowa 2008): The court held that plea agreements were not admissible under Rule 807 where the witnesses were available to testify. The government argument that the plea agreements would be "more persuasive" than the in-court testimony but the court was not convinced that this would be the case, nor that "more persuasive" was the same as "more probative." In a subsequent opinion, at 2011 WL 10483390, the court also held that a taped statement about a matter four years after the event, as well as grand jury testimony, were insufficiently trustworthy to be admissible under Rule 807.

Not more probative: Prior testimony of available witnesses

United States v. Peterson, 2008 WL 627418 (D.N.Dak.): The government sought to admit two witness transcripts of testimony from a prior, related trial. The witnesses were available but the government argued that admitting the transcripts would "streamline" the trial, and that the government did not wish to go to the expense of producing the witnesses. The government argued that the transcripts were admissible under Rule 807, but the court disagreed, stating that the transcripts were not more probative than testimony from the available witnesses.

Not more probative: Witness statements with no attempt to produce the witness or obtain an affidavit

Taylor v. N.E. Ill. Regional Commuter RR Corp., 2008 WL 244303 (N.D. Ill.): In a FELA action, the plaintiff sought to admit written statements that she had obtained from witnesses to her injury. The court found that these statements could not be admitted as residual hearsay:

> Here, none of the statements were taken under oath and plaintiff has failed to demonstrate how the statements are trustworthy or reliable at all. Moreover, under Rule 807 the statements must be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." Plaintiff has failed to show that these witnesses are unavailable to testify at trial. This Court cannot conclude that unverified statements are more probative than live witnesses who could be cross-examined and assessed for credibility. Even if one of the witnesses is retired and unavailable to testify at trial as plaintiff suggests, plaintiff still could have attempted to secure an affidavit from that witness. An affidavit would at least provide sworn testimony. Plaintiff failed to explain any reasonable efforts undertaken to procure an affidavit or to arrange for the available witnesses to testify at trial.

Not more probative: Statements to counsel where other statements have been made

United States v. Awer, 502 F.Supp.2d 273 (D.R.I. 2007): In a drug case, the defendant sought to admit a written statement by Johnson that the drugs were hers and not the defendant's. The court found the written statement admissible under Rule 804(b)(3). Johnson also made oral statements to attorneys to the same effect. These were held not admissible under Rule 804(b)(3) because they were confidential and so there was no risk of incrimination. The defendant moved to have the statements to attorneys admitted under Rule 807, but the court found the statements were not "more probative" of other reasonably available evidence: "because Ms. Johnson's written statement, the best evidence of her assertions, is admissible."

Reporter comment: The defendant has a good argument that the statements to the lawyer would be useful even though the written statement was admitted. The statements to the lawyers were made under circumstantial guarantees that were different, and probably stronger, than the written statement. This shows the difficulty of applying the "more probative" requirement. If trustworthy hearsay has circumstantial guarantees that are different from evidence already admitted, it should be admissible under the residual exception (as it would be if it qualified under a standard exception).

Note: The district court's opinion was affirmed in *United States v. Awer*, 770 F.3d 83 (1st Cir. 2014) ("Because reasonable minds can disagree on whether the attorneys' testimony was vital, the district court's position—that the testimony was not more probative than Johnson's written statements—cannot be an abuse of discretion, especially when Rule 807 is "to be used very rarely" and only in "exceptional circumstances.").

Not more probative: Deposition of a declarant not shown to be unavailable

Bouygues Telecom, S.A. v. Tekelec, 473 F.Supp.2d 692 (E.D.N.C. 2007): Deposition testimony was not admissible under Rule 807 because there was no showing that the deponents would be unavailable for trial and therefore the proponent had failed to show that the deposition testimony was more probative than any other testimony reasonably available.

Reporter's comment: This is a sound application of the necessity requirement --- the comparable is to evidence that could be obtained from the declarant, as opposed to any other source, so it is easily applied. Moreover, the residual exception should not be used as a device that would simply substitute deposition testimony for producing an available witness for trial.

Not more probative: Patient's statement of health where medical records are available

Morris v. Crete Carrier Corp., 2006 WL 6929730 (W.D. Okla.): An accident victim spoke to his wife about his health issues. The statements from husband to wife were offered under the residual exception, but the court found that the statements were not more probative than any other evidence on the point: "medical records provide the most probative evidence on this point."

Reporter's comment: The case shows the problem of a "more probative" requirement that requires consideration of evidence coming from other than the declarant. Who is to say that the medical records are better evidence than the victim's own statement of how he feels? And assuming reliability, why does it make sense to exclude one piece of evidence simply because you have the other?

Not more probative: Summary of a prior statement of an available declarant

United States v. Sparkman, 235 F.R.D. 454 (E.D.Mo. 2006): The defendant sought to offer a police officer's summary of a prior statement of a government witness. The court found it not admissible under Rule 807 as it was not more probative than the testimony of that government witness.

III. Interests of Justice

Interests of Justice: Foreign bank records

Lakah v. UBS AG, 996 F.Supp.2d 250 (S.D.N.Y. 2014): The court held that foreign bank records were not admissible under Rule 807. The proponents could not qualify the records under Rule 803(6) because they could not obtain a foundation witness or a certificate. The court held that it would be against "the interests of justice" for the court to use the residual exception to "end-run" the foundation requirements of Rule 803(6).

Reporter's comment: Here we see the interests of justice language being used as a means to explain an exclusion without the court having to resort to an actual investigation of whether the hearsay is trustworthy. This led the court to a different result than other courts that have admitted foreign bank records under Rule 807. *See* United States v. Turner, 718 F.3d 226 (3rd Cir. 2013), and Chevron Corp. v. Donziger, 974 F.Supp.2d 362 (S.D.N.Y. 2014), discussed in the digest on hearsay found admissible under Rule 807.

Interests of justice and Not more probative: Summary judgment affidavit

Ragin v. Newburgh Enlarged City School Dist., 2011 WL 2183175 (S.D.N.Y.): The court held that an affidavit previously prepared for a summary judgment motion was not

admissible under Rule 807, largely because it was not more probative than any other evidence reasonably available. The court elaborated as follows:

> The Saturnelli Affidavit addresses Saturnelli's recommendation to the Board that Ragin's employment be terminated and her subjective reasons for making this recommendation; it is certainly "offered as evidence of a material fact." It is not, however, more probative than other evidence Defendants could have procured through reasonable efforts. All of the facts contained in the affidavit can be established by the introduction of business records, Saturnelli's January 2007 deposition, or the testimony of other witnesses. Defendants could have elicited the testimony contained in the Saturnelli Affidavit by asking additional questions during her January 2007 deposition or by conducting an additional deposition at some time prior to December 2010, but they failed to take either course of action.

The court also had an unusual interpretation of the interests of justice requirement. It stated that "the general purposes of the Federal Rules of Evidence and the interests of justice will not be best served by admission of the Saturnelli Affidavit, because the application of the residual exception in this case would abrogate the requirement in Rule 804(b) (1) that a party against whom prior sworn testimony is offered must have had an opportunity for cross-examination."

Reporter's comment: The interests of justice can be criticized for being nothing but a duplication of Rule 102. But another criticism might be that it can be an empty vessel for the court to fill with its own discretion. In this case, the court refuses to apply the residual exception because it would not be "just" to do so as it would undermine the limitations of Rule 804(b)(1). But many other courts have allowed sworn but uncross-examined statements to be admissible under Rule 807. Interests of justice should not be an excuse for judge-dependent predilections either opposed to or in favor of a residual exception.

TAB 2C

Case Digest: Hearsay Proffered Under Rule 807 Found Admissible 2006-Present

By Daniel J. Capra

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

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

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

I. TRUSTWORTHINESS

Trustworthiness and More Probative: Material prepared during an underlying litigation

Pacific Employers Insurance Company v. Troy Belting & Supply Company, 2016 WL 5477758 (N.D.N.Y): This case involved secondary coverage for asbestos liability. A major dispute was over the time at which a triggering event occurred. To prove this point, the insurers submitted materials from the underlying asbestos actions, including depositions as well as case summaries prepared by counsel. The court found that the materials were sufficiently trustworthy, and specifically found the more probative requirement to be met. Its analysis was as follows:

> The Court agrees with the insurers that the evidence in question is admissible under the residual exception in Rule 807. First, there are circumstantial guarantees of trustworthiness in the statements. All were made in the context of litigation. The deposition testimony was given under oath, and the case summaries were prepared for the purposes of settlement, and were thus prepared based on the speakers' best assessment of the persuasive power of the evidence. While one piece of this evidence consists of attorneys' arguments at trial, which in general do not constitute evidence, the factual statements in such arguments do have some likelihood of truthfulness. The Court can find them admissible and still give them the value they possess. Second, the statements concerning date of first exposure address a fact material to the instant litigation; without such dates, the scope of the parties' coverage responsibilities cannot be determined.

Third, and most important, this evidence is the most probative on this issue which can be obtained through reasonable efforts. To require the parties to engage in more than a dozen mini trials to produce what would likely be the exact same evidence would not be an efficient use of the parties' resources or the Court's time. Fourth, the interests of justice will be served by accepting the evidence, as that evidence is the best way to answer the central questions in this case. The Court will therefore exercise its discretion and admit the evidence.

Trustworthiness: Probationer's report to probation officer

United States v. Moore, 824 F.3d 620 (7th Cir. 2016): The defendant was charged with selling a firearm to a felon and falsely reporting that it was stolen. The felon had provided a phone number to his probation officer in a written supervision report, and evidence indicated that the defendant called that phone number on a number of occasions. The calls to the felon would implicate the defendant in the sale of the firearm and rebut the argument that it was stolen. The trial court excluded testimony from the probation officer that the felon had provided him that phone number. But on interlocutory appeal, the court found that the trial court erred and the hearsay statement of the felon about his number should have been admitted as residual hearsay. The only disputed factor was trustworthiness. The district court had focused almost exclusively on the fact that the felon was not under oath when he filled out the supervision form. But the court of appeals found that focus to be too narrow. The court analyzed other trustworthiness factors as follows:

> [T]he most important factor here is Hayden's motivation—or lack thereof—to lie about his phone number. The district court concluded that Hayden's criminal history casts doubt on his motivation to tell the truth. Hayden's apparent willingness to break the law does not explain why he would lie in this instance, however. When Hayden identified his phone number as (___) ___-9312, he knew not only that he could be punished for lying but that probation officers would use that number to contact him. He knew that they would call him because they had done so with a number he had previously reported. Furthermore, at the time he gave his probation officer the 9312 number, Hayden had no reason to believe that his phone number would be integral in the criminal prosecution of another man. In short, he had no obvious reason to lie.

The court also found substantial corroboration:

> Most notably, we know that [Hayden] confessed to smoking marijuana in his February 2012 report and that he accurately conveyed a change in his contact information in the report filed on March 22, 2012. In the latter report, he listed a new phone number, the 6466 number, which a Deputy United States Marshal did use to contact him. And the 6466 number is also corroborative in another respect: Moore's phone was in frequent contact with the 9312 number throughout the first few months of 2012. But that correspondence ended abruptly on March 7, 2012. Hours later, Moore's phone commenced an equally prolific exchange with the 6466 number, a powerful indication that the person who owned that number was previously using the 9312 number.

The court closed with a general statement about applying the residual exception:

> We have warned against the liberal admission of evidence under Rule 807, see *Akrabawi v. Carnes Co*., 152 F.3d 688, 697 (7th Cir. 1998) (cautioning against the frequent utilization of Rule 807, lest the residual exception become "the exception that swallows the hearsay rule"), but in the circumstances of this case, the exception is particularly apt. Hayden's statements in the Reports bear markers of reliability that are equivalent to those found in statements specifically covered by Rule 803 or Rule 804. The purpose of Rule 807 is to make sure that reliable, material hearsay evidence is admitted, regardless of whether it fits neatly into one of the exceptions enumerated in the Rules of Evidence. That purpose is served by admitting the Reports, and the district court erred in excluding them from Moore's trial.

Reporter's comment: The court's permissive approach to the residual exception might possibly be related to the fact that Judge Posner was on the panel. As the Committee knows, Judge Posner is in favor of a broad use of the residual exception as a substitute for reliance on some of the more questionable standard exceptions.

Trustworthiness: Detailed statement made to an insurance investigator

Thompson v. Property and Casualty Ins. Co. of Hartford, 2015 WL 9009964 (D.Ariz.): In a dispute over insurance coverage, a factual dispute was whether the plaintiff had purchased one or two chandeliers from Elek. To prove that only one was purchased, the defendant offered a statement that Elek made to the defendant's insurance investigator. Elek gave a detailed statement that when the plaintiff made his purchase he had two chandeliers in stock, the plaintiff had only purchased one, and that at the time of his statement he still had the other in storage because he couldn't sell it. (Elek died before trial.) The court held that Elek's statement to the investigator was sufficiently trustworthy to be admissible as residual hearsay. The court cited *United States v. Valdez-Soto*, 31 F.3d 1467, 1471 (9th Cir. 1994) as "rebuffing the argument that the hearsay exception must be interpreted narrowly" and provided the following analysis of Elek's statement:

> The statements were not made under oath and subject to the penalty of perjury nor were they recorded in any way which would allow the judge an opportunity to view [Elek's] demeanor. These circumstances cut against a finding of trustworthiness. But the declarant's perception, memory, narration, and sincerity concerning the matter asserted support a finding of equivalent trustworthiness. The interview transcript establishes that Mr. Elek understood Detective Peters' questions clearly and recalled the details of the transaction with ease and clarity, noting that the chandeliers he kept at Rose Jewelers were both expensive and "pretty special item[s]." Importantly, Mr. Elek was certain as to the number of chandeliers that he sold Plaintiff. He noted that Plaintiff "was a fine gentleman," who most likely "paid in cash," and unequivocally stated that Plaintiff

> bought "only one" chandelier. Mr. Elek further supported his claim with current, detailed information, telling Detective Peters that he still owned the second chandelier, and that it was currently in storage at his ex-wife's residence. Mr. Elek's statements were detailed, specific, clear, and they directly contradicted Plaintiff's attestation. Moreover, the statements were made "voluntarily based on facts within [his] personal knowledge." *United States v. Leal-Del Carmen*, 697 F.3d 964, 974 (9th Cir. 2012). Finally, the record contains absolutely no evidence that Mr. Elek had motive to lie about the chandelier transaction or his business relationship with Plaintiff. See also *United States v. George*, 960 F.2d 97, 100 (9th Cir. 1992) (concluding that a declarant's statement had "particularized guarantees of trustworthiness" primarily because "there was no motive for the victim to lie"). For these reasons, the Court finds that Mr. Elek's statements—although not made under oath or subject to perjury—possess the "particularized guarantees of trustworthiness" necessary for their admission.

The court also found that admitting the statement was consistent with the interests of justice, essentially because Elek was unavailable and the statement was more probative than any other evidence reasonably available. Thus the interest of justice requirement was superfluous as it was met by another admissibility requirement in the rule.

Reporter's comment: You can see where a Rule 807 opinion is going by the way it starts out. If the court begins with reciting the "rare and exceptional" language from the legislative history, the evidence is very probably going to be excluded. If the court cites a case like *Valdez-Soto*, the evidence is very probably going to be admitted. There are thus two strains of authority that can be relied upon, giving rise to relatively unconstrained judicial discretion in applying (or not applying) the residual exception. It is probably better *either* to have a narrow or a broad residual exception, than it is to have an exception that can be applied either narrowly or broadly depending on the predilection of the court.

Trustworthiness --- Emails written by army officers in response to an official investigation

Brokaw v. Boeing Co., 137 F.Supp.3d 1082 (N.D. Ill. 2015): In an action seeking damages after the crash of a military plane in Afghanistan, the defendants sought to exclude emails sent from two army officers to the NTSB, the public agency investigating the plane crash. The emails reported what the officers knew about the accident. The court held that any hearsay concern was covered by Rule 807, because the emails were supported by circumstantial guarantees of trustworthiness. The court explained as follows:

> The emails were written under highly reliable circumstances, as they were prepared in response to the formal request of an NTSB investigator by members of the military, who responded directly through their military chain of command. The authors attest under oath that the statements made in their emails are true and accurate. In

addition to the usual penalties for perjury, the authors of the emails are subject to military court martial for knowingly making a false statement under oath. Under these circumstances, the Court finds the emails sufficiently reliable * * *.

Trustworthiness: Rap Video

United States v. Norwood, 2015 WL 2250481 (E.D.Mich.); The court found that a rap video made by the defendant's coconspirator, in which the coconspirator threated snitches, was admissible under Rule 801(d)(2)(E). In the alternative, the court found the video admissible under Rule 807. The court explained as follows:

> Here, the videos were recorded, and there is no dispute that it was Gills who wrote the songs, videotaped himself rapping them, and placed them online. The videos also are offered as evidence of a material fact: that members of the conspiracy furthered their exclusive territory by seeking to evade law enforcement and impeding attempts to stop the conspiracy by intimidating those who "snitched." Similarly, the fact that Gills wrote songs about threatening witnesses and posted them online is more probative than any other evidence the Government can obtain through reasonable efforts, because it is direct evidence of a member of the conspiracy making these explicit threats. Lastly, admitting the videos serves the purposes of the rules and the interests of justice, particularly given that Gills testified during trial—including about the songs—and was thus available for cross-examination by both the Government and his co-Defendants.

Reporter's comment: The trustworthiness analysis is thin here --- the mere fact of recording doesn't make a statement reliable, as seen most obviously in election year debates. Moreover, the "more probative" analysis could be challenged, because the declarant testified at trial --- though it could be argued that the context of the rap video could not be replicated by in-court testimony about the rap video.

Trustworthiness: Industrial Catalogs

Dunlap v. Liberty Natural Products, Inc., 2015 WL 1778477 (D.Ore.): In a disability discrimination action, the court admitted catalogs published in the industry that showed accommodation devices that could be purchased to assist disabled persons in doing their job. The court found that the catalogs were sufficiently trustworthy to be admissible as residual hearsay, because "the catalogs were generally published in the industry" and "were not created for the purposes of litigation."

Trustworthiness and More Probative: Consumer complaints

F.T.C. v. Magazine Solutions, Inc., 2009 WL 690613 (W.D.Pa.): The court found that multiple consumer complaints received by the FTC were admissible under Rule 807:

> I agree with the FTC that the consumer complaints have sufficient guarantees of trustworthiness to permit admission under Rule 807. The declarants are known and named. The relevant statements contained therein were made based upon personal knowledge. Further, though the statements were not made under oath or penalty of perjury, they were made to governmental agencies and / or consumer agencies with the apparent expectation that action would follow based upon the representations. This gives me a measure of confidence in the truth of the assertions. Additionally, I find compelling the fact that so many of the complaints corroborate each other * * * . The consistency of the representations again reinforces the trustworthiness of the complaints. Moreover every indication is that the complaints were also made spontaneously, another indication of their trustworthiness. Other courts have also found consumer complaints to have sufficient guarantees of trustworthiness under Rule 807 to permit admission. *See FTC v. Figgie International Inc.,* 994 F.2d 595 (9th Cir.1993) (finding that letters of complaint sent to the FTC had "circumstantial guarantees of trustworthiness because they were sent independently to the FTC from unrelated members of the public, they all reported roughly the same experience which suggested truthfulness and they had no motive to lie about the price they paid).

The court also found the "more probative" requirement met because admission of the complaints would "eliminate the needless expense of bringing in hundreds of consumers from across the country to testify to what is essentially already written down in complaint form."

For other cases admitted consumer complaints under Rule 807, see:

FTC v. Instant Response Systems, LLC, 2015 WL 1650914 (E.D.N.Y.): Consumer complaints to the FCC were found admissible under Rule 807. Trustworthiness was found because the reports "were sent spontaneously by unrelated individuals to a government agency" and recounted "similar and consistent factual accounts about the consumers' experiences." And the reports met the "more probative" requirement because "it would be unduly wasteful of time and burdensome for the FTC to call each aggrieved consumer to testify, and the interests of justice are therefore best served by using the caretakers' declarations." ***See also FTC v. Zamani,*** 2011 WL 2222065 (C.D. Cal): The court found that consumer complaints were admissible under Rule 807. As in similar cases, the court found that the consumer complaints were trustworthy because they cross-corroborated each other. And the complaints were found more probative than other evidence because, given their volume, it would be unreasonable to require production of all the declarants. ***FTC v. Direct Benefits Group,*** 2012 WL 5508050 (M.D. Fla.) (noting that complaints were "made independently by unrelated consumers without solicitation" and that because 25,000 complaints that were made regarding Defendants' practices, "it is not reasonable to expect that the Commission would call all—or even a significant percentage—of the consumers who complained."); ***FTC v. AMG Services, Inc.,*** 2014 WL 317781 (D.Nev.) (noting that the complaints reported "roughly similar experiences" and "were submitted by thousands of unrelated members of the public in different cities and states," and that "the combined volume and similarity of the complaints indicate that there is little risk that the statements were the product of faulty perception, memory or meaning, the dangers against which the hearsay rule seeks to guard."); ***FTC v. Ewing,*** 2014 WL 5489290 (D. Nev.) (finding consumer complaints to

the FTC to be sufficiently reliable under Rule 807: "Although the complaints are unsworn, the volume and similarity of the complaints indicates the complaints are not the product of fault perception, memory or meaning, the dangers against which the hearsay rule seeks to guard.").

Trustworthiness: Stamp of origin on a product

United States v. Burdulis, 753 F.3d 255 (1st Cir. 2014): The defendant was charged with possession of child pornography that was found on a thumb drive in his home. The crime required proof of some aspect of foreign commerce, and the government's proof on this jurisdictional element was that the thumb drive had "Made in China" stamped on it. The defendant argued that the stamp was inadmissible hearsay. The court found that the "Made in China" stamp was properly admitted under the residual exception. As to indicia of reliability, the court relied on the fact that inscriptions indicating foreign origin are statutorily regulated, and that "[a]n authentic description, of the kind made regularly by manufacturers in accordance with federal law, bears significant similarity" to other exceptions, most notably the business records exception. Moreover, "[c]ommon sense" suggested "a low probability that someone would stamp 'Made in China' on a device made in the United States and presumably marketed here." ***See also United States v. Seguil,*** 600 Fed. Appx. 945 (5th Cir. 2015) (stamp indicating that a video camera was made in Japan satisfied the Rule 807 trustworthiness requirement because "such inscriptions are required by law, and false designations of origin give rise to civil liability"); ***United States v. Scott,*** 2014 WL 2808802 (E.D. Va.) (stamped inscriptions on cellphone and memory cards to prove place of origin satisfied the trustworthiness requirement of Rule 807 because they are required by law and false designations are prohibited by law).

Trustworthiness: Report of dangerous condition

Parker v. Four Seasons Hotel, 2014 WL 1292858 (N.D. Ill.): The plaintiff claimed she was injured when a shower door shattered on her. She sought to admit an email from the contractor of the property, sent to the defendant, indicating that several shower doors had cracked, including the one in the room that the plaintiff stayed in. The court held that the email was admissible under Rule 807. It elaborated as follows:

> The email * * * does not appear to be admissible under any of the traditional exceptions to the Hearsay Rule. Nonetheless, courts have long recognized that the prohibition on hearsay is not intended to be a mechanical bar on otherwise reliable evidence. * * *
>
> Where, as here, the so-called "hearsay dangers"—lack of reliability and the inability to cross-examine the declarant—are minimal, there is no reason to bar evidence simply because it is hearsay in a technical sense. There can be no question that the contents of the Sheridan Email are highly probative to the case and, indeed, more probative than any other evidence on the issue of premises liability. Moreover, there is nothing to indicate that the Sheridan Email is somehow unreliable or otherwise inaccurate. Gartin's comment to Schiavon that "several" sliding glass doors had broken in

> the past provides additional circumstantial guarantees that the statements in Sheridan's email are neither untrustworthy nor false. Under these circumstances, the Court concludes that the admission of this evidence would significantly enhance the likelihood of a correct outcome in this case. Accordingly, the statement is admitted under the Residual Exception to the hearsay rule.

Reporter's comment: The court is surely taking a more free-and-easy attitude toward residual hearsay than other courts have done. There is no cautionary intro invoking Congress's "rare and exceptional" language. There is no trotting out the case law stating that the exception be "narrowly applied" and that the hearsay must be "particularly trustworthy. There is no slavish adherence to an "equivalence" analysis.

Note: The Seventh Circuit affirmed the lower court's decision on the residual exception. ***Parker v. Four Seasons Hotels, Ltd.***, 845 F.3d 807 (7th Cir. 2017), but there was no real ruling on the subject, as the court found that the defendant never argued that the district court abused discretion, so it waived any claim as to the admissibility of the evidence.

Trustworthiness: Arbitrator's opinion

Sievert v. City of Sparks, 2014 WL 358698 (D.Nev.): In an employment discrimination action brought by a firefighter, the plaintiff sought to admit factual findings determined by an arbitrator in a proceeding brought by another firefighter against the city. The court held that the arbitrator's findings were admissible as residual hearsay. It explained as follows:

> First, the arbitrator's opinion has the equivalent circumstantial guarantees of trustworthiness as the arbitrator was a neutral third party with no motive to favor either side, all the witnesses at the hearing swore on oath to tell the truth, and all the witnesses were subject to cross-examination by both the City and the union. Further, the witnesses' statements were made closer in time to the event in question than any other testimony currently before the court.

The court also found that the interest of justice factor was met because the evidence "forms part of the basis for Sievert's underlying retaliation claim." Which is to say it was relevant.

Trustworthiness: Prisoner's statement to an investigator

Marcum v. Scioto County, Ohio, 2013 WL 9557844 (S.D. Ohio): In a suit by a prisoner for failure to provide proper medical care, the plaintiff sought to submit statements that a fellow prisoner made to a state investigator, describing the plaintiff's poor medical condition. The court found that the fellow prisoner's statements were sufficiently trustworthy to be admissible under Rule 807. It reasoned as follows:

There is no evidence in the record demonstrating that Inmate Adams had any connection or relationship with Marcum aside from his incarceration at Scioto County Jail during the relevant time period. Nor is there any evidence that Inmate Adams is acquainted or has any relationship with plaintiff. Indeed, plaintiff represents that her numerous attempts to locate Inmate Adams for purposes of being a witness in this matter have been unsuccessful. As for Inmate Adams' relationship with defendants, defendants have put forth no evidence demonstrating that there was any animosity between them. It is therefore reasonable to characterize Inmate Adams as a disinterested party with no reason to misrepresent the events he witnessed at Scioto County Jail in the time leading up to Marcum's death.

As for his motive for making the statement, Inmate Adams did not provide this statement voluntarily. Rather, he was questioned pursuant to a BCI investigation into the event's surrounding Marcum's death. Given that the statement was gathered as part of a larger investigation, the Court cannot conclude from the record that Inmate Adams had any improper motivation to provide the statement. * * *

The record contains no prior history of the declarant's statements or any evidence that he made inconsistent statements about the events surrounding Marcum's death. There is, however, other evidence supporting Inmate Adams' statements. * * * It therefore appears that the Adams Statement has the necessary guarantees of trustworthiness for admission under the residual hearsay rule. * * *

Trustworthiness: Client intake form

United States v. Stern, 2013 WL 6087744 (E.D.Wisc.): In a fraud case, the government sought to admit a client intake form, in which a fraudster seeking legal advice stated that the defendant referred her to the lawyer. The court found the form admissible under Rule 807. As to trustworthiness, the court stated the following:

The record before me suggests no reason why, at the time she made the statement, Leonard–Allen would have reason to lie about why she selected Losey's office. Further, at the time she made the statement, Leonard–Allen could not have known that the answer to a referral question would matter, one way or the other, in a criminal prosecution occurring several years later. Finally, there is no reason to believe that Leonard–Allen lacked the knowledge or qualifications to make a statement as to who referred her to Losey. This information would particularly appear to be within her ambit. For all of these reasons, I find the statement sufficiently trustworthy.

Trustworthiness and More Probative: Recordings of customer confusion

ADT Security Services v. Security One International, Inc., 2013 WL 4766401 (N.D.Cal.): Recordings of customers indicating confusion were found admissible under the residual exception. The court explained as follows:

> With respect to the first Rule 807 factor, such Recordings, once properly authenticated, have circumstantial guarantees of trustworthiness because they are contemporaneous, real-time recordings of a conversation, wherein the customer was unaware of the questions that would be asked of them and the customer had personal knowledge of the events related.
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> With respect to the second Rule 807 factor, the Recordings are evidence of the material fact of customer confusion.
>
> With respect to the third Rule 807 factor, ADT persuasively argues that the Recordings of the phone calls between ADT's representatives and its former customers are ADT's "most reliable" source of evidence of customer confusion. ADT cannot present direct, contemporaneous evidence of confusion or of confusing statements by Defendants' telemarketers because the telemarketers did not record their calls. The telemarketers themselves reside in the Philippines, beyond the reach of this Court's subpoena power. As for the customers, many of them reside out of state, also beyond the reach of a subpoena, and in any event, requiring all the customers to testify personally would not be reasonable. * * *
>
> Lastly, with respect to the fourth Rule 807 factor, the Court concludes that admission of the Recordings will serve the interests of justice in this case because ADT should not be unduly hindered in presenting its case by Defendants' own conduct in not recording its telemarketers discussions with prospective customers. Admitting the recordings "furthers the federal rules' paramount goal of making relevant evidence admissible."

Trustworthiness: Recorded conversation between father and son

Brumley v. Albert E. Brumley & Sons, Inc., 727 F.3d 574 (6th Cir. 2013): In a copyright dispute regarding an old song, the defendant proffered a recorded conversation between the person who wrote the song and his son, in which the father said he sold the song for three dollars. The trial court admitted the recording under Rule 807, and the court found no error. The court analyzed the trustworthiness question as follows:

> [W]e believe that there are a numbers of factors indicating that the statements from the 1977 conversation have the requisite guarantees of trustworthiness. First, the statements should be considered more reliable than not given that Brumley, Sr. and Brumley, Jr. are father and son and not strangers. Second, there is no indication that Brumley, Sr. lacked capacity at the time that he gave the statement. One may argue that Brumley, Sr.'s

> memory might have been impaired due to the lapse of time between the Song's publication and the statement, but it is just as reasonable to assume that Brumley, Sr. would have accurately recalled the circumstances surrounding the creation of his most successful song despite the lapse of time. Third, Robert has not alleged that Brumley, Sr. was an untruthful person. Fourth, the statement is clear and unambiguous. Finally, the fact that Brumley, Jr. recorded the conversation adds an element of formality, which suggests that Brumley, Sr. may have given his statements added consideration. The district court did not abuse its discretion and err in admitting into evidence the statements from and transcript of the 1977 conversation.

Trustworthiness: Statement made to a police officer after an accident

Auto-Owners Ins. Co. v. Newsome, 2013 WL 3148334 (D.S.C.): After a boating accident, one of the participants made a statement to police officers that he was acting in the course of employment. The court found that this statement met the trustworthiness requirement of the residual exception:

> [T]he statement has "circumstantial guarantees of trustworthiness" as it was made to a third-party law enforcement officer shortly after the boating accident. The statement at least has as much trustworthiness as a statement of a party opponent. Additionally, the statement is also being offered as evidence of a material fact—whether Mr. Robinson was acting within the course of his employment—and it is the most probative evidence on this point given that the only other person on the boat, Mr. Newsome III, has refused to testify. For these reasons, admitting the statement would also serve the purposes of the Rules of Evidence and the interests of justice.

Reporter's comment: The court might be right about trustworthiness, but the analysis is questionable on two grounds: 1. Comparing the statement to a statement of a party-opponent is contrary to the text of the rule, which requires comparison with a Rule 803 or 804 exception; and 2. Party-opponent statements are not admitted because they are trustworthy but rather because admission is a consequence of the adversary system --- so they are not a proper referent if the goal is to determine whether residual hearsay is trustworthy.

Another thing to note about the analysis: the interest of justice/purpose of the rules factor is once again trotted out to do nothing. It is satisfied if the other admissibility requirements are met.

Trustworthiness: Plea allocutions offered in a civil case

Levinson v. Westport National Bank. 2013 WL 2181042 (D.Conn.): The court found that a guilty plea allocution was sufficiently trustworthy to be admissible as residual hearsay:

> The Court is * * * persuaded that the statements in the plea allocutions demonstrate a high guarantee of trustworthiness as a result of the safeguards that a sentencing judge must take in order to accept a guilty plea under Rule 11 of the Federal Rules of Criminal Procedure. Under Rule 11, a sentencing judge is required to ensure that each guilty plea is voluntary and has a factual basis which is developed on the record at the plea allocution. Further, the trustworthiness of a plea allocution is bolstered by the fact that the criminal defendant gives his statements during the allocation sworn under oath. * * * Lastly, admission of the plea allocutions would facilitate the interests of justice in this case as it bears on material facts in dispute. Accordingly, the Defendants may offer the plea allocutions at trial.

Reporter's comment: Note that the interests of justice are found met because the plea allocution is proof of a material fact. Thus do two superfluous requirements satisfy each other.

Trustworthiness: Foreign bank records

United States v. Turner, 718 F.3d 226 (3rd Cir. 2013): The defendant was convicted of fraud on the United States. He challenged the trial court's admission of foreign bank records under the residual exception, on the ground that the government had not shown that the records were trustworthy. The court found no error. The defendant noted that the identity of the person who prepared the records was unknown, but the court responded that "the Government is not required to identify the declarant of the foreign bank documents in order for the documents to be admissible under Rule 807." The court noted that under its case law, the court cannot rely *solely* on corroborating evidence for its finding of trustworthiness, but in this case the trial court relied on circumstantial guarantees of trustworthiness in addition to corroboration --- specifically, the records were found in the home of the defendant's accomplice, and "in general, bank records provide circumstantial guarantees of trustworthiness because the banks and their customers rely on their accuracy in the course of their business." ***See also Chevron Corp. v. Donziger,*** 974 F.Supp.2d 362 (S.D.N.Y. 2014) (foreign bank records found admissible under Rule 807: "There is no reason to doubt their trustworthiness. They appear in the exact manner that one would expect, and Guerra testified as to how he obtained them directly from the bank, testimony that the Court credits. Thus, given the circumstantial guarantees of trustworthiness which were present here, the distant location of the bank, and the lack of any evidence in the record to suggest that the bank records are anything other than what they purport to be, the bank statements are admissible under the residual hearsay exception as an alternative to the business records exception.").

Trustworthiness: Bank Records Without Foundation Testimony

In re Mendez, 2008 WL 597280 (E.D.Cal.): In an adversary proceeding in bankruptcy, the defendant's bank records were admitted. No foundation witness was provided, but the court found that the bank records were admissible under Rule 807. It stated as follows:

> The bank statements at issue here were not admitted under the business records exception to the hearsay rule, Federal Rule of Evidence 803(6), because there was no foundation testimony to establish that the bank statements were Bank of America's business records. However, courts have long recognized that bank statements may be admitted under the residual exception to hearsay because "bank documents, like other business records, provide circumstantial guarantees of trustworthiness because the banks and their customers rely on their accuracy in the course of their business." *United States v. Pelullo,* 964 F.2d 193, 202 (3d Cir.1992). In *Karme v. Comm'r of Internal Revenue,* 673 F.2d 1062 (9th Cir.1982), the Ninth Circuit Court of Appeals found that it was appropriate to admit bank statements into evidence as an exception to the hearsay rule "[g]iven the circumstantial guarantees of trustworthiness ..., the distant location of the bank, and the lack of any evidence in the record to suggest that the bank records are anything other than what they purport to be." *Karme v. Comm'r of Internal Revenue*, 673 F.2d at 1065.

See also

United States v. Banks, 514 F.3d 769 (8th Cir. 2008): An ATF form was offered to prove that a gun was bought by an individual. The form is prepared by the gun dealer upon the sale. The government did not seek to qualify the record as a business record by presenting a qualified witness. But the court found that the record was properly admitted under Rule 807, essentially as a "near-miss" of the business records exception. The court explained as follows:

> As the note to Rule 803 emphasizes, when a statement is made concurrent with a "duty to make an accurate record as part of a continuing job or occupation" we can infer a certain level of trustworthiness. Fed. R. Ev. 803 advisory committee note to 1972 Proposed Rules ¶ 6. In most cases, this duty is established by testimony of a record's custodian. In this case, it is established by the ATF regulations requiring proper record keeping practices. The contents of Form 4473 are, therefore, inherently trustworthy.

Reporter's comment: These courts appear to be holding that the Rule 803(6) requirement of a foundation can be dispensed with simply by offering the bank records under Rule 807. But it can be argued that the goal of the residual exception should be to *supplement* the standard exceptions, not to undermine the limitations on the standard exceptions.

Trustworthiness: Working through the hearsay dangers

Lopez v. Miller, 915 F.Supp.2d 373 (E.D.N.Y.): To prove actual innocence in a habeas corpus proceeding, the plaintiff offered alibi witness affidavits from two witnesses who were deceased by the time of the proceeding. The court found that the affidavits were sufficiently trustworthy to be admissible under Rule 807, by evaluating and dismissing the hearsay dangers of insincerity, faulty memory, misperception, and faulty narration:

> Guido and Rivera knew Lopez very well and almost certainly could not have "misperceived" that they were with him on the morning of the shooting absent some lapse in memory. * * * Although sixteen years had passed between the shooting and the signing of the affidavits, both Guido and Rivera described the morning of the shooting in detail: both remembered discussing the disagreement between Lopez and Juliana; Guido remembered that she was normally awake at around the time she saw Lopez because of her midnight shift at the hospital; and Rivera remembered the weather and the people present at her house that morning. The risk of faulty memory is particularly low because, soon after the events in question—once Lopez was arrested and indicted—the affiants expected that they would need to remember their interactions with Lopez. There is also no apparent risk of faulty narration, such as where testimony reflects confusion or where the witness simply misspeaks. Both witnesses stated without ambiguity (and in writing) that they were with Lopez on the morning of the shooting and gave relatively clear accounts of the basics of their interactions with Lopez. Although the witnesses could not describe the timing of these interactions with precision, this is not a problem of "faulty narration" but simply a fact that might make their testimony less compelling. The court must assume that the witnesses would have been similarly imprecise if they had been called to testify in person, but need not disregard their affidavits on this basis. In other words, the problem of imprecision goes to the affidavits' weight, not their admissibility.
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> The only potentially significant hearsay risk present with the alibi witness affidavits is the risk of insincerity—that is, the risk that Guido and Rivera were lying in their affidavits about their interactions with Lopez on the night of the shooting. Had the witnesses been available to testify, this class of error could have been tested with cross-examination. Nevertheless, * * * the court does not consider the risk of insincerity to be a major concern. The affidavits are detailed, internally consistent, and substantially consistent with each other. Because they were submitted in connection with a pending litigation, Guido and Rivera presumably expected to be subject to cross-examination on their contents, and indeed intended to testify before this court until shortly before the evidentiary hearing, when they became unable to do so. And * * * the court rejects Respondent's suggestion that Guido and Rivera fabricated false affidavits because of their familial relationships with Lopez; these relationships * * * had ended long before Guido and Rivera wrote their affidavits, which occurred twelve years after Lopez's remarriage and his loss of virtually all contact with those he had previously considered his family.
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> In short, three of the four classic hearsay dangers are absent or negligible, and the court does not find a significant risk of insincerity. See generally *Schering*, 189 F.3d at 233 (hearsay "need not be free from all four categories of risk to be admitted under Rule 807.").

Reporter's comment: This case comes from the Second Circuit, which requires courts to evaluate the trustworthiness of residual hearsay through the lens of the four hearsay dangers: insincerity, poor narration, impaired perception, and bad memory. This is a unique structure among the circuits. It is not clear that the structure is useful. For one thing, if the goal is equivalence, then many of the standard hearsay exceptions can be found wanting on one or another of the hearsay dangers --- for example, a dying declarant is likely to be short on the narrative quality, and an excited declarant may have been too excited to perceive the event accurately. Moreover, a focus on the four factors may lead a court to ignore corroboration, or other circumstances that simply don't fit within the structure.

Trustworthiness: Statements in an unrelated litigation

FTC v. Ross, 2012 WL 4018037 (D.Md.): In an action alleging deceptive conduct in the sale of software, the court held that statements made in an unrelated litigation involving a dispute over profits among defendants in the instant litigation were admissible under Rule 807. The court went through the litany of Rule 807 requirements in the following analysis:

> The United States Court of Appeals for the Fourth Circuit has cautioned that the residual hearsay exception "should not be construed broadly," and that "[t]o construe it broadly would easily cause the exception to swallow the rule." *United States v. Dunford,* 148 F.3d 385, 394 (4th Cir.1998) (citation omitted). Notwithstanding this cautionary instruction, this Court nevertheless finds that the circumstances of this case warrant admissibility of the challenged evidence under the residual exception because the evidence in question meets the four requirements of the rule.
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> * * *
>
> Here, the out-of-court statements and documents were made in connection with the Canadian Litigation—a lawsuit in which Ms. Ross' co-defendants sued each other over the profits of Innovative Marketing, the business at the center of the present case. The statements were made by Innovative Marketing's high-ranking executives, and although they were not subject to cross-examination, were made in anticipation that they would be evaluated and challenged in a court of law. More importantly, however, unchallenged evidence in this case substantially corroborates the contents of the challenged evidence and therefore affords the challenged evidence the "ring of reliability."
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> Regarding the second and third elements of the Rule 807 analysis, the Court concludes that the challenged evidence is offered as evidence of a material fact and is more probative than other evidence that can reasonably be obtained. The evidence relates to the scope and nature of the alleged conspiracy, and serves to illustrate a major element of the upcoming trial in this case—namely, the role Ms. Ross played while working at Innovative Marketing. The evidence is certainly more probative than other obtainable evidence. To the extent other evidence even exists, Ross' and her co-defendants' silence and non-participation in discovery have severely hampered the FTC's collection of

evidence in this case, and have made the collection of other probative evidence nearly impossible.

Finally, this Court concludes that admission of the challenged evidence under the residual hearsay exception will "best serve the purposes of these rules and the interests of justice." [The defendant's] and her co-defendants' silence and non-participation in discovery have limited the available evidence in this matter. Admitting the challenged evidence will best allow this Court to weigh the credibility of all of the evidence and to resolve the serious charges.

Reporter's comment: Here once again, the interest of justice requirement replicates the more probative requirement. The interesting part is that the more probative requirement is satisfied because no other evidence is reasonably available --- because the defendant is suppressing it.

Trustworthiness: Child-victim's statement regarding abuse

United States v. DeLeon, 678 F.3d 317 (4th Cir. 2012): The defendant was convicted of murdering his 8-year-old stepson. He argued that the trial court erred in admitting testimony of a social worker (Thomas) that the victim (Jordan) had told her of being severely beaten by the defendant. The court found the statement properly admitted under the residual exception:

Thomas's credentials and use of specific questions to verify Jordan's truthfulness support the trial court's conclusion that the statement had circumstantial guarantees of trustworthiness. Given that the government's case against DeLeon was largely circumstantial, the evidence of DeLeon standing and kneeling on Jordan's back to the point that it caused a visible injury to his forehead was certainly material. And because Jordan was deceased there was no more probative evidence of the encounter than his description to Thomas. Under the deferential abuse-of-discretion standard, we affirm the district court's ruling.

See also Doe v. Darien Bd. Of Educ., 110 F.Supp.3d 386 (D.Conn. 2015) (autistic child's report to his parents of sexual abuse was admissible under Rule 807 because it was made without prompting, declarant's tone was serious, the child was diagnosed as not being capable of lying, the child exhibited signs of trauma, and exhibited fear of the alleged perpetrator).

Trustworthiness: Statement of a prisoner about his medical condition

Estate of Gee v. Bloomington Hosp., 2012 WL 639517 (S.D.Ind.); A prisoner died, allegedly as a result of inadequate medical care. The prisoner's mother sought to testify to phone conversations, in which the prisoner said that he had not been eating, he needed to see a doctor,

that he needed to go to the hospital, that he had a high fever, that he had blood sugar level of 588, and that he didn't think that anybody cared. The court found that these statements were admissible under Rule 807, explain that they "bear a strong indicia of reliability: at the time he made these alleged statements, Terry Gee obviously was not in a position to prognosticate that a lawsuit would arise out of his ultimate demise."

Reporter's comment: The court is holding that the trustworthiness requirement is met solely on the basis that the statement was not made in anticipation of litigation. As seen in other cases in this outline, most courts require a far stronger showing for a statement to be qualified under Rule 807. ***Compare Bedingfield v. Dean,*** 487 Fed. Appx. 219 (5th Cir. 2012) (in a case charging inadequate medical care of a prisoner, the prisoner's statement to his mother that the warden threatened him was not admissible under Rule 807; it was not enough that the prisoner had no motive to fabricate the statement).

Trustworthiness: Statement of a former employee

Lasnick v. Morgan, 2011 WL 6300159 (D.Conn.): The disputed question was whether the owner of a boat should have sought medical attention for a nanny that was on the boat. In response to a request from defense counsel, a former employee of the defendant sent an email with statements describing the disputed event. The court found that the statement was not sufficiently trustworthy to be admissible as residual hearsay. The court stated that a statement offered as residual hearsay must be compared to the standard exceptions, and in this case the most comparable exception was Rule 801(d)(2)(D) --- as the statement would have been admissible under that rule had the declarant still be employed at the time the statement was made. The court observed that "[e]mployee statements are liberally admitted under Rule 801(d)(2)(D) due to an assumption that an employee is usually the person best informed about certain acts committed in the course of his employment." * * * Though Seiler was no longer employed by Jamaica Bay at the time he wrote the email in question, the court finds no reason to suspect him of insincerity. The email was not solicited by the plaintiffs for use in this litigation; instead it was composed in response to a request from one of the defendants, Captain Kercher. Further, as the defendant points out, the email features no criticism of Kercher or the other defendants; on the contrary, it seems designed to justify Kercher's response to Santa Ana's illness. * * * Accordingly, the court finds that the Seiler email possesses a reliability commensurate with that of statements admitted under Rule 801(d)(2)(D) and, further, that it is sufficiently trustworthy for purposes of Rule 807.

Reporter's comment: The court made an error when it admitted the statement because it was comparable to a statement admissible under Rule 801(d)(2)(D). The comparable exceptions for trustworthiness are, by the terms of the Rule, the hearsay exceptions in Rules 803 and 804. This is a sensible limitation, because the exceptions in Rule 801(d)(2) are not based on reliability --- they are based on the adversarial theory of litigation. The court focused primarily on matters *other than* whether the hearsay statement was trustworthy, largely because of the equivalence language in Rule 807.

Trustworthiness and More Probative: Child victim of sexual abuse

United States v. White Bull, 646 F.3d 1082 (8th Cir. 2011): In a child sex abuse prosecution, the trial court admitted a written statement that the victim prepared for a forensic examiner about the abuse. The court found that the statement satisfied the trustworthiness requirement of the residual exception.

> Evidence presented at trial showed that Paula Condol has ten years of extensive training and experience as a forensic examiner, S.C.G.1. used age-appropriate language in describing the abuse, and S.C.G.1. consistently repeated the same facts about the abuse to adults. Perhaps the strongest circumstantial guarantee of trustworthiness, however, is the fact that S.C.G.1. testified at trial and was subject to cross examination regarding her statement. S.C.G.1. testified that she wrote [the statement] and that it described an event that actually occurred. We have previously stated that this situation vitiates the main concern of the hearsay rule. Additionally, [the statement] was offered as evidence of a material fact because it was relevant to the allegation of aggravated sexual abuse. The materiality requirement in Rule 807 is merely a restatement of the general requirement that evidence must be relevant.

The court had more difficulty with the question whether the written statement was more probative than any other evidence --- because the witness testified at trial. The court ultimately found no plain error in the trial court's finding that the more probative requirement had been met, because the written statement was more detailed than the victim's in-court testimony.

> [W]e cannot say it was clear or obvious error to conclude that Exhibit 13 was more probative for the specific details of the alleged aggravated sexual abuse than what S.C.G.1. could provide through her testimony at trial. In her answers to the Government's questions on direct examination, S.C.G.1. repeatedly stated that she did not know what White Bull had done to her. Although S.C.G.1. later went on to describe aspects of the alleged abuse, her hesitant and somewhat inconsistent testimony made the admission of Exhibit 13 through Rule 807 possible.

Trustworthiness: Surveys

Lion Oil Trading & Transp., Inc. v. Statoil Marketing and Trading (US) Inc., 2011 WL 855876 (S.D.N.Y.): In a breach of contract action involving oil purchases, one party submitted a survey conducted regarding barrel pricing. The court found that while there were some methodological flaws, the survey was sufficiently trustworthy to be admissible under Rule 807:

Survey respondents were unaware of the survey's purpose. While the interviews often took varied courses, they all arrived at the ultimate question of payback barrel pricing. This question was prefaced by a fact pattern recited in generally the same manner and phrased in generally the same way to each respondent. Moreover, the question as phrased cannot be characterized as leading. Finally, issues of perception were addressed through a standard set of screening questions designed to ensure familiarity with the crude oil trading market. The survey therefore contains sufficient indicia of trustworthiness to warrant admission.

See also United States v. Various Gold, Silver and Coins, 2013 WL 5947292 (D.Ore), where the court found surveys to be admissible under Rule 807:

[T]he reliability of the TurboSonic questionnaire responses has been sufficiently shown. Trustworthiness, which is closely aligned with reliability, depends on:

(a) properly defining the "universe" of people whose opinions matter with respect to the subject of the litigation;

(b) selecting a representative sample from this universe;

(c) framing questions that are clear, simple, and nonleading;

(d) following sound interview procedures;

(e) accurately recording the gathered data;

(f) following proper statistical methods in analyzing the data; and

(g) protecting objectivity by keeping the polling process separate from litigation.

None of the factors discussed above provide a basis to find that the TurboSonic questionnaire responses are untrustworthy—all known TurboSonic customers were sent questionnaires and there has been no representative sampling or data analysis. Further, although the cover letter to the questionnaires noted that TurboSonic was subject to investigation, the potential for bias would not be in the proponents' (Claimants') favor. * * * [T]he questions were framed in such a way as to elicit truthful and accurate responses.

Trustworthiness: Plea agreement

In re Slatkin, 525 F.3d 805 (9th Cir. 2008): A trustee sought recovery from people who had received money from the perpetrator of a Ponzi scheme. To prove the Ponzi scheme, the trustee offered the fraudster's plea agreement, in which he admitted his intent to defraud. The court found that the plea agreement was admissible as residual hearsay. On the trustworthiness question the court reasoned as follows:

Slatkin's plea agreement has equivalent circumstantial guarantees of trustworthiness. His guilty plea, based on the plea agreement, (1) was made under oath with the advice of counsel, (2) subjected Slatkin to severe criminal penalties, (3) was made after Slatkin was advised of his constitutional rights, and (4) was accepted by the court in the criminal matter only after the court determined that Slatkin's plea was knowing and voluntary.

See also:

Pendergest-Holt v. Certain Underwriters at Lloyd's of London and Arch Specialty Ins. Co., 2010 WL 3359528 (S.D. Tex.): In a case involving corporate fraud, the court held that two sets of documents were admissible under Rule 807: 1. A plea agreement and rearraignment transcript of one of the fraudsters, who refused to testify in this proceeding; and 2. Records of a forensic accountant retained by a receiver. As to trustworthiness of the plea agreement, the court reasoned as follows:

> Davis pleaded guilty under oath in open court to three serious criminal charges, which carry the potential of many years of imprisonment. The factual material in his plea agreement and transcript describing Davis's personal conduct are among the strongest evidence of those matters. See, e.g., *RSBI Aerospace, Inc. v. Affiliated FM Insurance Co*., 49 F.3d 399, 403 (8th Cir.1995) (in coverage determination for lost inventory under insurance policy that excluded loss caused by any employee of the insured, court allowed the guilty plea of plaintiff's employee that he set the fire and confirmed he was employed by plaintiff at the time of the fire, and stated "guilty plea taken in open court is a sworn statement and, while not always conclusive, is powerful evidence."). The plea-related factual information, while hearsay, has circumstantial guarantees of trustworthiness equivalent to other evidence otherwise admissible under Rules 803 and 804. For instance, he knows that the Government continues to investigate the matters and is relying on his information to do so. If Davis is found to have lied, his can be charged with perjury.

As to the forensic accountant's reports, the court found sufficient trustworthiness through the following analysis:

> The Court finds that there are "circumstantial guarantees" of the trustworthiness of the factual analysis Van Tassel and her expert staff have performed and described in her Reports. * * * FIT has performed a variety of services, including assisting in the capture and safeguarding of electronic accounting and other records of the Stanford Entities, and forensic accounting analyses of those records, including cash tracing.Van Tassel, who has "25 years of experience providing a variety of audit, accounting, tax, litigation, valuation and other financial advisory services," is a Certified Public Accountant and the Senior Managing Director of FTI consulting. Van Tassel interviewed dozens of people who were formerly employed by or who worked with Stanford entities. In addition, during at least 18 months of intense work, Van Tassel and her FTI staff examined many thousands of documents, including available accounting and other records (including email files of certain former Stanford employees) relating to numerous Stanford entities * * * . Van Tassel and her staff also examined extensive "SIB customer records, including but not limited to paper and electronic records documenting SIB CD purchases, interest payments and redemptions." FTI also obtained and analyzed paper and electronic files from third-party financial institutions where bank accounts of various Stanford entities are or were located, and electronic and other data from institutions that currently hold SGC customer accounts and former employee accounts, as well as STC accounts. This intense, complex, and geographically far-flung work apparently has cost

several, if not more, millions of dollars and simply cannot be replicated by the parties in this case.

Trustworthiness: Statement of a bystander

Goode v. United States, 730 F.Supp.2d 469 (D.Md. 2010): The only bystander to an accident gave a statement to the responding officer. She was unavailable at trial. The court found that the statement was admissible under the residual exception. The court evaluated trustworthiness as follows:

> Plaintiffs seek to admit the hearsay statement of the only identified witness to the officer who responded to the accident scene. * * * The statement was obviously not made under oath, during a plea agreement, or before a grand jury. Furthermore, Jackson's statement to the officer was not contemporaneously transcribed so as to produce an exact replica of her statements, and the statement does not contain many details. Likewise, Jackson's statement to the officer was not subject to cross examination. [However] Jackson voluntarily gave her statement to the officer and she is otherwise an independent witness who did not have a personal stake in the outcome of this litigation [and] she provided her statement as to what she personally observed shortly after the accident occurred, which, without contrary evidence, convinces the Court that her statement contained in the Motor Vehicle Report, satisfies the circumstantial guarantees of trustworthiness.

The court found, however, that a handwritten statement that the witness provided to the Plaintiff's private investigator nearly three months after the accident did not satisfy the trustworthiness requirement of Rule 807.

> First, the fact that this statement was provided nearly three months after the accident raises the possibility that Jackson's memory of the incident was affected by the passage of time. In addition, the statement was given at the request of Plaintiff's private investigator and in preparation for the litigation, which the Court believes at least raises a question as to the extent that the witness's handwritten statement was influenced by others.

Trustworthiness: Prior testimony at a related trial

United States v. Guerrero, 2010 WL 1645109 (S.D.N.Y.): Two defendants were tried separately for their part in a murder. At the first trial, an eyewitness testified in a way that identified the defendant at trial but tended to exculpate Guerrero. The eyewitness was extensively cross-examined by defense counsel. Guerrero, at his trial, proffered that eyewitness testimony from the first trial, the witness having become unavailable. The court held that the statement was admissible under Rule 807. As to trustworthiness, it explained as follows:

> Negron's statements were given under oath subject to penalty of perjury in a formal judicial setting, and Negron is unavailable. Mercado's skilled and experienced defense counsel had at least as strong a motive to undercut the accuracy and/or truthfulness of Negron's testimony as the Government would have here.

The court found that the testimony was a near-miss of prior testimony under Rule 804(b)(1): the miss being that the first case was in state court and the second in federal, and the federal government did not have an opportunity to develop the testimony at the prior trial. It stated that "[t]he reference to guarantees of trustworthiness equivalent to those in the enumerated exceptions suggests that almost fitting within one of these exceptions cuts in favor of admission, not against."

Trustworthiness: Deposition

SEC v. Curshen, 372 Fed. Appx. 872 (10th Cir. 2010): Deposition testimony of a codefendant who was unavailable for trial was found properly admitted under the residual exception. The court found that the trustworthiness requirement was met because "it was taken under oath subject to penalty of perjury."

Reporter's comment: The court's conclusory trustworthiness analysis goes way too far in admitting residual hearsay. If a statement is admissible under Rule 807 whenever it was made under oath subject to penalty of perjury, then the residual exception has just swallowed up Rule 804(b)(1) --- because that rule requires that the statement be made under oath subject to penalty of perjury, but it *also* requires that the opponent had a similar motive and opportunity to develop the testimony at the time it was given. The case digest on statements excluded under Rule 807 contains a number of examples in which depositions are found inadmissible.

For a similarly questionable decision, see ***United States v. Kimoto,*** 2008 WL 4545342 (S.D.Ill.): A deposition was admitted against the defendant under the residual exception, even though the declarant was not unavailable. While the deposition might have been trustworthy, the court made no real attempt to apply the "more probative" requirement. Moreover, the ruling undermines the requirement in Rule 804(b)(1) that prior testimony is admissible only if the declarant is unavailable.

See also:

Stryker Corp. v. XL Ins. America, 2007 WL 172401 (W.D.Mich.): In a case by a manufacturer against its insurer regarding damages from a product, the sought to admit deposition testimony from a product liability case in which an official testified to how the product was marketed and tracked. The manufacturer was not a party to that action, so the court held that the deposition could not be admitted against the manufacturer as prior testimony under Rule 804(b)(1). But the court held that the deposition was admissible as residual hearsay. The court reasoned as follows:

> Ms. Kashuba's deposition in the Bartlett case offers guarantees of trustworthiness equivalent to hearsay admitted under Rule 804 because Ms. Kashuba's deposition was taken as part of a prior case. * * * The Court finds that admission of this evidence supports the general purpose of the Rules of Evidence as it is reliable evidence that almost conforms to the requirements of Rule 804.

Reporter's Comment: The court seems to be using the residual exception to dilute (or erase) the limitations of Rule 804(b)(1). Under that rule a party (or a predecessor in interest in a civil case) must have had a motive and opportunity to develop the testimony that is similar to the motive that would exist in the proceeding in which the testimony is proffered. Many courts have applied the "predecessor in interest" language to expand Rule 804(b)(1) so that there need not be a privity-type relationship between the party who developed the testimony and the party against whom it is offered. But this court went a step further and ruled that even if there was no predecessor in interest relationship (even expansively applied) the deposition was reliable because it was "taken as part of a prior case." So the case is an example of how a broad application of the residual exception may be used to erode the limitations (and predictability) of the standard exceptions.

Trustworthiness: Interrogatory responses

In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 681 F.Supp.2d 1412 (D.Conn. 2009): Interrogatory responses of one defendant, essentially laying out a timeline of the conspiracy, were found admissible against other defendants under Rule 807. The defendant ultimately settled with the plaintiffs but the interrogatories were filed before settlement discussions began. The basic challenge was to trustworthiness. The court reasoned that the interrogatory answers were inculpatory --- they did not and could not shift blame. The court also noted that "[i]nterrogatory answers are treated as judicial admissions, which can be used against a party in the course of litigation, meaning that interrogatories must be answered with a special degree of care. Accordingly, at the time the answers were verified by the appropriate corporate representative, Crompton remained subject to liability—and to the possibility of treble damages—on the basis of their answers to those interrogatories."

Trustworthiness: Recorded statement to the authorities

United States v. Lawson, 2009 WL 4663287 (E.D. Ky): The court found that a recorded statement to the authorities was admissible under the residual exception. It was made before the witness began to cooperate with the authorities and the defendants moved to admit it in order to provide a contrast with the witness's later, post-cooperation statements. The court found that the statement was admissible pursuant to the following analysis:

> The recording has sufficient particularized guarantees of trustworthiness to be admissible under Rule 807. Rummage was under oath when he made the statements and

was not under duress when the recording was made. Although Rummage now claims that those statements were untrue, he acknowledges making them. Whether he was lying during the OIG interview or lying in his more recent testimony is a central issue in this case but it does not support the United States' argument that the recording of the OIG interview is untrustworthy. The recording has circumstantial guarantees of trustworthiness equivalent to those underlying hearsay exceptions.

Trustworthiness: Testimony at a prior trial but not admissible under Rule 804(b)(1)

In re September 11 Litigation, 621 F.Supp.2d 131 (S.D.N.Y.2009): In the civil actions against the airlines for injuries suffered in the World Trade Center terrorist attack, the court held that testimony by FBI agents at the trial of Moussaui, the "20th Hijacker" was admitted to show how the terrorists planned to overcome airport security was admissible under Rule 807. As to trustworthiness the court stated as follows:

> In general, the prior testimony of Billings and Samit is trustworthy, to the extent that it reports their observations in carrying out the investigations. Billings and Samit were experienced FBI agents. Their testimony described their observations during authorized investigations, as well as their reports to superior officers of those observations. They testified in court, before a jury, under oath and penalty of perjury, in a highly-scrutinized, public proceeding, regarding matters they were trained to perform.

Next the court proceeded to tick off the other admissibility factors:

> The agents' testimony about their investigations' results is material and more probative than other available evidence. * * * [E]vidence of the terrorists' plans is relevant to the element of causation. Billings and Samit both discovered evidence that makes more likely the Aviation Defendants argument that the terrorists intended to skirt aviation security. The testimony is the most probative of such evidence that is available because it is based on direct observations of government officials during property searches and interviews of an admitted would-be hijacker. The evidence is not synthesized, either by 9/11 Commissioners, or multiple anonymous government agents. Also, for these reasons, admitting this reliable and relevant evidence serves the interests of justice and is consistent with the general principles underlying the federal evidentiary rules.

See also:

Annunziata v. City of New York, 2008 WL 2229903 (S.D.N.Y.): In a malicious prosecution case, the plaintiff alleged that police officers coerced a grand jury witness to implicate the plaintiff falsely. The plaintiff sought to admit the witness's notarized statement and subsequent trial testimony, in which he recanted his identification. The court found that the trial testimony was not admissible under Rule 804(b)(1), because the prosecutor who developed the testimony could not be found to be the predecessor-in-interest of the police officer-defendants.

But the court did find that the trial testimony as well as the written statement were admissible under Rule 804(b)(3) because, by making the statements, the witness was subjecting himself to a perjury charge --- and corroborating circumstances need not be found, because that requirement does not apply in a civil case. The court further concluded that the written statement and the witness's testimony were admissible under Rule 807. As to trustworthiness, the court declared as follows:

> In addition to being statements against interest, these statements are also admissible under Rule 807. With regard to the written statement, Mitchell initialed each page and signed the last page, after writing: "I have read this three page report and it is true." Furthermore, the statement was notarized by a public notary and is dated October 19, 2005, after Mitchell gave his grand jury testimony. Finally, the factual allegations contained in the statement are relatively neutral and matter of fact. Annunziata is not mentioned anywhere in the statement which merely avers that Mitchell "did not see anyone fire a gun." Thus, I find sufficient guarantees of trustworthiness to deem this statement admissible, in the alternative, under Rule 807.
>
> So, too, do I find sufficient guarantees of trustworthiness with respect to Mitchell's trial testimony. Mitchell testified before a judge while under oath in a criminal proceeding. I find that the formalities of a trial, including the oath given to witnesses, the presence of a judge, and the transcription of testimony by a court reporter, provide sufficient guarantees of trustworthiness. Thus, in addition to being a statement against interest, Mitchell's trial testimony is admissible under 807.

And see also:

Sonnier v. Field, 2007 WL 2155576 (W.D.Pa.): In a section 1983 action alleging excessive force during a high speed chase, the defendant sought to admit testimony that a bystander gave at a coroner's inquest. The court agreed with the plaintiff that the testimony was not admissible under Rule 804(b)(1) because he had not had an opportunity to cross-examine at the inquest. But the court found sufficient trustworthiness for admission under Rule 807. It noted that "Revi was under oath, so there is a substantial guarantee of trustworthiness. Moreover, he was relating his personal observations as an uninterested bystander of a recent incident and had no apparent reason to testify falsely." And because the bystander was now deceased, the testimony was more probative than any other evidence reasonably available.

Trustworthiness and More Probative: Findings of a Bankruptcy Judge

Mountain Highlands LLC v. Hendricks, 2009 WL 2426197 (D.N.Mex.): The court found that a bankruptcy judge's statements at a hearing could be admitted under Rule 807 to prove why a plan was rejected. On the question of trustworthiness and "more probative" the court held forth as follows:

> As a general matter, the Court believes that statements made on the record by a sitting judge and then reproduced in a transcript bear guarantees of trustworthiness

similar to those in the other hearsay exceptions. With professional court reporters or recording equipment, there is little chance of error in the actual words used, and while judges are not giving testimony under oath during a hearing, the requirements of judicial oaths of office and the formality of a hearing give a judge's comments similar indicia of trustworthiness to that accompanying testimony under oath. Also, a judge, if he or she is sitting on a case, does not have a financial interest in the case, and has made a decision that he or she can be fair and impartial. A judge's statements thus have indicia of reliability similar to those for former testimony under rule 804(b)(1). Moreover, both counsel and parties appearing before the judge rely upon transcripts of judges' statements and appellate courts rely upon them in their appellate review. Part of the foundation of our system of justice presumes that a transcript can be trusted and that if a judge gives a reason for doing something the judge is taken at his or her word. The reason that judge gives may be incorrect or unreasonable, but that the reason was the basis for a particular action is accepted.

Stepping back, admitting a judge's statements on the record into evidence accords with common sense. As the parties' conduct in this case highlights, litigants are generally reluctant to depose sitting judges or subpoena them to testify at trial and, furthermore, requiring judges to act as witnesses can interfere with their judicial duties. Without depositions or live testimony at trial, however, courts will be excluding what may be the best and possibly only evidence unless courts accept judicial statements on the record as admissible evidence. Necessity has long been viewed as one of the hallmarks of the [residual] hearsay exception. * * * The scenario confronting the Court underscores how admitting into evidence judicial statements made on the record is appropriate as a matter of necessity. If the Court excluded the statements, it would be excluding the most direct evidence of why Chief Judge Starzynski held as he did and would be leaving the question largely to conjecture.

Note: The Tenth Circuit affirmed the trial court's Rule 807 ruling in *Mountain Highlands.* 616 F.3d 1167 (10th Cir. 2010): "[W]e conclude the district court did not abuse its discretion by ruling that a statement by a federal bankruptcy judge, made on the record in a hearing before both the parties in this case and clarifying the grounds for an earlier ruling, has sufficient 'guarantees of trustworthiness' so as to fall under the residual hearsay exception."

See also:

Athridge v. Rivas, 421 F.Supp.2d 140 (D.D.C. 2006): Findings of fact from a prior related determination were admitted under the residual exception. Trustworthiness existed in the fact that a judge made the findings.

Trustworthiness: Cross-corroborating records

Cahoon v. Shelton, 2009 WL 1758738 (D.R.I): In a dispute over medical payments for firemen, the court found that two records indicating that the Board authorized payment of

medical expenses for injuries sustained on the job were admissible under Rule 807. The court dutifully found that the evidence was "material" to an estoppel claim; that the records were more probative than any other evidence because of the passage of time; that the purposes of the Rules and the interests of justice would be met because the plaintiffs could use the evidence to prove their case; and that the records were trustworthy. As to trustworthiness the court reasoned as follows:

> In each case, the documents were found in files maintained by the Fire Department and/or the Chief of the Fire Department. The memoranda are identically formatted and contain the same pieces of information regarding Thompson and Gordon: name, residence, date of birth, appointment date, retirement date, percentage of disability pension, number of service years, age at time of retirement, nature of injury sustained on the job, and Board decisions regarding to the plaintiff's pension.

Reporter's comment: Reliability is found here largely through corroboration. The court is impressed that the records cross-corroborated each other. The case is also an example of the court feeling the obligation of applying the materiality and interest of justice requirements, but to little effect. It basically comes down to the evidence being relevant, which it has to be anyway.

Trustworthiness: Privilege logs

Siemens v. Seagate Technology, 2009 WL 8762978 (C.D. Cal): In a patent infringement action, the court admitted privilege logs under Rule 807, to prove that a matter was diligently prosecuted. The court found the logs to be trustworthy "because the preparation was either done by or under the supervision of officers of the court."

Trustworthiness: Bystander's statement to police

United States v. Carneglia, 256 F.R.D. 384 (E.D.N.Y. 2009): The court held that a statement by an eyewitness to police was admissible under Rule 807 when offered by the defendants to prove facts related to a decades-old murder. The court stated as follows:

> Defense exhibits A–2 through A–5 are reports of subsequent police interviews of Ball [after his initial report to police], bearing dates ranging from one day to eight months after the murder. While not excited utterances, the contents of these exhibits were admissible under Rule 807. These statements have circumstantial guarantees of trustworthiness reflected in their consistency with the statements [previously made by Ball], the high degree of specificity of the statements, and the fact that Ball's only apparent motive was to assist law enforcement. Ball's statements were evidence relevant to a central issue, who shot Albert Gelb, and they were more probative on the point for

which the defendant sought their introduction than any other available evidence. Where the charges relate to a crime committed over thirty years ago, recordings of contemporaneous statements by a reliable recorder, here a police officer, may be more valuable than any current recollections of available trial witnesses. Ball is, in any event, deceased and was thus unavailable as a witness.

Reporter's Comment: The case digest on excluded statements contains a number of cases in which statements from bystanders to police were excluded because they were not sufficiently trustworthy.

Trustworthiness and More Probative: Determinations by other courts

Alluisi v. Elliot Mfg. Co., Inc. Plan, 2009 WL 565544 (E.D.Cal.): The court held that determinations by other federal courts could be used to establish a fact under Rule 807 --- in this case the fact recognized was that the insurer Unum has a history of biased claim administration. The court applied Rule 807 as follows:

> The evidence that Unum has a biased history is relevant to whether Unum had a conflict of interest and whether it abused its discretion in this case. The probative value of the judicial findings is more probative on the issue of biased history than any other evidence Plaintiff can procure through reasonable efforts. For Plaintiff to show this history through a review of Unum's other claims grants and denials would be burdensome as it would require significant discovery, expert interpretation of data, and potentially mini trials as the parties fought over whether Unum's conduct when denying other claims was proper. Because of the difficulty of this court reviewing other claims denials to show a history of biased claims administration, the interests of justice support admission. An established fact found by the Supreme Court, Second Circuit, Eight Circuit, Ninth Circuit, this court, and several other district courts has a sufficient indicia of reliability, accuracy, and trustworthiness to support the purpose behind the Federal Rules of Evidence.

Trustworthiness: Prison yard conversation

United States v. Berrios, 2008 WL 2700884 (D.V.I.): A prison yard conversation between two criminal associates was found admissible under the residual exception. The court reasoned that "[t]he conversation between Moore and Berrios was highly incriminating against them. Neither Moore nor Berrios was attempting to deflect criminal liability or to inculpate Cruz or Rodriguez. If Moore or Berrios knew that they were being overheard, neither would have engaged in such a discussion. Thus, the statements possessed a particularized guarantee of trustworthiness."

Trustworthiness: Offers of employment

Virola v. XO Communications, Inc., 2008 WL 1766601 (E.D.N.Y): In an employment actions, the plaintiffs sought to testify to offers of employment and salary quotes they obtained from other employers. The court held that the offers and quotes were admissible as residual hearsay. As to trustworthiness, the court reasoned as follows:

> The trustworthiness of an offer of employment and a salary quote, at least when given to an experienced professional, is circumstantially guaranteed by the powerful reputational pressures that a competitive labor market exerts on corporations. * * * Even with a legal presumption of at-will employment, a corporation that extends offers it does not intend to keep, or provides inaccurate salary quotes, will incur a negative reputation among prospective employees. While certainly not infallible, these market pressures provide circumstantial guarantees of trustworthiness that are equivalent to the assurances of reliability afforded by other hearsay exceptions. *Cf., e.g.,* Fed.R.Evid. 803(3); Fed.R.Evid. 803(16); Fed.R.Evid. 804(b)(4). Finally, given that the plaintiffs will be subject to cross-examination as to whether the statements to them were actually made, and in what circumstances, the interest in ensuring that the plaintiffs' prospective employers did not deceive them regarding the terms of their offers or potential offers is minimal, and I find that the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.

Reporter's comment: The court is probably right that offers and salary quotes are trustworthy, but the analysis shows a problem with the "equivalence" standard of Rule 807. If the ancient documents exception is a comparable, then the bar for admissibility is shockingly low. It is interesting that Judge Gleeson picked probably the three weakest hearsay exceptions as comparables.

Trustworthiness: Statements consistent with subsequent action

Patsy's Italian Restaurant, Inc., v. Banas, 2008 WL 850151 (E.D.N.Y.): In a trademark dispute, one of the issues was whether a consent agreement had been entered into many years earlier. The defendant sought to admit testimony from a witness who was told by the principals of each party that they has entered into an agreement. The court found that the statements made to the witness by the principals were admissible as residual hearsay. As to trustworthiness, the court reasoned as follows:

> Given the fact that the parties concede that for several decades the parties' predecessors operated their respective establishments in peaceful coexistence, the evidence of the purported consent agreement bears independent indicia of reliability.

Reporter's comment: It appears that the court found the statements trustworthy solely on the basis that they were corroborated by independent evidence.

Trustworthiness: Affidavit of a Public Official

Osprey Ship Mgmt., Inc. v. Jackson County Port Authority, 2008 WL 282267 (D.Miss.): An affidavit of the Chief of Operations of the Army Corps of Engineers about a COE project was found admissible under Rule 803(8), 803(16) and 807. The overlap between Rule 803(16) and 807 is notable.

Trustworthiness: Near miss of a dying declaration

Fossyl v. Watson, 2007 WL 6960324 (S.D. Ohio): A person dying of cancer made a statement to her husband that implicated herself in a previous murder. The court found that the statement was admissible under Rule 807. The entirety of the court's analysis is as follows:

> First, Ms. Chinn's statement is offered to prove the material fact of who killed Cheryl Fossyl and how. Further, Ms. Chinn's statement is more probative on this point than other evidence which Plaintiffs can procure since she is the only eye witness to the death who tells a complete story. Finally, the general purposes of the rules and the interest of justice are served by admission of the statement because Ms. Chinn was seriously ill and facing her own mortality and thus, there are other indicia of trustworthiness associated with the statement.

Reporter comment: The statement was not a dying declaration because it did not concern the causes and circumstances of the declarant's pending death. Essentially the court is using the residual exception to cover a "near miss" of the dying declarations exception. But the analysis is pretty thin.

Trustworthiness: Claims investigation

Wezorek v. Allstate Ins. Co., 2007 WL 1816293 (E.D.Pa. 2007): In a dispute over insurance coverage after a house was burned down, the defendant sought to admit statements made by the insurance agent (Torres) during a claims investigation, about what information was provided to and provided by the insureds during the application process. The court held that the statements were admissible under Rule 807. The court discussed the trustworthiness requirement as follows:

> Allstate asserts Torres' statement is trustworthy because of the following: (1) it was taped, allowing the court to assess the credibility of the statement by listening to

> Torres' voice; (2) it was made two months after the application process in question; (3) Torres had personal knowledge of the events recounted in the statement; (4) it was not prepared in anticipation of litigation; (5) it is consistent with documents in Torres' file; and (6) Torres said his answers were true and correct. I agree.

The court found it not problematic that Torres was an insurance agent of the company that was doing the claims investigation. The court noted that "Torres' statement shows his willingness to admit when he made a mistake on the insurance application. After admitting the mistake, Torres did not attempt to explain it away as if he felt his job was in jeopardy."

Reporter comment: While the court sets forth the mantra that Rule 807 is to be narrowly used in exceptional circumstances, on the facts it takes a broad view of the residual exception. After a fire, the claims investigation was adversarial, and Torres was being interviewed by his employer. These are not exactly strong circumstantial guarantees of reliability.

Trustworthiness: Corroborated letter describing abuse

Duncan v. Oregon, 2007 WL 987451 (D.Ore.): Plaintiffs sought to prove that a victim, Munoz, was abused by a probation officer. They sought to introduce the victim's letter describing threats and abuse. The plaintiffs offered the letter as an adopted statement under Rule 801(d)(2)(B), but the court declined to decide that question, finding that the letter "fits better" within Rule 807. On the question of trustworthiness, the court found as follows;

> The trustworthiness of the letter is supported in a few ways. Its description of Boyles' abuse of Munoz is consistent both with Munoz's grand jury testimony and with Munoz's statements made to Detective Sudaisar. I realize that we have no grand jury transcript but the fact that an indictment resulted from the testimony creates an inference that Munoz testified about the abuse. Further, the threats Munoz describes in the letter are consistent with the threats Boyles made to other plaintiffs here. Based on the corroboration, I conclude that the letter's trustworthiness is equivalent to other hearsay exceptions.

Reporter's comment: Under a flexible approach to Rule 807, the court should not have to evaluate standard exceptions if it can find (perhaps more easily) that the statement is admissible under Rule 807. That is what the court did in this case. And the court's approach to trustworthiness shows the importance of and need for relying on corroboration. Without corroboration, the report would have been admitted only because it was consistent with other statements made by the declarant; and that would not seem to be a sufficient ground to conclude that the statement was true.

Trustworthiness: Balance sheet

In re Worldcom, Inc., 357 B.R. 223 (S.D.N.Y. 2006): In the Worldcom corporate fraud case, the court found that the Bankruptcy Court properly admitted Worldcom's restated balance sheet. The entirety of the analysis reads as follows:

> The document is admissible as a business record under Rule 803(6) of the Federal Rules of Evidence, or under the general exception found in Rule 807 of the Federal Rules of Evidence. Moreover, Judge Hardin found that the intense public scrutiny involved in the restatement of WorldCom's financial adequately ensured that the results were trustworthy. The Court therefore holds that the bankruptcy court properly admitted WorldCom's restated balance sheet and relied on it in deciding the motion for summary judgment.

Trustworthiness: Newspaper article

Mandal v. City of New York, 2006 WL 3405005 (S.D.N.Y.): A newspaper article quoting a public official was offered to prove what the official said. The court found the article to be sufficiently trustworthy to qualify under Rule 807. It stated that the author of the article testified in his deposition that he has an independent recollection of the statements, and the parties who made the statements were available to testify and to be cross-examined.

Reporter's comment: This is a pretty broad view of the residual exception. Essentially any newspaper article that can be verified by the author or attacked by witnesses is admissible for its truth. Moreover, the necessity for admitting the article seems thin, because the author is available to testify and can verify what was said. The court did not consider whether the article was more probative than any other evidence reasonably available. The case digest on exclusion sets forth a number of cases in which newspaper articles were found inadmissible under Rule 807, either because insufficiently trustworthy or not more probative than other available evidence.

Trustworthiness: Usenet postings

Symantec Corp. v. Computer Assoc. Intern., 2006 WL 3950278 (E.D. Mich.): On a summary judgment motion in a patent case, the court found Usenet postings could be considered as they probably could be admitted at trial under Rule 807. The court analyzed the trustworthiness requirement as follows:

> Richardson's hearsay statement was made contemporaneously with his purported uploading of the PKSFANSI program on the Internet, and was obviously made on personal knowledge. It is a simple statement of a recent past act, and thus does not bear

the risks of faulty perception, memory, or narration, and Richardson repeated the statement in a subsequent posting. Further, nothing in Richardson's posting, nor any other evidence, suggests that Richardson would have had any motive to fabricate his claim to have posted the program on the Internet.

Evaluating other requirements of Rule 807, the court stated that the materiality requirement "is merely a restatement of the general requirement that evidence must be relevant" and that the interests of justice requirement "is merely a restatement of the general requirement that evidence must be relevant."

Trustworthiness: Birth Certificate

United States v. Vidrio-Osuna, 198 Fed.Appx. 582 (9th Cir. 2006): In an alien-reentry case, the court found that a birth certificate was properly admitted as proof that the defendant was born in Mexico. Applying the residual exception, the court declared as follows:

> The hearsay statements were admissible under Fed.R.Evid. 807 because (1) the birth certificate contained birth records about which it would be difficult to conceive of any motive to lie and thus contained sufficient indicia of trustworthiness; (2) it was offered to prove an element of the crime; (3) it was more probative on this point than any other available evidence; (4) its admission served the general purposes of the Rules of Evidence and the interests of justice; and (5) defendant received a copy of it sufficiently in advance of trial in order to raise any doubts about its accuracy. Although the district court failed to make detailed findings to support admission of the birth certificate under Rule 807, we can and do make such findings.

Trustworthiness: Ancient document

Fresenius Medical Care Holdings, Inc. v. Baxter Intern., Inc., 2006 WL 2006 WL 1330001(N.D.Cal): In a patent case, a document describing a recording and monitoring system, found in a garage of the architect of the system, was found admissible as an ancient document, a business record, and under the residual exception. The court did not do an independent analysis of reliability under the residual exception.

Reporter's comment: The case supports the argument that limitation of the ancient documents exception is not problematic as to reliable hearsay).

Trustworthiness: Business record

Malletier v. Lincoln Fantasy, 2006 WL 897966 (D.P.R.): The court found that an inventory list of seized counterfeit items, prepared by a court-appointed custodian, was trustworthy enough to be admitted as residual hearsay. But the court also found that the list was admissible as a business record and a public record, so Rule 807 was not doing much work here.

II. MORE PROBATIVE

More Probative: Expert reports from a related case

Muhammad v. Crews, 2016 WL 3360501 (N.D.Fla.): The plaintiff, a prisoner, alleged that he was not receiving a diet consistent with his religious needs. He sought to admit expert reports prepared for the Department of Justice in a case with similar issues. The court found the expert reports to be admissible under Rule 807. As to trustworthiness, the court reasoned that the reports were "sworn expert reports prepared for the Department of Justice." As to the "more probative" requirement, the court stated that "Muhammad—a prisoner proceeding pro se—can hardly expect to procure similar expert reports about the economics and security issues surrounding the provision of alternative diets through 'reasonable efforts' of his own. And allowing Defendants to offer their own de facto expert opinions without allowing Muhammad a reasonable chance to rebut those opinions would not serve the interests of justice." The court emphasized, however, that the "more probative" requirement would generally be used to exclude expert reports prepared in other cases:

> To be clear, this Court's ruling should not be construed as an endorsement of the regular use of the residual hearsay exception as a tool to bring expert reports from a similar case into one's own case. Under normal circumstances, the residual exception would not be appropriate because most parties can obtain their own expert reports—that is, they can, through "reasonable efforts," find evidence just as probative, and probably more probative, on the issues involved in their case than an expert report from another case. *See, e.g., N5 Tech. LLC v. Capital One N.A.*, 56 F. Supp. 3d 755, 765 (E.D. Va. 2014) (rejecting attempt by plaintiff to introduce expert report through Rule 807 because "plaintiff, through reasonable efforts, could have retained its own expert and presented testimony on the doctrine of equivalents, but chose not to do so" and "[p]laintiff must now live with the consequences of this choice"). * * * But here we have a somewhat unique situation: there exist recent expert reports prepared for a case with similar issues to this one, brought against (more or less) the same defendants, and a pro se prisoner wishes to use those reports to rebut certain claims made by Defendants. Under these circumstances, the Magistrate should have considered the expert reports of Clark and Watkins under the residual hearsay exception.

More probative: Child-victim's statement regarding abuse

United States v. W.B., 452 F.3d 1002 (8th Cir. 2016): Hearsay statements of a victim of child-sex-abuse made to a forensic interviewer were admitted under the residual exception. On appeal the only claim of error was that because the child testified, her statements to the interviewer were not more probative than any other evidence reasonably available. The court noted that generally speaking, in-court testimony is more probative than hearsay, but this is not the case where a child witness's testimony is impaired by communication difficulties, reluctance to testify, fear, and the like. The court concluded as follows:

> Given J.D.'s reticence in providing details of the abuse and her stated belief she could be hurt by testifying against W.B. in court, we believe the district court had ample reason to believe J.D. was unable or unwilling to testify further or more clearly regarding the details of the abuse. Accordingly, the district court did not abuse its discretion by concluding J.D.'s out-of-court statements to Hawkins were the most probative evidence available under Rule 807.

Reporter's Comment: The result would not change if the "more probative" requirement were limited to a comparison of the hearsay and any other statement that could be obtained from the declarant. In this case, that comparison was made and the hearsay was found to be the better statement.

III. INTERESTS OF JUSTICE

Interests of Justice: Statement of participant in an accident

Royal & Sun Alliance Ins. PLC v. UPS Supply Chain Solutions, 2011 WL 3874878 (S.D.N.Y.): The court held that a statement by a participant in an accident, taken by a police officer who visited the participant an hour after the accident, was admissible under Rule 807. The court explained as follows:

> The fact that Crews provides the only eyewitness account of the accident, the severity of the accident, and the timing of the interview are all indicia of the statement's materiality and trustworthiness. As discussed above, only a short interval of time had elapsed between when the statement was made and when Crews suffered life-threatening injuries, making it less likely he fabricated a story. The statement is also material and probative, as the decision regarding whether Crews was at fault for the collision is vital to both parties' claims and any negligence determination. The inclusion of the statement best serves the interest of justice, as the unfortunate fact that Crews succumbed to his injuries should not preclude IMSCO from introducing statements from the only available eyewitness.

Reporter's comment: Here the "interests of justice" factor is that the witness has died and there is no other evidence. But that is just another way of saying that the evidence is "more probative" than any other evidence reasonably available. So the interests of justice language adds nothing and in fact confuses the court, because the court should have been applying the "more probative" language.

TAB 3

TAB 3A

FORDHAM

University School of Law

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

Daniel J. Capra
Philip Reed Professor of Law

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

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to Fed. R. Evid. 801(d)(A)
Date: April 1, 2017

Over the last several meetings, the Committee has been considering the possibility of expanding substantive admissibility for certain prior statements of testifying witnesses under Rule 801(d)(1) --- the rationale of that expansion being that unlike other forms of hearsay, the declarant who made the statement is subject to cross-examination about that statement. At the Symposium on Hearsay in October, 2015, a panel was devoted to treatment of prior witness statements. Then the matter was discussed among a different panel of experts at the Pepperdine Conference in October 2016. Over all this time and after all this input, the Committee's focus has changed from a general review of prior witness statements to a more particularized consideration: whether substantive admissibility of prior inconsistent statements should be expanded from the current limitations in Rule 801(d)(1)(A) --- under which substantive admissibility is limited to statements that were made under oath at a formal proceeding.

This memorandum is divided into four parts. Part One is a discussion of Committee determinations up to now, including discussions at the last meeting after the presentation at the Pepperdine Conference. Part Two considers concerns and suggestions that have been previously expressed and addressed concerning a proposal to expand substantive admissibility of prior inconsistent statements; this section is taken from previous memos. Part Three considers concerns and suggestions that were raised at (and after) the last Committee meeting about the working draft of an amendment to Rule 801(d)(1)(A) that would expand substantive admissibility to include statements that are video recorded. Part Four considers drafting alternatives to the existing working draft that respond to some of the suggestions discussed in Part Three.

Attached to this memorandum is an excellent and thorough memo prepared by Professor Liesa Richter, the new academic consultant to the Committee. The memo discusses in detail the practice in the states that have expanded substantive admissibility beyond that provided by Rule

801(d)(1)(A), while still retaining some limitations --- what Professor Richter refers to as "compromise" states.[1] The practice in these states gives some indication of what might be expected in the federal system should Rule 801(d)(1)(A) be expanded.

At this meeting, the question for the Committee is whether to recommend that the Standing Committee release for public comment a proposed amendment that would expand substantive admissibility for prior inconsistent statements under Rule 801(d)(1)(A). The date of enactment for that amendment would be December 1, 2019. The option of deferring the proposal probably does not make much sense, as it has been before the Committee now for more than two years and has been discussed at two Conferences. It seems like the time has come for an "up or down" vote, but of course that question is for the Committee.

I. Introduction --- Prior Committee Determinations

Since beginning its review of all prior witness statements under Rule 801(d)(1), the Committee has narrowed its focus. Here is a synopsis of the Committee's determinations:

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

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

- Currently Rule 801(d)(1)(A) provides for substantive admissibility only in unusual cases, i.e., where the declarant made the prior statement under oath at a formal proceeding. Two possibilities for expansion are: 1) allowing for substantive admissibility

[1] As discussed in prior memos, a number of states provide for substantive admissibility of *all* prior inconsistent statements. California and Wisconsin are two examples. A compromise state is one that provides broader substantive admissibility than the Federal Rule, while retaining some limitations.

of *all* prior inconsistent statements, as is the case in California, Wisconsin, and a number of other states; and 2) allowing substantive admissibility only when there is proof --- other than a witness's statement --- that the prior statement was actually made, as is the procedure in Connecticut, Illinois, and several other states. The Committee quickly determined that it would not propose an amendment that would provide for substantive admissibility of all prior inconsistent statements. The Committee was concerned about the possibility that a prior inconsistent statement could be used as critical substantive proof even if the witness denied ever making it and there was a substantial dispute about whether it was ever made. Cross-examination is the touchstone of the exception, and it could be difficult to cross-examine the witness about a statement he denies making; and it would often be costly and distracting to have to prove whether a prior inconsistent statement was made if there is no reliable record of it.

● If the concern is whether the statement was ever made, a majority of Committee members have concluded that the concern could be answered by a requirement that the statement be videotaped. It was also noted that allowing substantive admissibility of videotaped inconsistent statements could lead to more statements being videotaped in expectation that they might be useful substantively--- which is a good result even beyond its evidentiary consequences. And it was further noted by some members that one of the major costs of the current rule is that a confounding limiting instruction must be given whenever a prior inconsistent statement is admissible for impeachment purposes but not for its substantive effect. That cost may be justified when there is doubt that a prior statement was fairly made, but it is unjustified when the prior statement is on video --- as there is easy proof of the statement and its circumstances if the witness denies making it or tries to explain it away.

The Committee developed a working draft of an amendment that would allow substantive admissibility for videotaped prior inconsistent statements. A straw vote was taken at the Spring 2016 meeting, with five members in favor and three opposed. The working draft provides as follows:

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

*** * ***

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

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

(A) is inconsistent with the declarant's testimony and ~~was~~:
(i) was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or
(ii) was recorded on video and is available for presentation at trial; or

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

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

At the Pepperdine Conference before the Committee meeting, participants generally were in favor of expanding the substantive admissibility of prior inconsistent statements. One participant --- who served as a state prosecutor in California, a state where all prior inconsistent statements are substantively admissible --- stated that without that rule many prosecutions (especially gang prosecutions) could not be brought. Another participant --- a California appellate judge who also served as United States Attorney and as a Federal District Judge --- noted that a major problem with the Federal Rule is that it relies on a distinction between substantive and impeachment use of prior inconsistent statements that cannot be understood by juries. She had this to say about the limiting instruction made necessary by the Federal Rule:

> The other issue, of course, is the effectiveness of a limiting instruction. It's my belief that it's very difficult to let one portion of a cat out of a bag. If you've ever tried to put a cat in a cage, you know that as soon as the word is out. And so I recognize and the rules recognize that we do give limiting instructions, and God knows how many times I've written an opinion that says that the court presumes the jury followed the judge's instructions. But if you're really talking about a prior inconsistent statement and the jury hears it, the notion that the jury individually or as a whole will be able to compartmentalize that and say of course we can't consider that for its substantive meaning, whatever the hell that means, but only for impeachment, I just think we're kidding ourselves.

After the Conference, the Committee discussed the working draft. The Committee's discussion raised the following points:

● One Committee member argued that expanding the exception could lead to abuse. The stated scenario was that a criminal defendant could coerce a witness to make a video statement that would exculpate the defendant. Then, when the witness testified to the defendant's guilt at the trial, the defendant could admit the prior videotape as substantive evidence. There does not appear to be any reported indication that this abuse is occurring in the states where prior inconsistent statements are substantively admissible, but the Reporter stated that he would check the practice in those states for signs of abuse.

● Judge Campbell stated that it was a good idea to provide incentives for videotaping witness statements. But he feared that expanding substantive admissibility would also provide incentives to create video. He also expressed concern that with the increasing use and distribution of video, e.g., on YouTube and Facebook Live, an expanded rule would lead to broad use of such video, and this might be a problem.

● Judge Campbell wondered how an amendment might treat a statement that is recorded on a police officer's body camera when the statement is heard on the audio but the camera is not trained on the person making the statement. This raises a broader question of statements made "off camera." Committee members appeared to agree that the amendment, if it were to be proposed, should be limited to statements that the witness made while on camera. Otherwise there could be a dispute about whether the witness in fact made the statement, requiring burdensome proceedings and making it difficult to cross-examine the witness.

● Another Committee member observed that given all the statements that are now being recorded, many might not be reliable --- though arguably the concern about reliability would be handled by the fact that the witness who made the statement would be subject to cross-examination about it. The member wondered whether there would be a category of cases that would be particularly affected by the change.

● Committee members generally agreed that if the amendment is to go forward, the language "recorded on video" should be changed because it is subject to becoming outmoded by technological change. Committee members suggested the term "audiovisual" --- which is the same term used in Civil Rule 30.

II. Recap of Previously Expressed Concerns About Expanding Substantive Admissibility of Prior Inconsistent Statements

What follows in this section is a recap of concerns about expanding substantive admissibility of prior inconsistent statements --- concerns that were expressed and addressed at previous meetings. This section is derived from previous memos, and is replicated here for the convenience of the Committee.

A. Concerns about the Difficulty of Cross-Examination When the Witness Contests the Accuracy of the Testimony Concerning the Inconsistent Statement

It can be argued that the premise of having a hearsay exception for prior inconsistent statements --- the ability to cross-examine the person who made the statement --- is faulty when the declarant simply denies having made it. How do you cross-examine the witness about the prior statement if the witness denies saying that?

It is surely true that there are special challenges in cross-examining a witness who denies the prior assertion. But those challenges would not seem as significant when the prior statement has been videotaped. This is true for at least three reasons. First, the *likelihood* of the witness denying that he made a videotaped statement would appear to be quite low. The witness is essentially risking a perjury charge by doing so. Second, a witness who denies making a videotaped statement is testifying so implausibly that the cross-examination of the witness's motives and recall should be pretty straightforward and effective. Third, the hearsay problem --- that the jury is unable to assess the credibility of the person who made the out-of-court statement --- is quite attenuated because the jury has everything it needs to assess the witness's credibility when the prior statement is videotaped and the witness has testified at trial.

There are a couple of other arguments that could favor substantive admissibility for a videotaped prior inconsistent statement even where the witness denies making it:

- It seems a questionable policy to preclude substantive admissibility of a prior inconsistent statement simply because the witness denies making it. That gives the witness veto power over admissibility.

- A prior inconsistent statement is admissible for impeachment even though the witness denies making it. The challenges of cross-examination are exactly the same. Why should substantive admissibility be any different?

B. The Concern about Proving a Prior Inconsistent Statement to Show That Neither the Statement Nor the Testimony is True.

At the Chicago Symposium, A.J. Kramer observed that sometimes a cross-examiner raises a prior inconsistent statement not to show that it is true, but to show that *nothing* the witness has said is true. A.J.'s example was of drugs found in a car, and the government wants to place the defendant in the car. A witness testifies that the defendant was in the back seat of the car. He has made a prior inconsistent statement (videotaped for purposes of the discussion) that the defendant was in the front passenger seat and another statement (again, videotaped for purposes of the discussion) that the defendant was driving. The point of introducing the inconsistencies would be to show that the witness is all over the place (literally) with his story and in fact he is lying about the defendant being in the car at all. But A.J.'s concern is that if the prior inconsistent statements are admissible as proof of a fact, then defense counsel, when offering the statements, will have proved as a fact that the defendant was (somewhere) in the car.

It would of course be a bad state of affairs if an amendment to Rule 801(d)(1)(A) would mean that a party, who was only seeking to use the inconsistent statement for impeachment, could end up proving the adversary's case with substantive evidence. The question is how to allow a party to use a prior inconsistent *only* for impeachment if that is their election, even though it could be used substantively under an expanded rule.

One factor tempering the concern about unintended substantive use is that when the cross-examiner is trying to prove that the witness had never told the truth, the prior statement on direct has already been made and is admissible as substantive evidence. Thus, in the car hypothetical, it is the direct testimony that has put the defendant in the car as a matter of substantive evidence. So the cross-examiner's attack really *does* go to impeachment and has no real substantive impact.

More broadly nothing in the hearsay rule or Rule 801(d)(1)(A) *requires* a proponent to offer the inconsistent statement for its truth --- even if to do so is permitted by the Rule, that doesn't mean that the proponent can't control the use of the statement by offering it for a limited purpose. Conceptually, the situation is analogous to a party who is offering an out-of-court statement for its effect on the listener, or for context, rather than for the truth. The party controls the use of the evidence by articulating the purpose, so long as that purpose is plausible. So it would seem that a proponent could avoid a substantive evidence trap in the car hypothetical by making it clear to the court and the jury that the inconsistent statement is offered not to prove that the defendant was in the car but rather to prove that the witness is lying about the defendant being in the car. It seems unlikely that a trial court would find that a defense counsel who was

simply trying to show that a witness was lying should be held to have proven the truth of an adverse fact.

That said, it would be prudent in any amendment to mention and provide guidance on the possible use of inconsistent statements solely for impeachment. There are of course two possibilities --- adding to text and adding to Committee Note. Adding to the Committee Note would seem preferable because nothing in the text of the rule needs to be changed to make the point that a party does not *have to* offer a statement for its truth --- if the statement is not offered for its truth, it doesn't satisfy the definition of hearsay in Rule 801(c), and so Rule 801(d)(1)(A) cannot be applicable. Moreover, it would be difficult to add a condition to the rule that would be anything more than restating the condition of the hearsay rule itself. Something like "is inconsistent . . . and the proponent offers the statement for the truth of the matter asserted" would not seem helpful.

The working draft Committee Note contains the following language to cover the question that arises when a prior inconsistent statement is offered not for its truth but to show that it was a lie. It provides as follows:

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

C. The Concern in Civil Cases That Parties Will Avoid Summary Judgment by Filing an Affidavit with an Inconsistent Statement

At the Hearsay Symposium in 2015 the concern was expressed that if prior inconsistent statements are given substantive effect, a party could avoid summary judgment simply by filing an affidavit with an inconsistent statement. The example provided was as follows: a party has made a concession in a deposition that essentially ends its case. The opponent then moves for summary judgment on the basis of the statement. The party, in opposition to the motion, files an affidavit that contradicts the deposition. If that affidavit must be given substantive effect due to

an expansion of substantive admissibility under Rule 801(d)(1)(A), then the thinking is that the court would have to deny the motion. In contrast, if it were admissible only for impeachment then it would have no effect, because the court considers only substantive evidence on summary judgment.

If the scenario presented above were an inevitable outcome from an amendment to Rule 801(d)(1)(A), then the amendment would probably need to be rejected, or limited to criminal cases, or subject to an exception that would prohibit the practice. That is to say, it is a bad result to propose an amendment that would provide undeserving parties a shady means to escape summary judgment.

But on closer inspection it appears that the risk of misuse of substantive admissibility of prior inconsistent statements on summary judgment is far less likely than it sounds. That is so for two reasons:

- First, the scenario painted at the Symposium can occur *today* --- no amendment is necessary for a party to file an affidavit averring to an inconsistent statement as a means of forestalling summary judgment. This is because an affidavit containing a statement is an assertion that the affiant will testify at trial to that statement, i.e., it will be presented in admissible form at trial. Fed.R.Civ.P. 56(c). So if, for example, a party makes a statement at the deposition that he didn't read the prospectus, but then files an affidavit saying that he did, he is averring that he will testify at trial that he did. That will be substantive evidence at trial, regardless of Rule 801(d)(1)(A). The same would hold true if the statement presented to forestall summary judgment is in an affidavit of a non-party that contradicts a statement the non-party previously made. The non-party's averment of an inconsistent statement must be treated as substantive evidence because it will be provided in an admissible form at trial, i.e., as in-court testimony. That rule has nothing to do with the substantive admissibility of a prior inconsistent statement because the inconsistency will be presented at trial in the form of testimony.

Thus, the only risk of abuse that could possibly be *added* by an expansion to Rule 801(d)(1)(A) is quite narrow: Assume that a statement by a non-party in a deposition would terminate the case; but instead of the non-party filing an affidavit with an inconsistent statement, the *party* files an affidavit averring that the non-party made an inconsistent statement, and the non-party will be unavailable to testify at trial. In that case, under the existing Rule 801(d)(1)(A), the non-party's inconsistent statement would be admissible only to impeach the deposition testimony under Rule 806 (and so cannot be considered on summary judgment) because it is not presented in a form that would be admissible substantively at trial (i.e., the party's testimony about the inconsistent statement would be hearsay). Under a rule providing for greater substantive admissibility

of prior inconsistent statements, that inconsistent statement would have to be considered by the court in opposition to summary judgment.

The narrowness of the problem of expanded substantive use of prior inconsistent statements on summary judgment is borne out by Ken Broun's research of summary judgment in states that provide a hearsay exception for all prior inconsistent statements. Ken concluded that the problem of prior inconsistent statements on summary judgment in these states rarely arises in reported cases, and when it does, it is exclusively the situation in which a party files an affidavit averring to a statement made by a *non-party* that is inconsistent with the statement that the non-party made at a deposition.

The problem becomes even narrower under an amendment that would allow substantive admissibility only for prior statements that are videotaped. In that case, a party would have to aver that the non-party made a *videotaped* statement that was inconsistent with his deposition testimony. If not videotaped, it could only be admissible for impeachment and therefore could not be considered by the court on summary judgment. Thus, the putative bad actor trying to forestall summary judgment would have to get the non-party to make a videotape of a statement that is inconsistent with his deposition testimony --- that is going a long way to forestall summary judgment.

● Second, even if expanded substantive admissibility of prior inconsistent statements might lead a party in bad faith to think about forestalling summary judgment by creating such a statement, it wouldn't work. There is already substantial case law in place to prevent parties from submitting "sham affidavits." Case law in every circuit establishes a "sham affidavit" rule. See Edward Brunet, John Parry, & Martin Redish, *Summary Judgment: Federal Law and Practice* § 8:10 (citing cases from every circuit providing authority of district courts to strike sham affidavits). A sham affidavit "is an affidavit that is inadmissible because it contradicts the affiant's previous testimony . . . unless the earlier testimony was ambiguous, confusing, or the result of a memory lapse." *Pourghoraishi v. Flying J., Inc.,* 449 F.3d 751, 759 (7th Cir. 2006). Thus if a party submits an affidavit solely to contradict a previous statement, it will be rejected on summary judgment even if it is substantively admissible. *See also Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1237 (11th Cir. 2010) ("[a] court may determine that an affidavit is a sham when it contradicts previous deposition testimony and the party submitting the affidavit does not give any valid explanation for the contradiction"); *Brown v. Henderson,* 257 F.3d 246, 252 (2d Cir. 2001) (affirming summary judgment for employer in a Title VII sex discrimination case, finding the trial court properly rejected the plaintiff's affidavit that directly conflicted with her own prior deposition testimony); *Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703 (3d Cir. 1988) (trial court

properly disregarded the plaintiff's affidavit "submitted only after [she] faced almost certain defeat in summary judgment," finding that the affidavit "flatly contradicted no less than eight of her prior sworn statements"); *Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 198 (4th Cir. 1997) (affirming summary judgment in an employment discrimination case and finding that the trial court properly disregarded the affidavit of the nonmovant that "contradicts his prior deposition testimony"); *Dotson v. Delta Consol. Industries, Inc.*, 251 F.3d 780, 781(8th Cir. 2001) (affirming summary judgment in a Title VII race discrimination case and rejecting nonmovant's argument that his affidavit created an issue of fact with his earlier conflicting deposition "because we have held many times that a party may not create a question of material fact, and then forestall summary judgment, by submitting an affidavit contradicting his own sworn statements in a deposition"); *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1138 (9th Cir. 2000) ("[G]enerally, a nonmoving party may not create an issue of fact for summary judgment purposes by means of an affidavit contradicting that party's prior deposition testimony.").

Thus, the concern that expansion of substantive admissibility of prior inconsistent statements would create a crisis for summary judgment cases is belied both by the narrowness of the problem and, more importantly, by existing law that would prohibit a party from manufacturing an inconsistent statement in an effort to forestall summary judgment.

III. Suggestions and Concerns at and After the Last Committee Meeting

A. Audio Visual Recording

At the last meeting it was suggested that the working draft iteration of "video recording" could lead to problems of interpretation and might be outstripped by technological developments. The suggestion was to use the term "audiovisual" recording. That term would be uniform with other national rules. See Civil Rule 30(b)(3) (deposition testimony "may be recorded by audio, audiovisual, or stenographic means"). Because "audiovisual" does not refer to any particular technology, it should stand the test of time. Therefore, the updated working draft set forth in Section Four includes the term "audiovisual" --- to wit:

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

(A) is inconsistent with the declarant's testimony and ~~was~~:
(i) was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or
(ii) was recorded by audiovisual means, and the recording is available for presentation at trial;

B. Proliferation of Prior Inconsistent Statements

Concern was expressed at the last meeting that granting substantive admissibility to audiovisual recordings would provide incentives to record all kinds of statements in anticipation of use in a subsequent litigation. Because formal trappings would not be required for admissibility, the amendment could potentially cover everything on YouTube, all kinds of employee statements when an employer anticipates litigation, and every video taken on every person's iphone.

Let's call this the "proliferation problem." It can't be denied that there has been a proliferation of audiovisual recordings in the last ten years or so. But that doesn't mean that an amendment to Rule 801(d)(1)(A) will provide a significant incentive to record anyone's statements. The most obvious limitation on any such incentive will be that the party will have to *know about the rule.* That, right there, is enough to knock out the random YouTube poster. But there is more. The person deciding whether to record the statement would have to understand the *difference between substantive and impeachment admissibility*. The thinking would have to be like this: "I would not record this statement under ordinary circumstances, but I am going to record this one, because then it can be used not only for impeachment purposes but as substantive evidence." So that kind of required thinking, and knowledge about the rule, narrows the class of incentivized statement-recorders significantly.

It is true that some statement-recorders will know about the rule and its nuances. Probable candidates include police officers and businesses that have counsel. As to police officers, the Committee had determined that incentivizing officers to record prospective witnesses is one of the major *benefits* of the rule --- so no more need be said about that. As to corporations, it is difficult to see why it is a problem if corporations begin recording statements of prospective witnesses. Why that is a bad thing? But even if it were, there is one further contingency that will dampen whatever incentives exist in any amendment: a recorded statement will only be admissible *if the witness takes the witness stand and testifies inconsistently with the statement.* The recorded statement will not be admissible if the witness is unavailable or not produced for trial (unless it is admissible under some other exception). It will not be admissible if the witness testifies consistently with the statement. So the possible use of the statement is so contingent that there seems to be little incentive to go to the trouble of recording --- with one exception that is seen in the practice under the current rule.

Under the current rule, a prosecutor has the incentive to take a "wobbler" --- i.e., one who might say one thing one day but change their mind by the time of trial --- to the grand jury in

order to lock in substantive testimony in case the witness does wobble. The impact of the proposed amendment, in terms of incentive to record, is that the universe of parties who might lock in the testimony of known "wobblers" would be expanded. So now police officers and possibly corporations may have an incentive to record statements of witnesses who they think may change their mind by the time of trial. Again it is hard to see that this is a bad thing, and it doesn't look like widespread proliferation of recorded statements in dependence on the rule amendment.

Perhaps the issue of proliferation is not about *incentivizing* the making of recordings, but rather (or also) about the fact that there are so many more recordings out there these days that Rule 801(d)(1)(A) will somehow be put to use in virtually every litigation. If that is the concern, perhaps the response is, isn't that a good thing? More probative evidence is being admitted, and in each case the person who made the statement is on the stand subject to cross-examination. The knock often made on the Federal Rules hearsay system is that it is too rigid and exclusionary. Allowing more prior inconsistent statements to be used for their truth cuts against that criticism. Moreover, once again it must be remembered that prior inconsistent statements are currently admissible anyway, for impeachment. The fact that there is so much more video out there means more admissibility of prior inconsistent statements *regardless* of any amendment to Rule 801(d)(1)(A). Finally, Professor Richter's memo indicates that there does not appear to be any overuse of the rule in the states that provide for substantive admissibility of recorded statements, even in the age of video. More broadly, there appears to be no overuse of prior inconsistent statements even in the states that provide for substantive admissibility of *all* prior inconsistent statements. The California practitioners and judges at the Pepperdine Conference were happy with their state rule and gave no indication that is was being overused. And Professor Dan Blinka, who researched the practice in Wisconsin and provided a detailed memo to the Committee in 2015, found that there had been no problems in applying the wide-open Wisconsin rule, and no indication of overuse.

There is really no drafting alternative that would address the proliferation problem. Or, put another way, the current very limited ground of substantive admissibility limits the rule to very rare cases, and if the Committee is critically concerned with proliferation, it should probably stay with the status quo. But perhaps public comment will assist the Committee in determining whether an amendment is likely to cause overuse of audiovisual recorded statements.

C. Criminal Defendant's Incentive to Record Unreliable Statements

At the last meeting, AJ Kramer suggested that amending the rule would incentivize criminal defendants to record statements of associates who would lie about the fact that the defendant was involved in criminal activity --- then, when they testified for the government, the

defendant could admit the prior recorded statement as substantive evidence. The question is whether this scenario is sufficiently probable and problematic enough to be a material reason for rejecting the amendment.

It is true that one of the outcomes of the amendment would be that the criminal defendant will be able to use a small set of prior inconsistent statements as substantive evidence in his favor.[2] Currently the limited rule is essentially only useable by prosecutors with their wobblers, because the impeachment has to be with something like grand jury testimony. On the face of it, one would think that evening out a rule so that it can be used by both sides is a good thing, not a bad thing. But of course it is not a good thing if the rule incentivizes a criminal defendant to generate false testimony.

Again, however, the incentives concern is subject to overstatement. Let's assume that criminal defendants become aware of an amendment to the Evidence Rules that provides for substantive admissibility of audiovisual recordings of inconsistent statements of a trial witness.[3] Remember that the statement, if inconsistent, is *already* admissible for impeachment. So we need to assume that the defendant is aware of the extra potency of a statement when it is offered for truth rather than impeachment --- a potency that is less for the defendant than for the prosecution because it is the government that has the burden of presenting substantive evidence to prove the case beyond a reasonable doubt. What we must posit then is a defendant who says: "I wasn't planning on recording my accomplice's lying statement because it was only going to be admissible to impeach him when he testifies for the government; but I am now going to record it because it will be given substantive effect --- thank you Advisory Committee on Evidence Rules!"

The truth is that if the defendant wants to generate a lying statement to use at trial should the accomplice testify for the government, he has ample incentive to record the statement today. Recording the statement will make it easier to prove at trial that the statement was made. And using the statement to impeach the witness can be quite powerful. It is hard to see how the greater use of the statement for substantive purposes will lead to more false statements being recorded.

[2] Professor Richter's memo addresses some cases where the defendant offers prior inconsistent statements in his favor in those states which provide for substantive admissibility of recorded statements.

[3] Presumably they would be told about the rule by defense counsel. This discussion runs the risk of going down the rabbit hole of professional responsibility questions that arise when a defense counsel has an indication that the defendant is generating false evidence. This memo will avoid that risk.

D. Reliability Issues

Professor Richter's analysis of the practice in states that allow substantive admissibility of prior statements if they are recorded indicates that some states impose an extra consideration on such statements --- that they were not made under circumstances that indicate unreliability. Examples would include statements that were made under police pressure, or while the declarant was on drugs. A fair reading of her analysis is that while some of these states discuss reliability as an extra requirement, some do not. And in those that discuss a reliability requirement, most do not actually exclude statements that are made under allegedly questionable circumstances. Finally, it appears that some of the concerns of reliability are about statements that are written as opposed to audiovisual records --- because some of these states provide substantive admissibility for written statements.

If the Federal Rule is amended to cover audiovisual statements only, must or should an extra reliability requirement be added for those statements? If an extra reliability requirement needs to be imposed, then that surely cuts against adding to the rule in the first place. An extra reliability requirement would impose costs --- in the way of hearings, appeals, etc. --- that might cut against whatever benefit would be gained by expanding substantive admissibility.

But a good argument can be made that there is no need to impose an extra reliability requirement for inconsistent statements when they are recorded by audiovisual means --- at least that no such requirement should be added to the rule. The basic guarantee of admissibility is that the person who made the statement is testifying under oath and subject to cross-examination --- so the jury is able to assess the circumstances of the prior statement (including any possibility of undue influence, intoxication, etc.) and weigh the statement accordingly. There wouldn't appear to be a substantial need for judicial intervention. More importantly, the proposed expansion extends only to audiovisual recordings. Thus the jury can see (and not just be told about) the circumstances of the prior statement.[4] So it is not obvious that a reliability requirement needs to be added to the rule.

It should be noted that the courts already do deal with admissibility of prior inconsistent statements in which the witness contends that they are unreliable. That is because prior inconsistent statements are already admissible for impeachment. Courts have generally held that any concern about the circumstances under which the statement was made does not raise a question of admissibility, because those circumstances can be explained to the jury. *See, e.g., Jenkins v. TDC Mgt. Corp.*, 21 F.3d 436 (D.C.Cir. 1994) (concerns about the source of the prior statement can be addressed by simply instructing the jury about the source). There is no apparent reason why there should be a different result for substantive admissibility. The question in both cases is whether the possible unreliability can be handled by the jury, and that would seem to be so given the witness's presence at trial and given that the jury can look at the audiovisual record.

[4] Many jurisdictions have a requirement that interrogation sessions must be recorded for the same reason --- that any problem of abuse or undue influence will be shown in the recording.

If the Committee does decide to proceed with an amendment to Rule 801(d)(1)(A), and further decides that a separate reliability requirement should not be added to the text for audiovisual recordings of prior statements, then it might consider adding a paragraph to the Committee Note instructing that the court is not required to make an independent determination of reliability. A paragraph to that effect is added to the revised working draft, infra.

E. Should Substantive Admissibility Be Extended to Prior Statements that the Witness Acknowledges Making?

The DOJ representative has suggested that any expansion of Rule 801(d)(1)(A) should also cover statements that the witness acknowledges having made. The reasoning is that the goal of the amendment is to allow for substantive admissibility when it is clear that the witness made the prior statement; and this is so if the witness admits having made the statement.

Acknowledgment by the witness is recognized as a ground for substantive admissibility in Illinois. The Illinois rule, discussed by Professor Richter, allows for substantive admissibility if "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."

The problem as seen in the Illinois practice discussed by Professor Richter, is that it is often unclear whether a witness has acknowledged making the prior statement. There are many close questions here. To take some examples:

- The witness, testifying in another proceeding, admits having made the statement. But at the current trial she contends that she was confused at that prior proceeding and thought she was being asked about a different statement, or was on drugs, or subject to improper influence.

- The witness testifies that she remembers making some statement but that it differs from the examiner's account in several ways, but she can't remember much more than that.

- The witness says she made the statement but what is being offered is only part of what she said. The rest would put everything in context and clarify what she meant.

The bottom line is that there may be a lot of "yes, maybe" or "yes, but" or "yes, some of it" when a witness is asked to acknowledge a prior statement. In Illinois, this has led to a hearing requirement when a prior inconsistent statement is offered as substantive evidence on the ground of acknowledgment. The court must find that the witness truly acknowledged making the statement before it can be introduced at trial. As Professor Richter notes, the Illinois courts recognize that this process is "laborious." It is fair to state that any amendment to the Federal Rules should try to avoid instituting a laborious procedure, unless the payoff is great.

It can be argued that one of the reasons the Illinois acknowledgment rule is so problematic is because it is somewhat overbroad. It does limit admissibility to acknowledgments made under oath, which certainly seems appropriate --- otherwise the court would be sent down the rabbit hole to look at letters, statements from others, etc. to determine whether the witness ever acknowledged the statement. But allowing for acknowledgments in other proceedings raises the possibility of arguments such as "I was confused" or "it was taken out of context" that might be best avoided. In other words, there is a strong argument that if acknowledgment is to be a ground of substantive admissibility, it should be an acknowledgment that is explicitly made *at the trial in which the statement is offered.* Then arguments such as "I was confused then" or "I was being threatened then" cannot be made.

Yet there will remain shades of gray even for acknowledgments at trial. Anything short of "yes, I made that statement, no ifs ands or buts" will probably require some finding by the judge. Professor Richter notes that Illinois runs into significant problems even when acknowledgement occurs in the trial in which the statement is being offered; the courts require the declarant/witness to acknowledge the prior statement on a line by line basis. In Illinois it is not enough that the witness will acknowledge generally making a statement to police, for example. She has to admit saying each and every statement the proponent wants to admit through the hearsay exception. That is laborious indeed --- though there would not appear to be a reason for Federal courts to follow such a strict standard for acknowledgment.

It is for the Committee to determine whether expanding the exception to cover acknowledged statements is worth the practical difficulties that could arise in determining whether the witness has actually acknowledged making the prior statement. For the Committee's review, a subsection covering acknowledgment, and an explanatory Committee Note, are added to the revised working draft in Part Four. The Committee Note tries to minimize the standard for acknowledgment, to avoid the results that occur in Illinois.

F. Off-Camera Statements

At the last meeting Judge Campbell asked whether the amendment would or should cover a statement that was made off-camera but which could be heard on the videotape. Judge Campbell's example was a police officer with a body camera, and an off-camera statement made by a suspect or a bystander.

The answer to admissibility for off-camera statements should be found in the reason for the amendment --- to allow substantive admissibility for prior inconsistent statements only when there can be no doubt that the statement was actually made by the witness. That is why the Committee rejected substantive admissibility for "audio only" statements. The witness could contest having made it, or argue that he had a gun to his head, etc. and the result would be

hearings, jury distraction, and difficulty in cross-examining a witness who contends that he never really made the statement.

Given that focused and narrow rationale for the amendment, the "off-camera" statement should not be admissible substantively. In terms of certainty, the "off-camera" statement is not appreciably better than the audio-recorded statement that the Committee has already rejected.

The question is whether the current language in the working draft --- revised to refer to "audiovisual" recording --- is sufficient to exclude statements on a video that are off-camera. The reference to "audiovisual" is probably sufficient to establish that the statement must be both audio *and* visual. An attempt to be even more specific might look something like this:

> **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
>
> (A) is inconsistent with the declarant's testimony and ~~was~~:
>
> (i) was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or
>
> (ii) was made *on camera* and recorded by audiovisual means, and is available for presentation at trial; or

But a possible problem with "on camera" might be that it could be outstripped by technology. Maybe in the future there will be something other than "cameras" that take statements. Perhaps a better way to put it is:

"*was recorded by both audio and visual means*"

Breaking up audio and visual arguably makes it more clear that both are required. But is it necessary? It seems an odd iteration, compared to "audiovisual." (The stylists have been consulted on this and they prefer "audiovisual."). Moreover, "audio and visual" makes it sound like two *separate* recordings must be made at the same time.

Another option is to address the off-camera problem in the Committee Note, under the rationale that "audiovisual" is descriptive enough and the Note can help those who might still be confused. If so, the Note excerpt might look something like this:

> The amended rule expands substantive admissibility for prior inconsistent statements only if there is no dispute that the witness actually made the statement. The amendment requires a statement to be recorded by "audiovisual" means. To be substantively admissible, it must be clear that the witness made the statement on both audio and video. "Off-camera" statements are not substantively admissible under the amendment.

For full review by the Committee, the revised working draft in Part Four includes possible changes to both the text and notes to address the question of "off-camera" statements.

G. Recording Glitches

What happens if the recording is garbled in some way? Examples include microphone difficulty; video failure for part of the statement; a recording that begins after the statement has started, or ends before the statement ends; and so forth. Should any kind of glitch prevent substantive admissibility? Should it be left to the discretion of the court?

There is a substantial body of case law on recording glitches in the context of authentication under Rule 901. Generally courts admit electronic recordings over objections about glitches (including incomplete and garbled recordings) as long as the deficiencies do not "render the recording as a whole untrustworthy." *United States v. Adams,* 722 F.3d 788 (6th Cir. 2013); *United States v. Powers,* 75 F.3d 355 (7th Cir. 1996) (same); *United States v. Cejas,* 761 F.3d 717 (7th Cir. 2014) (intermittent skips in video recording did not render recordings untrustworthy). This body of case law provides guidance for courts in determining whether challenged prior inconsistent statements can be substantively admissible. One solution is to refer to that law, and suggest that standard, in a Committee Note. ***That Committee Note could read like this:***

> Questions may arise when the recording is partial, or subject to technical glitches. Courts in deciding the analogous question of authenticity under Rule 901 have held that deficiencies in the recording process do not bar admissibility unless they render the recording as a whole untrustworthy. [Case law should really be cited here and it is to be hoped that Dan Coquillette will permit it.] Courts can usefully apply that standard in assessing the witness's prior statement for substantive admissibility.

A contrary contention is that, given the limited goal of the amendment --- to allow substantive admissibility only when the witness cannot dispute having made the statement --- arguably the standard should be higher. To limit the scope of the amendment, and to avoid the necessity of hearings, it could be that the rule should not cover a statement in which there is a colorable complaint that some problem in the recording raises a question of whether the recording is complete and accurate.

A stricter test of accuracy, to address glitches, could be added to the text. It might look like this:

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

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

(ii) was recorded *accurately and in full* by audiovisual means, and is available for presentation at trial; or

A Note on the subject of recording glitches, applying this strict test, could look like this:

> [The amendment requires that for substantive admissibility, the prior statement must be recorded accurately and in full.] If there are problems with either the audio or visual, such as garbled statements, incomplete recordings, microphone problems, etc., then the statement should not be admitted as substantive evidence. The goal of the amendment is to allow substantive admissibility for prior inconsistent statements only if the witness cannot plausibly deny having made the statement.

The bracketed material would be added if the textual change is made. The remainder could be added to the note even if no language is added to the text to address recording glitches.

It should be noted, though, that limiting admissible statements in rule text to those that are "recorded accurately and in full" could lead to more disputes than it would resolve. Professor Richter came up with these possibilities: What if an officer and witness talk briefly before they turn on the recording device, as certainly happens in all cases. Does that make the recording "incomplete" because it didn't capture those preliminaries? What if there is a body-cam type recording that includes some on-camera and other off-camera statements? If the off-camera statements are inadmissible because they are not captured visually, does that make the on-camera statements inadmissible because they are incomplete? If there are technical difficulties and the interview is restarted to repair them, is the subsequent statement incomplete because it failed to capture the original statements due to technical difficulties?

Given all these questions, and possibly more, it may well be that the existing case law in the authenticity arena serves as a helpful guide that courts can use, and that probably leads to less litigation of these issues in the long run. Professor Richter notes that in all her research in the states, she found only one reported case on recording glitches. So perhaps any concern about recording glitches is at most something that should be treated in the note, with the mild language applicable to authenticity questions. That treatment is shown in Part Four, immediately below.

IV. The New Working Draft

What follows is the working draft with the text and notes revised to address the questions and comments discussed in this memorandum.

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

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

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

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

(ii) was recorded by audiovisual [audio and visual] means, and the recording is available for presentation at trial; or

(iii) is acknowledged by the declarant, while testifying at the trial or hearing, as the declarant's own 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 rebabilitate the declarant's credibility as a witness when attacked on another ground; or

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

A working draft of the Committee Note provides as follows:

The amendment provides for greater substantive admissibility of inconsistent statements of a testifying witness, which is appropriate because the declarant is by definition testifying under oath and is subject to cross-examination about the statement. The requirement that the statement be made under oath at a former proceeding is unnecessarily restrictive. That requirement stemmed mainly

from a concern that it was necessary to regulate the possibility that the prior statement was never made or that its presentation in court is inaccurate --- because it may be difficult to cross-examine a declarant about a prior statement that the declarant plausibly denies making. But as shown in the practice of some states, there is a less onerous alternative --- not widely available at the time the rule was drafted --- to assure that what is introduced is what the witness actually said. The best proof of what the witness said, and that the witness said it, is when the statement is made in an audiovisual record. That is the safeguard provided by the amendment. Given this important safeguard, there is good reason to dispense with the confusing jury instruction that seeks to distinguish between substantive and impeachment uses for prior inconsistent statements.

The amendment expands substantive admissibility for prior inconsistent statements only if there is no dispute that the witness actually made the statement. Subidivision (A)(ii) requires a statement to be recorded by "audiovisual" ["audio and visual"] means. So to be substantively admissible, it must be clear that the witness made the statement on both audio and video. "Off-camera" statements are not substantively admissible under the amendment.

It may arise that a prior inconsistent statement, even though made in an audiovisual record, is challenged for being unreliable --- for example that the witness was subject to undue influence, or impaired by alcohol at the time the statement was made. These reliability questions are generally for the trier of fact, and they will be relatively easy to assess given the existence of an audiovisual recording and testimony at trial by the person who made the statement.

Questions may arise when the recording is partial, or subject to technical glitches. Courts in deciding the analogous question of authenticity under Rule 901 have held that deficiencies in the recording process do not bar admissibility unless they "render the recording as a whole untrustworthy." *United States v. Adams,* 722 F.3d 788, 822 (6th Cir. 2013). *See also United States v. Cejas,* 761 F.3d 717 (7th Cir. 2014) (intermittent skips in video recording did not render recordings untrustworthy). Courts can usefully apply that standard in assessing the witness's prior statement for substantive admissibility.

There is overlap between subdivisions (A)(i) and (A)(ii). For example, audiovisual recording of a deposition is potentially admissible under both provisions. But the Committee decided to retain the longstanding original provision, as it has been the subject of extensive case law that should not be discarded. Rather than replace the original ground of substantive admissibility, the decision has been made to add a new, if somewhat overlapping, ground.

New Subdivision (A)(iii) provides for an additional, limited ground of substantive admissibility: where the declarant acknowledges having made the prior statement while testifying at the trial or hearing. Acknowledgment by the witness eliminates the concern that the statement was never made, so the acknowledging witness can be fairly cross-examined about the statement. It is for the court in its discretion to determine under the circumstances whether the witness has, in testifying, sufficiently acknowledged making the statement that is offered as inconsistent. There is no requirement that the court undertake a line-by-line assessment.

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

Reporter's Note

As the draft note recognizes, there is some overlap between (A)(i) and (A)(ii). For example, if an inconsistent statement was made at a videotaped deposition, it would be substantively admissible under both provisions. But the language of the original rule has been in place for 40 years and there is case law on it. Moreover it covers different factual situations --- because formal proceedings are not always taped and, conversely, taped statements are not always formal. The better approach seems to be to retain the language and then provide other

grounds that provide assurance that the statement was made. That process is similar to the one chosen in the 2014 amendment to Rule 801(d)(1)(B): the original language was retained and new grounds for admissibility were added.

TAB 3B

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The University of Oklahoma

COLLEGE OF LAW

To: Professor Daniel J. Capra, Reporter to the Advisory Committee on Evidence Rules

From: Liesa L. Richter

Re: State Evidence Rules Permitting Substantive Admissibility of Recorded Prior Inconsistent Statements

Date: February 16, 2017

The Advisory Committee on Evidence Rules has been considering expanding substantive admissibility of prior inconsistent statements of testifying witnesses beyond those given under oath in a prior trial, hearing, deposition or other proceeding. In particular, the Committee has explored the possibility of amending Fed. R. Evid. 801(d)(1)(A) to permit substantive admissibility of "video-recorded" prior inconsistent witness statements "available for presentation at trial."[1] Several states currently have provisions allowing for the substantive admissibility of prior inconsistent statements that have been recorded using a variety of methods. This memorandum explores the experience of Connecticut, New Jersey, Maryland, Illinois, Pennsylvania, and Hawaii in applying and interpreting their rules permitting substantive admissibility of recorded inconsistent statements. In particular, the memorandum focuses on the potential for abuse of a recording option and on other concerns surrounding the admissibility of recorded statements.

Appellate opinions reviewing the substantive admissibility of recorded prior inconsistent statements in these jurisdictions all arise from criminal cases. Allowing recorded inconsistencies to be admitted for their truth does not appear to have altered civil practice in state court with respect to witness statements. In criminal cases, it is the prosecution that routinely uses recorded

[1] See Memorandum to Advisory Committee on Evidence Rules from Daniel J. Capra (October 1, 2016)(discussing possible amendment to Fed. R. Evid. 801(d)). There was some discussion at the October 2016 meeting of the Advisory Committee about replacing the language "was video-recorded" with "was recorded audio-visually" to track the language of Fed. R. Civ. Pro. 30(b)(3) governing recorded depositions.

witness statements as substantive evidence at trial when those witnesses recant.[2] Recanting witnesses often claim that their prior recorded statements are untrue and unreliable because they were threatened, coerced and pressured by law enforcement or because they were drunk or high on drugs when they gave their prior recorded statements. Different jurisdictions have responded differently to such allegations. Some, like Connecticut and New Jersey require a trial court to conduct a hearing to determine the reliability of the circumstances in which the recorded statement was taken prior to admitting it. Others, like Maryland and Illinois, have expressed concerns about factors that could undermine the reliability of recorded statements, but have declined to require consideration of "reliability" beyond the recording requirements of the hearsay exception itself. Finally, other jurisdictions like Hawaii and Pennsylvania express no concern about the circumstances surrounding a recording.

None of the cases reveal any *actual* abuse or misuse of the option to record a substantively admissible witness statement outside a formal hearing, however. Even in the jurisdictions that require reliability hearings, courts routinely admit the prior recorded statements notwithstanding claims of coercion and witness intoxication. Courts rely upon officer testimony regarding the circumstances in which the statements were taken and on the contents of the recordings themselves in finding the circumstances surrounding recordings fair and reliable.

This memorandum sets out the evidentiary rules governing admissibility of prior inconsistent statements and the case law surrounding them in the foregoing jurisdictions in three parts. Part I describes the jurisdictions that have insisted upon a reliability hearing to evaluate the circumstances surrounding the taking of a recorded statement when allegations of abuse have been raised. Part II describes the jurisdictions that have expressed concerns about reliability in connection with recording, but that have not required a separate reliability determination. Part III briefly discusses the jurisdictions that largely ignore considerations of reliability beyond the requirements of their hearsay exceptions. In addition to addressing reliability concerns, all three Parts note any unique features of a jurisdiction's rules governing admissibility of prior inconsistent statements to the extent that they may be relevant to the experience in applying those rules.

I. Reliability Hearing Required

Connecticut

Section 8-5 of the Connecticut Code of Evidence recognizes a hearsay exception for the prior inconsistent statements of testifying witnesses when those statements are recorded, as follows:

> The following are not excluded by the hearsay rule, provided the declarant is available for cross-examination at trial:

[2] I did locate a few cases in which a public defender took a recorded witness statement prior to trial and sought to use it as substantive evidence at trial. See e.g.,Sheppard v. State, 650 A.2d 1362 (Md. Ct. Special App. 1994); People v. Willis, 654 N.E.2d 571, 574 (Ill. App. First District 1995).

(1) Prior inconsistent statement. 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.

The Whelan Doctrine

Up until 1986, Connecticut adhered to the traditional view of prior inconsistent witness statements as hearsay and allowed them to be admitted for impeachment purposes only. In *State v. Whelan*, the Connecticut Supreme Court held that substantive use of some prior inconsistent statements was appropriate given that "the oath is not as strong a guaranty of trustworthiness as it once may have been, and that the requirements that the jury observe the declarant and that the defendant have the opportunity to cross-examine are met when the declarant takes the stand and is subject to cross-examination."[3]

Although the court held that the reasons for precluding substantive use of all prior inconsistent statements were no longer valid, the Connecticut court found that "certain additional criteria of admissibility were appropriate to ensure the reliability of such statements for substantive use."[4] To ensure the reliability of prior inconsistencies admitted for their truth, the Connecticut court permitted substantive use of only *written* prior inconsistent statements *signed* by a declarant with personal knowledge and who appears at trial and is subject to cross-examination.[5] The court held that "[t]he hazard of error is greatly lessened with respect to prior inconsistent written statements signed by the declarant" and that the "likelihood of fabrication is slight and the risk of coercion, influence or deception is greatly reduced."[6] Although a signed writing is not an "absolute guaranty of reliability," the court noted that it gives assurance of an "accurate rendition of the statement" and also ensures that the declarant realized at the time of its making that it "would be relied upon."[7]

Thus, the Connecticut Supreme Court included a recording requirement not only to ensure that the prior inconsistent statement was made, but also with the idea that a declarant giving a recorded statement would be more aware of its import and hence more reliable. After *Whelan*, the Connecticut courts recognized its applicability to audio-recorded and video-recorded statements, in addition to written prior inconsistencies.[8] The "Whelan doctrine" is now codified as set forth above in Section 8-5 of the Connecticut Code of Evidence and is broader than a potential rule allowing only audio-visual recordings to be admitted substantively.

Concerns About Abuse: The Mukhtaar Procedure

[3] State v. Whelan, 513 A.2d 86 (Conn. 1986), *cert. denied,* 479 U.S. 994 (1986).
[4] Id.
[5] Id.
[6] Id.
[7] Id.
[8] *See* State v. Luis, 856 A. 2d 522, 526-27 (Conn. App. 2004)(inconsistent video-recorded statements admissible substantively); State v. Alzarez, 579 A.2d 515 (Conn App. 1990)(tape-recorded statements).

Concerns about coercion, pressure and abuse in connection with the recording of prior inconsistent statements arose not long after the *Whelan* decision.[9] In 2000, the Connecticut Supreme Court finally set out the procedure for handling allegations of abuse or coercion in connection with a written prior inconsistent statement in *State v. Mukhtaar*.[10] In so doing, the court recognized that "a prior inconsistent statement that fulfills the *Whelan* requirements may have been made under circumstances so unduly coercive or extreme as to grievously undermine the reliability generally inherent in such a statement so as to render it, in effect, not that of the witness."[11] According to the court, the trial court must act as a "gatekeeper" to ensure that such a statement does not go to the jury for substantive purposes. The court stated that the "linchpin of admissibility is reliability" and held that a prior inconsistency should be excluded as substantive evidence "only if the trial court is persuaded, in light of the circumstances under which the statement was made, that the statement is so untrustworthy that its admission into evidence would subvert the fairness of the fact-finding process." The court outlined the following procedure for trial courts fulfilling this gatekeeping role, which reflects a burden-shifting approach to reliability challenges:[12]

> Thus, we suggest the following procedure to our trial courts: If a statement meets the four *Whelan* requirements, it will be deemed admissible, unless the party seeking to exclude it makes a preliminary showing of facts that, if proven true, would grievously undermine the statement's reliability. If such a showing has been made—and we leave the methods and contours of such a showing to the discretion of the trial court—the court should then hold a hearing to determine the truth of those facts and whether they do, in fact, grievously undermine the reliability of the statement. The ultimate question for the trial court, therefore, is whether, notwithstanding the statement's satisfaction of the *Whelan* requirements, the circumstances under which the statement was made nonetheless render it so unreliable that a jury should not be permitted to consider it for substantive purposes.[13]

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[9] In State v. Hopkins, 609 A.2d 236 (Conn. 1992), the Connecticut Supreme Court responded to allegations of impropriety in connection with a recorded prior inconsistent statement by acknowledging the need for "case by case reliability determinations" by the trial court due to circumstances surrounding the making of certain recorded prior inconsistent statements. The Connecticut Supreme Court found that *Hopkins* was not an appropriate case for fashioning a procedure for such an analysis because the prior inconsistency challenged in the case was so reliable.

[10] State v. Mukhtaar, 750 A.2d 1059, 1076 (Conn. 2000). Westlaw suggests that *Mukhtaar* was in some way abrogated on other grounds in State v. Osimanti, 6 A.3d 790 (Conn. 2010). My reading of the case reveals no abrogation. Further, Connecticut courts including the Connecticut Supreme Court routinely rely on the "Mukhtaar" procedure in reviewing cases alleging coercion in connection with recorded prior inconsistent statements. The Connecticut Supreme Court cites *Mukhtaar* without any qualification. *See e.g.* State v. Carrion, 100 A.3d 361, 373 (Conn. 2014)(relying on Mukhtaar in affirming substantive admission of prior video-recorded witness inconsistent statement and citing case without qualification).

[11] Id.

[12] Id. at 1076 (holding that statements satisfying requirements of 8-5 are "presumptively admissible" and placing burden on opponent to persuade trial court that statement was so untrustworthy as to subvert the fact-finding process).

[13] Id. at n. 27.

Following this approach, the Connecticut Supreme Court upheld the trial court's substantive admission of a written prior inconsistent statement against Mukhtaar. The defendant in *Mukhtaar* objected to the substantive admission of the signed inconsistent statement of a testifying eyewitness, arguing that the circumstances surrounding the written statement undermined its reliability. Specifically, the eye-witness testified outside the presence of the jury that he felt "pressured" to sign the statement because the interviewing officer refused to return his parents' car (which had been seized) until he gave the statement. In addition, the eye-witness testified that he only glanced over the statement at the time and that it was incomplete because it omitted things he had told police. Further, the eye-witness testified that he was under the influence of heroin and crack cocaine when he signed the statement, that the interviewing officer offered to help him with a pending case if he made the statement, and that he only selected the defendant's photo to get the police "off [his] back." Notwithstanding all of this testimony, the eye-witness acknowledged that the statement accurately reflected his answers to the officer's questions. The officer involved in taking the written statement from the eye-witness testified that the eye-witness was afraid and reluctant to get involved in the investigation, but that ultimately he identified the defendant from the photographic lineup. The officer further testified that no pressure was placed on the eye-witness, that the officer had been unaware of pending narcotics charges against the witness, and that the eye-witness appeared "normal" and "coherent" during the interview. In upholding the trial court's admission of the prior inconsistent statement, the Connecticut Supreme Court held that this was not "the highly unusual case in which a statement that meets the *Whelan* requirements nevertheless must be kept from the jury."[14] Thus, all of the concerns about the declarant's statement were ones of weight for the jury rather than an impediment to admissibility.

It appears that criminal defendants in Connecticut frequently raise reliability challenges to recorded prior inconsistent witness statements under *Mukhtaar*.[15] Defendants commonly argue that the declarant was subjected to undue pressure from interviewing police officers, was fearful, or was under the influence of drugs or alcohol at the time that the statement was made.[16]

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[14] Id. at 1076-77.

[15] *See* State v. Carrion, 100 A.3d 361, 367 (Conn. 2014)(defendant arguing that video-recorded prior inconsistent statement satisfying § 8-5 should have been excluded as unreliable); State v. Pierre, 890 A.2d 474, 488 (Conn. 2006)(same); State v. Smith, 113 A.3d 103, 128 (Conn. App. 2015) (written statement same); State v. Rodriguez, 56 A.3d 980, 988 (Conn. App. 2012) (same); Crocker v. Comm'r of Corrections, 10 A.3d 1079, 1088 (Conn. App. 2011)(same); State v. Hart, 986 A.2d 1058, 1069 (Conn. App. 2010)(same); State v. Smith, 937 A.2d 1194, 1208 (Conn. App. 2008)(same); State v. Duncan, 901 A.2d 687, 701 (Conn. App. 2006)(same); State v. Camacho, 884 A.2d 1038, 1048 (Conn. App. 2005); State v. Anderson, 813 A.2d 1039, 1049 (Conn. App. 2003)(same); State v. Trotter, 793 A.2d 1172, 1180 (Conn. App. 2002)(same);State v. Watkins, 806 A.2d 1072, 1078 (Conn. App. 2002)(same); State v. Sotomayor, 765 A.2d 1, 7 (Conn. App. 2001)(same).

[16] *See e.g.*, State v. Smith, 937 A.2d 1194, 1208 (Conn. App. 2008)(declarant allegedly intoxicated at the time that he gave recorded statement and felt pressured by police to give the statement); State v. Camacho, 884 A.2d 1038, 1048 (Conn. App. 2005)(declarant allegedly under the influence of drugs when she signed statement, did not read statement, and was afraid of being charged); State v. Anderson, 813 A.2d 1039, 1049 (Conn. App. 2003)(declarant allegedly on pain medication at time of statement and could not read English); State v. Watkins, 806 A.2d 1072, 1078 (Conn. App. 2002)(declarant claimed that he was pressured by police to make recorded statement); State v. Trotter, 793 A.2d 1172, 1180 (Conn. App. 2002)(declarant allegedly on heroin at time of events reported in recorded statement and allegedly impaired by medications and pain at the time of the recorded statement); State

That said, every appellate case I located upheld the substantive admission of a prior inconsistency over such a defense objection.[17] Further, the Connecticut Supreme Court has noted that the availability of a "video-recorded" statement enhances the ability of the defendant to challenge the prior statement and of the jury to assess its credibility.[18] Of course, it is difficult to determine the frequency with which trial courts uphold defense objections and exclude prior inconsistencies under this procedure (although the Connecticut Supreme Court's suggestion that it should be the unusual case would suggest that it is infrequent). That said, the Connecticut appellate cases suggest no findings of legitimate abuse in connection with recorded prior inconsistent statements.

New Jersey

New Jersey Rule of Evidence 803(a)(1) governs substantive admissibility of prior inconsistent statements made by testifying witnesses, as follows:

> **Rule 803. Hearsay exceptions not dependent on declarant's unavailability**
>
> The following statements are not excluded by the hearsay rule:
>
> **(a) Prior statements of witnesses.** A statement previously made by a person who is a witness[19] at a trial or hearing, provided it would have been admissible if made by the declarant while testifying and the statement:
>
> (1) is inconsistent with the witness' testimony at the trial or hearing and is offered in compliance with Rule 613. However, when the statement is offered by the party calling the witness, it is admissible only if, in addition to the foregoing requirements, it (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

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v. Sotomayor, 765 A.2d 1, 7 (Conn. App. 2001)(declarant allegedly experiencing heroin withdrawal and was given $20 by police after making recorded statement).

[17] *See* State v. Carrion, 100 A.3d 361, 367 (Conn. 2014)(upholding trial court decision to admit recorded prior inconsistent statement over defense reliability challenge and noting that video-recording enhanced the jury's ability to evaluate the prior statement); State v. Pierre, 890 A.2d 474, 488 (Conn. 2006)(same); State v. Smith, 113 A.3d 103, 128 (Conn. App. 2015) (same); State v. Rodriguez, 56 A.3d 980, 988 (Conn. App. 2012) (same); Crocker v. Comm'r of Corrections, 10 A.3d 1079, 1088 (Conn. App. 2011)(finding no ineffective assistance of counsel due to lack of reliability objection); State v. Hart, 986 A.2d 1058, 1069 (Conn. App. 2010)(upholding trial court decision to admit recorded prior inconsistent statement over defense reliability challenge); State v. Smith, 937 A.2d 1194, 1208 (Conn. App. 2008)(same); State v. Duncan, 901 A.2d 687, 701 (Conn. App. 2006)(same); State v. Camacho, 884 A.2d 1038, 1048 (Conn. App. 2005); State v. Anderson, 813 A.2d 1039, 1049 (Conn. App. 2003)(same); State v. Trotter, 793 A.2d 1172, 1180 (Conn. App. 2002)(same); State v. Watkins, 806 A.2d 1072, 1078 (Conn. App. 2002)(same); State v. Sotomayor, 765 A.2d 1, 7 (Conn. App. 2001)(same).

[18] *See* State v. Carrion, 100 A.3d 361, 367 (Conn. 2014)(upholding trial court decision to admit recorded prior inconsistent statement over defense reliability challenge and noting that video-recording enhanced the jury's ability to evaluate the prior statement).

[19] "While the "cross-examination" requirement is not explicitly stated in Rule 803(a)(1), it is implicit." Editor's Notes N.J.R.E. 803(a)(1).

penalty of perjury at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition.[20]

Therefore, New Jersey adopts a hybrid approach, allowing wide-open substantive admissibility of prior inconsistent witness statements when offered by the party who did not call the testifying witness,[21] but requiring additional safeguards when the proponent of a witness seeks to use a prior inconsistency for its truth. For substantive use by a proponent, the New Jersey Rule requires either the protections mandated by current Fed. R. Evid. 801(d)(1)(A) (of oath and a prior proceeding or deposition) *or* a prior sound recording or written inconsistency made in "circumstances establishing its reliability."

In determining substantive admissibility of a prior inconsistency offered by a proponent under this last alternative, therefore, the New Jersey courts analyze whether there is a qualifying writing or sound recording *and* whether the circumstances surrounding the statement demonstrate sufficient reliability. Indeed, the New Jersey courts are required to hold a hearing outside the presence of the jury to determine reliability of prior inconsistent statements offered by a proponent for their truth, utilizing the following factors:[22]

(1) the declarant's connection to and interest in the matter reported in the out-of-court statement,

(2) the person or persons to whom the statement was given,

(3) the place and occasion for giving the statement,

(4) whether the declarant was then in custody or otherwise the target of investigation,

(5) the physical and mental condition of the declarant at the time,

(6) the presence or absence of other persons,

7) whether the declarant incriminated himself or sought to exculpate himself by his statement,

(8) the extent to which the writing is in the declarant's hand,

(9) the presence or absence, and the nature of, any interrogation,

(10) whether the offered sound recording or writing contains the entirety, or only a portion or the summary, of the communication,

(11) the presence or absence of any motive to fabricate,

[20] New Jersey considers "feigned memory loss" at trial to be inconsistent with a prior description of events. See State v. Soto, 340 N.J. Super 47, 66 (N.J. App. 2001).

[21] State v. Provet, 337 A.2d 374, 376 (N.J. App. 1975)(stating that the New Jersey rule permits the use of a prior inconsistent statement as substantive evidence when offered by a party other than the proponent of the witness).

[22] See e.g., State v. Brinson, 2017 WL 105998 *7 (N.J. App. Jan. 11, 2017)("In order to determine whether the circumstances provide sufficient indicia of reliability, a trial court holds a hearing outside of the presence of the jury, at which the party offering the statement has the burden of proving the reliability of the prior statement by a 'fair preponderance of the evidence.'")(quoting State v. Gross, 577 A.2d 806, 813-14 (N.J. 1990)).

(12) the presence or absence of any express or implicit pressures, inducement or coercion for making the statement,

(13) whether the anticipated use of the statement was apparent or made known to the declarant,

(14) the inherent believability or lack of believability of the statement, and

(15) the presence or absence of corroborating evidence.

Notwithstanding this long list of factors, the New Jersey courts have held that the circumstances establishing reliability need not be as persuasive as those required when the declarant is not a witness at trial because the declarant will be subject to cross-examination at trial.[23]

State v. Gross is the New Jersey Supreme Court opinion that established the need for a pre-admission hearing on reliability. In that case, the court remanded for a hearing to determine the reliability of a prior written statement by a prosecution witness who recanted his statement against the defendant at trial.[24] The witness claimed that he gave the previous statement implicating the defendant because he was motivated to get himself out of trouble, was pressured by police, handcuffed to a chair and left with a bag over his head. At trial, the officer who took the written statement denied exerting pressure, making threats, using handcuffs or putting a bag over the witness's head. The appellate court held that remand was appropriate for a hearing to assess the reliability of the written prior inconsistent statement and that defendant's conviction could be affirmed only if a reliability finding could be made, but would be reversed absent a finding of reliability. Thereafter, the reliability hearing required by current NJRE 803(a)(1) has been known as a "Gross hearing."[25]

Recently, in *State v. Brinson*, a New Jersey appellate court affirmed a murder conviction over the defendant's objection to the substantive admission of three video-recorded statements given to police placing defendant near the scene of the crime.[26] All three witnesses recanted at trial, claiming that their previous statements were inaccurate. The trial judge held three separate "Gross hearings" to determine the reliability of the video-recorded statements. While the witnesses claimed that they gave the video-recorded statements because they were on drugs and scared, the officers who took the recorded statements testified that the witnesses appeared lucid and that none were threatened. The trial court found the prior inconsistent statements sufficiently reliable and allowed them to be played for the jury. The appellate court affirmed, noting the additional evidence supporting the trial judge's finding of reliability in the form of the videos themselves, indicating that "all the witnesses were oriented as to place, time and location of the

[23] Id. at *7.
[24] State v. Gross, 577 A.2d 806 (N.J. 1990).
[25] See also State v. Spruell, 577 A.2d 821,829 (N.J. 1990)(failure to hold a reliability hearing prior to admission of written prior inconsistent statements by prosecution's recanting witnesses not harmless error and case must be remanded for hearing).
[26] State v. Brinson, 2017 WL 105998 *8 (N.J. App. Jan. 11, 2017).

shooting." The *Brinson* decision demonstrates the benefits of a video-recording in judging accurately the circumstances surrounding the statement.[27]

The New Jersey appellate court in *State v. Snowden* did reverse a defendant's murder conviction due to the substantive admission of prior inconsistent statements notwithstanding a finding of reliability.[28] A witness gave a written and video-recorded statement to police implicating the defendant in a gang-related shooting. The court held a Gross hearing to determine the reliability of that statement prior to trial. Although the witness claimed that he had been high on PCP at the time of the statement and that officers threatened him for several hours prior to the video-recording, the officer who recorded the statement testified that the witness did not appear to be intoxicated or under the influence of drugs when he gave his statement. The office denied that he or any other officer threatened, coerced, or otherwise improperly threatened the witness. The trial court viewed the video-recorded statement and found it reliable and admissible.

At trial, the witness refused to take an oath or affirm that he would tell the truth. The trial court nonetheless ordered the witness to testify, persuaded that this was a "trick" learned in jail to undermine the justice system. The witness claimed that he had lied about defendant's involvement in the crime and that he was high when he gave his statement and that he knew nothing about the crime. Thereafter, the court permitted the prosecution to play the prior video-recorded statement implicating defendant for the jury. The appellate court affirmed the trial judge's finding of reliability, but reversed the conviction because the witness was not qualified to testify at all after refusing an oath or affirmation and because neither his testimony nor his prior inconsistent statement should have been allowed.

II. Reliability Surrounding Recorded Prior Inconsistent Statements Considered, But Not a Condition of Admissibility

Maryland

Maryland Evidence Code § 5-802.1(a) allows for substantive admissibility of prior inconsistent statements of testifying witnesses as follows:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> (a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and was signed by the declarant;

[27] See also State v. Torres, 2012 WL 444037 *8 (N.J. App. Feb. 14, 2012)(affirming trial court's admission of prior inconsistent video-recorded statements of recanting government witnesses based upon reliability findings in Gross hearing); State v. Rock, 2012 WL 177866 (N.J. App. Jan. 24, 2012); State v. Cleveland, 2016 WL 1122500 *4-5 (N.J. App. March 23, 2016).

[28] State v. Snowden, 2011 WL 2321216 *11 (N.J. App. May 25, 2011).

or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement.

Thus, the Maryland provision maintains the federal limitation found in Fed. R. Evid. 801(d)(1)(A), but expands substantive admissibility of prior inconsistent statements to those written and signed by the declarant or to those otherwise recorded verbatim stenographically or electronically and contemporaneously.

Prior to the Maryland Court of Appeals' decision in *Nance v. State*, Maryland adhered to the common law rule regarding prior inconsistent statements, admitting them only for impeachment purposes.[29] *Nance* was a murder prosecution in which three separate witnesses provided: (1) identifications of defendants in a photo array; (2) written signed statements in police interviews implicating the defendants; and (3) grand jury testimony implicating the defendants. At trial, all three witnesses recanted their prior statements and identifications, asserting that they forgot events described in their statements, that they were intoxicated due to heroin use during all statements and testimony, that police misunderstood their statements and inaccurately recorded them, and that police pressured them into making the statements and identifications. The trial court allowed all of the statements to be admitted, erroneously leaving to the jury the choice to use them substantively or only for impeachment. The defendants were convicted.

On appeal, the *Nance* court addressed the question of whether prior inconsistent statements by testifying witnesses should be admitted substantively. The court noted the policy arguments favoring wide-open substantive admissibility of all prior inconsistencies, including the availability of the declarant for cross-examination, the greater reliability of prior inconsistent statements made closer in time to underlying events, and the ability to avoid confusing limiting instructions cautioning jurors against substantive use. Although persuaded by these policy arguments, the court rejected the wide-open approach that would admit all prior inconsistent statements in favor of a compromise position that would allow only those that were written and signed or otherwise adopted by the declarant. The court noted that this compromise position had been adopted in several states, including Connecticut, Illinois and Hawaii and found that the compromise position better protected the rights of the accused.

In applying the new rule to the case at hand, the court found all of the written statements that were signed by the testifying declarants substantively admissible and upheld the defendants' convictions. The defendants specifically expressed concern over police abuse of an expanded hearsay exception for prior inconsistent statements: "a rule permitting the use of prior inconsistent statements as substantive evidence would encourage police to pressure witnesses into making out-of-court statements without regard to their accuracy, because police would know that if the witnesses later recanted, the prior statements would be admissible at trial."[30]

[29] Nance v. State, 629 A.2d 633, 641 (Md. Ct. App. 1993). The Court of Appeals of Maryland, established by Md. Const art IV, §§ 1 and 14, is the highest court of the state. Md. Code Ann, Cts & Jud Proc § 1-301.
[30] Id. at 638-639.

The Maryland court did not specifically address this policy argument raised by the defense, but the court did note that the witnesses' signed statements in the *Nance* case were obtained by police in a way that suggested their accuracy: (1) the witnesses gave "full descriptive answers" rather than "Yes" or "No" answers; (2) the officers' questions were not unduly leading; (3) detectives committed answers to paper as literally as possible without subjective interpretation; and (4) the witnesses expressly acknowledged the written statements to be true and accurate when signing them.[31] The court further suggested that questions regarding the officers' practices and the witnesses' intoxication at the time of the statements "lay entirely within the jury's province of distinguishing truth from falsehood."[32] Contrary to the Connecticut Supreme Court's approach in *Mukhtaar*, therefore, the Maryland court's *Nance* decision does not expressly embrace any gatekeeper role for the trial court in connection with prior inconsistent statements once the requirements of the hearsay exception are satisfied.

Maryland Evidence Code § 5-802.1 became effective on July 1, 1994 and codified the holding in *Nance,* although it requires signing of a written statement by a declarant and does not permit the written statement to be "otherwise adopted" as suggested in *Nance*. The Rule also makes substantively admissible prior inconsistent witness statements recorded verbatim by stenographic or electronic contemporaneous transcription.[33]

The Maryland Court of Appeals revisited the substantive admissibility of prior inconsistent statements in 1996 in *Stewart v. State*. The issue in that case was whether a prosecutor could call a witness knowing the witness would recant, only to admit written and signed prior inconsistent statements.[34] The court held that the prosecutor could knowingly call a witness she expects to recant and rely on written and signed prior inconsistent statements because such statements are substantively admissible and there is no danger of jury misuse.[35]

While the potential for overreaching in obtaining prior recorded inconsistent statements was not an issue raised directly in the case, the declarant-witness did claim at trial that he had selected a suspect other than the defendant from a photo array and was pressured by police to change his selection and choose the defendant. The court did not address this specific contention in affirming the trial court's admission of the prior inconsistent statement, but did state in a footnote that "a witness's statement written down by a police officer is not *per se* admissible under *Nance* or Md. Rule 5-802.1(a) even if signed by the witness."[36] The court emphasized that the statements in *Nance* were made in circumstances suggesting their accuracy and that "a statement recorded by police, even when signed by the declarant, might not be admissible if the

[31] Id. at 643.
[32] Id. at 645.
[33] *See* Stewart v. State, 674 A.2d 944, n. 2 (Md. Ct. App. 1996)(describing adoption of Maryland rule and modifications); *see also* Dumornay v. State, 664 A.2d 469, 475 (Md. St. Special App. 1995)(finding tape-recorded prior inconsistent statement of a testifying witness substantively admissible pursuant to *Nance* even before enactment of Md. Ev. Rule 5-802.1(a)).
[34] Id. at 946.
[35] Id. at 950-51.
[36] Id. at n.3.

circumstances suggest that the declarant did not clearly intend to adopt it by signing."[37] Thus, the Maryland Court of Appeals seemed to open the door to some trial court screening of the circumstances surrounding an otherwise admissible prior inconsistent statement with this footnote.

None of the cases interpreting Md. Rule 5-802.1(a) after *Stewart*, however, pick up this thread and examine the circumstances surrounding the prior inconsistent statement beyond ensuring that the statement satisfies the stated requirements of the hearsay exception. In *Parker v. State*, for example, the Maryland Court of Special Appeals affirmed the admission of a witness's prior written and signed statement to police implicating the defendant in a shooting where the witness repudiated the statement at trial subject to cross-examination.[38] The witness's prior inconsistent statement was admitted substantively notwithstanding her testimony that the officer who took the statement "just told me to put – write down in so many words, okay? Some of the words, he had used, I used also. I was just writing it down."[39] The court performed no reliability analysis beyond the requirements of Md. Rule 5-802.1(a)).

In *Makell v. State*, the State's star witness in a murder trial denied knowing the victim or the defendant and denied having been present at the shooting or knowing anything about who did it.[40] In a prior written and signed statement to police, as well as in grand jury testimony, the same witness had given a detailed description of the shooting, implicating the defendant. The witness claimed that he did not remember giving a statement or his grand jury testimony and that "because of his continuous multi-year drug stupor, he could not accurately perceive, understand, or remember anything that happened from 1988 through 1994."[41] In rejecting defense arguments that the unreliability of the witness undermined the admissibility of his prior inconsistent statements to police, the court stated that "*Nance* added no proviso that redeeming trustworthiness shall not be available to out-of-court declarations made by drug offenders" and found that the statement was admissible because it satisfied all of the criteria in *Nance* and Md. Evidence Rule 5-802.1.[42] This opinion suggests, therefore, that concerns about the taking of a prior inconsistent statement are issues of weight and should not affect admissibility.

Similarly, the court in *Marlin v. State* upheld substantive admission of an audio-recorded statement of a testifying witness that was inconsistent with the witness' trial testimony "despite [the witness's] claims that he was under the influence of drugs when he made them."[43] Likewise, in *Campos v. State*, the Maryland Court of Special Appeals upheld the substantive admission of a testifying witness's recorded statement to police that was inconsistent with her trial testimony notwithstanding her testimony that she had no memory of the statement or events underlying it due to narcotics intoxication. The court performed no additional reliability analysis

[37] Id.
[38] Parker v. State, 742 A.2d 28, 50 (Md. Ct. Special App. 1999), *rev'd on other grounds*, Parker v. State, 778 A.2d 1096 (Md. Ct. App. 2001).
[39] Id.
[40] Makell v. State, 656 A.2d 348 (Md. Ct. Special App. 1995).
[41] Id.
[42] Id. at 354.
[43] Marlin v. State, 993 A.2d 1141, 1149 (Md. Ct. Special Appeals 2010).

beyond applying requirements of Md. Rule 5-802.1(a).[44] Therefore, notwithstanding a footnote in a Maryland Court of Appeals case suggesting that trial judges may need to evaluate the circumstances surrounding the recording of a prior inconsistent statement, Maryland courts do not engage in such analysis.

One interesting consequence of adopting a compromise approach to substantive admissibility of prior inconsistent statements is that it provides criminal defendants an opportunity to take recorded statements of defense witnesses who might recant testimony favorable to the defense at trial. In *Sheppard v. State*, the Maryland Court of Special Appeals reversed a defendant's assault conviction due to trial court error in refusing to allow the defense to admit signed written witness statements given to the public defender that contradicted the witnesses' trial testimony implicating defendant. The signed written statements given to the public defender were substantively admissible where they were inconsistent with trial testimony and the witnesses were subject to cross-examination by the State.[45]

Illinois

IL ST Evid. Rule 801 allows substantive admissibility of witness prior inconsistent statements that is in some ways broader and in others narrower than Fed. R. Evid. 801(d)(1)(A) permits. The substantive admissibility of prior inconsistent statements is narrower in Illinois than it is in federal court because such inconsistencies are admissible for their truth only in *criminal* cases.[46] The Illinois rule is broader in criminal cases than the current federal provision because it allows some witness inconsistencies beyond those that were given under oath in a prior trial, hearing, deposition, or other proceeding. Specifically, the Illinois rule allows prior inconsistent witness statements that have been written or signed by the declarant, that have been acknowledged by the declarant under oath, or that have been accurately recorded. The text of Illinois Evidence Rule 801(d) is as follows:

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[44] Campos v. State, 223 Md. App. 769, at 14 (Md. Ct. Special App. 2015)(*unreported opinion).*

[45] Sheppard v. State, 650 A.2d 1362 (Md. Ct. Special App. 1994). Another interesting feature of the Maryland law surrounding substantive admissibility of prior inconsistent statements that is not pertinent to the potential expansion of Fed. R. Evid. 801(d)(1)(a) is that Maryland requires memory loss at trial to be "feigned" in order to be deemed "inconsistent" with a prior positive statement about events in question. See Corbett v. State, 746 A.2d 954, 963 (Md. Ct. Special App. 2000)(adopting requirement that memory loss by a trial witness be "feigned" in order to be inconsistent with a prior statement recounting events in question pursuant to Md. Rule 5-802.1(a) and reversing defendant's conviction where trial court failed to make a finding that trial witness's memory loss was "feigned" before admitting her signed written prior inconsistent statement pursuant to Md. Rule 5-802.1(a)).

[46] The Illinois Evidence Code was enacted only recently in 2011. The codification largely mirrored the Illinois common law of evidence, while incorporating some modernizations. The Illinois Code of Criminal Procedure has long permitted the substantive admissibility of some witness prior inconsistent statements, however, and Illinois Evidence Rule 801(d)(1)(A) was taken from that pre-existing statute. *See* Illinois State ch. 725, para. 5/115-10.1. Because of this history, most Illinois appellate opinions cite to this statute rather than the recent but identical evidence rule. *See* Moran v. Erickson, 696 N.E.2d 780, 791-92, n. 2 (Ill. First Dist. App. 1998) (describing criminal statute and application to criminal cases only).

(d) **Statements Which Are Not Hearsay.** A statement is not hearsay if

(1) **Prior Statement by Witness.** In a criminal case, the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

(A) inconsistent with the declarant's testimony at the trial or hearing, and—

(1) was made under oath at a trial, hearing, or other proceeding, or in a deposition, or

(2) narrates, describes, or explains an event or condition of which the declarant had personal knowledge, and

(a) the statement is proved to have been written or signed by the declarant, or

(b) 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, or

(c) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.

The substantive admissibility of written, recorded, or acknowledged statements depends upon a finding that the statement "narrates, describes, or explains an event or condition of which the declarant had personal knowledge." Although this requirement on its face appears to be surplussage and a restatement of the personal knowledge generally required of witnesses, this language has been given a restrictive interpretation by the Illinois courts in connection with prior inconsistent statements. This reading prohibits the use of Illinois Evid. Rule 801(d)(1)(A)(2) to admit prior inconsistent statements by witnesses that relate statements made to them by third parties. This restrictive reading explained below has the effect of foreclosing access to admissions and confessions made by defendants directly to declarant witnesses. This personal knowledge requirement has generated much of the litigation surrounding Illinois Evid. Rule 801(d)(1).

The substantive admissibility of prior inconsistent statements "acknowledged under oath" by the declarant witness has also generated some appellate opinions evaluating the proper procedure for obtaining an acknowledgement at trial. Illinois courts require a cumbersome "acknowledgement hearing" outside the presence of the jury before this provision of the evidence rule may be utilized. Recorded and written prior inconsistent statements have generated few concerns apart from those of personal knowledge.

Reliability of Prior Inconsistent Statements

There are a few cases in Illinois in which defendants challenge the circumstances surrounding the recording of a prior inconsistent statement and seek to exclude a prior statement due to its lack of reliability. The Illinois courts have largely been unreceptive to these challenges, finding no independent reliability requirement beyond the terms of the hearsay rule

for the substantive admission of prior inconsistent statements. Below are the few cases raising alleged reliability problems with written or recorded prior inconsistent statements.

Witness Unaware of Recording

During defendant's trial for murder in *People v. Carlos*, the State called the defendant's cousin to the stand.[47] During his testimony, the defendant's cousin stated that he was in the parking lot at the time of the murder, but that he did not see anyone shoot anyone else or see anyone with a gun. Over defendant's objection, the trial court permitted the State to play a video-recording of the cousin describing in great detail the defendant's shooting of the victim and the cousin's own efforts to stop the defendant from shooting the victim. The video recording was made in a basement shortly after the incident where the cousin did not know that he was being recorded. At trial, the cousin claimed that he could not remember what he had said previously, that he was not under oath when he made the statements in the basement, and that he had no personal knowledge of the shooting and was simply repeating what he had heard from others on the tape.

Defendant appealed his conviction, arguing that the trial court erred in admitting the videotape as substantive evidence for two reasons. First, he argued that the cousin's testimony about his lack of personal knowledge demonstrated that the requirements of the hearsay exception for prior inconsistent statements were not satisfied. The appellate court rejected this argument, noting that the cousin repeatedly spoke about his first-hand knowledge of events in the video-recorded statements and even described his own role in the events at issue. Therefore, the personal knowledge requirement was satisfied by the contents of the prior statement itself and the witness's attempt to undermine his personal knowledge while recanting on the stand could not defeat the admissibility of his statement. Defendant further argued on appeal that this secret basement video-recording should be excluded notwithstanding its satisfaction of the requirements for admissibility under the Illinois hearsay rule, because it was not made under circumstances indicating that it was reliable and trustworthy. The appellate court rejected this argument, finding that the requirements of the hearsay rule alone governed substantive admissibility of a prior inconsistent statement. In the court's words, satisfying those requirements "*already* demonstrates [the statement's] reliability, so no *additional* evidence of the statement's reliability need be shown."[48]

Portion of Recording Missing

In a prosecution for sexual abuse in *People v. Vannote*, the State called the 11 year-old victim to testify.[49] On the stand, the victim stated that he could not remember the alleged incident and could not remember what he told an investigator about the defendant's conduct. Thereafter, the investigator took the stand and authenticated a video-recording of his interview with the victim during which the victim described the defendant's sexual abuse. The defendant objected to the substantive admission of the victim's video-recorded statement, arguing that it

[47] People v. Carlos, 655 N.E.2d 1182, 1183-84 (Ill App. Fourth District 1995).
[48] *Id.* at 1184.
[49] People v. Vannote, 970 N.E.2d 72 (Ill. App. Fourth District 2012).

was not accurately recorded because 31 to 35 seconds of the recording were missing. The investigator testified that the recording failed to capture 31-35 seconds at the beginning of the 12 minute interview due to technical difficulties, but that the remainder of the interview was recorded properly. The video was admitted and played at trial and defendant was convicted.

On appeal, the Illinois appellate court upheld the admission of the video, stating that "a partially recorded statement is admissible unless the unrecorded portion is so substantial as to render the recording untrustworthy as a whole."[50] The court held that the trial court did not abuse its discretion in finding that the gap in the recording did not undermine the trustworthiness of the recorded statement where the investigator testified that only background information was lost and where the remainder of the tape included the victim's detailed statement and where other evidence corroborated the recorded statement.

Witnesses Threatened and Coached to Make Statements

Some older Illinois cases suggest some consideration of the voluntariness of prior inconsistent statements prior to their substantive admission in circumstances in which witnesses claim coercion in connection with their recorded prior statements. More recent cases appear to retreat from that position, finding that prior inconsistencies are admissible without a separate voluntariness analysis so long as they satisfy the requirements of the Illinois hearsay exception.

In *People v. Johnson*, an affiliate of the defendant testified at the defendant's trial that he had no knowledge of the armed robbery or shooting at issue in the case.[51] The witness claimed that a written signed statement and grand jury testimony he previously gave implicating the defendant were the product of coercion and threats by the police. Specifically, the declarant-witness claimed that he was threatened with a murder charge, that the police composed the statements he made implicating the defendant, and that he was detained by police until he testified in the grand jury. Officers testified that they made no threats to the witness, that the witness gave his own statements willingly, and that the witness remained at the station prior to his grand jury testimony at his own request. The trial court admitted the incriminating written statement and grand jury testimony as substantive evidence.

On appeal, the defendant conceded that the prior inconsistent statements were admissible substantively pursuant to the Illinois hearsay rules, but argued that their admission violated his constitutional due process rights because they were the product of coercion by the police. Defendant argued that a trial judge must make a threshold determination regarding the inherent reliability of prior inconsistent statements admitted through Illinois Rule 801(d)(1) in addition to evaluating the requirements of that provision. The appellate court identified the due process question as one of "first impression" and found that no Illinois court had ever required an independent reliability determination in applying the requirements of the Illinois rule governing prior inconsistent statements.

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[50] Vannote at 79. (quoting People v. Manning, 695 N.E.2d 423, 431 (Ill. 1998)(upholding admissibility of defendant's own recorded confessions to a jailhouse informant despite inaudible gaps in the recording caused by technical difficulties, but reversing conviction on other grounds)).

[51] People v. Johnson, 626 N.E.2d 1073, 1076-77 (Ill. App. First District 1993).

The appellate court found the question of the voluntariness of a prior inconsistent statement to be a Rule 104(b) type question, requiring the trial court to find sufficient evidence from which a reasonable jury could determine that the prior inconsistent statement was voluntary, but leaving to the jury the question of voluntariness as part of its weighing of the statement.[52] Applying this standard, the appellate court found that the officers' testimony about the witness's willingness to give his written statement and grand jury testimony was sufficient to allow a jury to conclude that the prior inconsistent statements were voluntary. Accordingly, admission of the statements for their truth under the Illinois hearsay rules was not a violation of the defendant's due process rights.[53]

In *People v. Barker*, a defendant was tried criminally for killing a motorist. The State admitted a prior written inconsistent statement of a testifying passenger relating the circumstances surrounding the accident.[54] Following his conviction, the defendant argued that the trial court erroneously failed to assess the voluntariness of the passenger's prior inconsistent statement given in the hospital shortly after the accident. The appellate court rejected any need for an assessment of reliability and voluntariness beyond the requirements of the Illinois hearsay rule. The court noted the holding in *Johnson* requiring a screening for voluntariness, but relied upon more recent Illinois cases in rejecting a voluntariness assessment:

> In *Johnson*, this court stated that even if a statement meets the requirements of section 115–10.1, the court must make a finding that there is a sufficient evidentiary basis from which a jury could find that the declarant's prior statements were knowing and voluntary. However, in *People v. Pursley*, 284 Ill.App.3d 597, 220 Ill.Dec. 237, 672 N.E.2d 1249 (1996), the court specifically addressed the holding in *Johnson*, noting that the legislature determined what would constitute reliability when drafting section 115–10.1 and indicated that, " [t]herefore, a finding of reliability and voluntariness is automatically made by concluding that a prior statement meets section 115–10.1's test." The *Pursley* court then noted that, "[a]ccordingly, no additional analysis is needed." We agree with the court's analysis in *Pursley* and find that if a prior inconsistent statement meets section 115–10.1's requirements, it may be admitted as substantive evidence without an independent determination of its voluntariness.[55]

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[52] Johnson at 1081-82 (citing United States of America ex. rel Derrick White v. Michael P. Lane and Neil F. Hartigan, 785 F. Supp. 768 (N.D. Ill. 1992) and People v. McBounds, 536 N.E.2d 1225 (Ill. App. 1989)). In McBounds, a witness testified that prior inconsistent statements otherwise substantively admissible were the product of police coercion. The appellate court found the trial court's finding in a bench trial that the statements were voluntary was not unreasonable. Because it was a bench trial, it is unclear whether the voluntariness finding was a predicate to consideration of the prior statements or was a matter of weight for the trial judge acting as fact-finder.

[53] See also People v. Morales, 666 N.E.2d 839, 845 (Ill. App. First District 1996) (While court should first make certain that there is a sufficient evidentiary basis from which the trier of fact could find that the statements were made voluntarily, testimony of two assistant State's Attorneys and several police officers supported the State's claim that Willer's statement was made voluntarily.)

[54] People v. Barker, 699 N.E.2d 1039 (Ill. App. First District 1998).

[55] Barker at 1045; see also People v. Pursley, 672 N.E.2d 1249 (Ill. App. Second District 1996)(reviewing Johnson and finding court's assessment of "voluntariness" identical to requirements of Illinois hearsay rule, thus obviating the need for a voluntariness inquiry independent of the statutory requirements).

In 2004, the Illinois appellate court in *People v. Tolliver* adhered to these more recent holdings regarding voluntariness.[56] In that case, six witnesses called by the State recanted their prior written statements and grand jury testimony implicating defendant in the shooting of an undercover police officer. At trial, these witnesses explained that their previous statements were made after police threats to charge them with crimes and to take away their children. One witness testified that police entered her home to take her to the station to give her statement with guns drawn. Another claimed that police hit him in the head with a clipboard or hit his head into the wall when he wouldn't give them the answers they wanted. Still another claimed that officers hit him in the face repeatedly during his interview and "threatened to blow his brains out." The witnesses testified that officers kept them for extensive time periods (up to 20 hours) in order to obtain their written statements and grand jury testimony and that officers coached them into implicating the defendant. Notwithstanding this testimony, the trial court admitted all of the prior statements for their truth consistent with the Illinois hearsay rule.

Following his conviction, the defendant raised three arguments concerning the admission of the prior inconsistent statements. First defendant argued that the admission of the statements for their truth violated his constitutional confrontation and due process rights. The appellate court rejected these arguments in reliance on Illinois precedent without analysis.[57] Second, defendant argued that the trial court must make an independent determination that prior statements were given voluntarily prior to admitting them substantively pursuant to the Illinois rule. The appellate court also rejected this argument summarily, stating that "if a prior inconsistent statement meets section 115-10.1's requirements, it may be admitted as substantive evidence without an independent determination of its voluntariness."[58] Finally, defendant argued that it was error to allow him to be convicted solely upon recanted prior inconsistent statements that were insufficiently reliable. In rejecting this argument, the court found that the prior inconsistent statements were not the sole evidence supporting his conviction.

Defense Use of Prior Inconsistent Statements

In *People v. Willis*, an Illinois appellate court held that a trial court should have admitted a witness's written signed statement given to defense counsel as substantive evidence. The statement exonerated the defendant, was inconsistent with the witness's trial testimony, and narrated a shooting of which the witness had first-hand knowledge. The court found the statement admissible notwithstanding the witness's claim that the defendant threatened him to give the written statement to defense counsel.[59]

Personal Knowledge Limitation

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[56] People v. Tolliver, 807 N.E.2d 524 (Ill. App. First District 2004).

[57] Tolliver at 538-39 (citing People v. Morales, 666 N.E.2d 839 (Ill. App. 1996) and People v. Wilson, 706 N.E.2d 1026 (Ill. App. 1998)).

[58] Id. at 539 (quoting People v. Barker, 699 N.E.2d 1039 (Ill. App. 1998)).

[59] People v. Willis, 654 N.E.2d 571, 574 (Ill. App. First District 1995); see also People v. Deramus, 19 N.E.3d 1137, 1145 (Ill. App. First District 2014)(holding that police report that was inconsistent with officer's trial testimony was substantively admissible writing signed by officer about events of which he had personal knowledge, but that trial court's error in limiting use of statement to impeachment was harmless).

The personal knowledge limitation in the Illinois rule governing substantive admissibility of prior inconsistent statements is an interesting feature of the rule that prevents admission of prior inconsistencies that reveal a defendant's confessions or other admissions made to the witness-declarant. To admit substantively a witness's prior written, recorded, or acknowledged inconsistent statement (that was not made under oath in a prior trial, hearing, deposition or other proceeding), the proponent must demonstrate that the statement "narrates, describes, or explains an event or condition of which the declarant had personal knowledge." The Illinois Supreme Court addressed this requirement most recently in *People v. Simpson*.[60]

In *Simpson*, the defendant was convicted of murder arising out of a gang beating that killed the victim. At trial, the prosecution called a man named Franklin as a witness. Although Franklin was not present during the beating itself, the prosecutor asked him to recount a conversation he had with the defendant about the beating shortly after the incident. After Franklin testified that he could not recall the conversation specifically or what defendant might have told him, the state offered the testimony of a police detective who had interviewed Franklin shortly after the incident. The conversation with Franklin was video-recorded and clips from the conversation were played after the detective authenticated the recording. In the video, Franklin stated that defendant told him directly that defendant and others had "bashed" the victim's head in and that the defendant personally had beat the victim "about 30 times" with a baseball bat.[61]

After his conviction, defendant appealed, arguing that his counsel was ineffective for failing to object to the inadmissible recording of Franklin's prior inconsistent statement. The intermediate appellate court reversed the conviction, finding that Franklin's prior inconsistent recorded statement was inadmissible because Franklin had no personal knowledge of the actual beating and the events surrounding the charged crime. On appeal to the Illinois Supreme Court, the State argued that Franklin had the requisite first-hand knowledge of his own conversation with the defendant and that the underlying event narrated by the prior statement was the conversation and not the beating. According to the State, the witness's personal knowledge of defendant's remarks should be sufficient to satisfy the personal knowledge requirement in the Illinois Rule. The Illinois Supreme Court disagreed, relying upon longstanding precedent. First, the Illinois Supreme Court noted that the State's reading of the personal knowledge requirement in Illinois Evid. Rule 801(d)(1)(A)(2) would render that requirement completely superfluous because witnesses are never allowed to provide evidence about matters of which they lack first-hand knowledge. Accordingly, the limit in the hearsay rule must have some different meaning. The Illinois Supreme Court found that a testifying witness "must have actually perceived the events that are the subject of the statement, not merely the statement of those events made by the defendant" for a prior recorded inconsistency to be admitted for its truth.[62] The intermediate appellate court's reversal and remand for a new trial was affirmed. Many other Illinois cases

[60] People v. Simpson, 25 N.E. 3d 601, 609 (Ill. 2015).
[61] *Id.* at 606.
[62] *Id.* at 612.

reach the same result, excluding prior inconsistent statements that reveal incriminating statements by a defendant about participation in the charged offense.[63]

In *People v. McCarter*, the Illinois appellate court attempted to explain how this restrictive personal knowledge requirement enhances the reliability of prior recorded inconsistent statements admitted substantively, as follows:

> When a witness has personal knowledge of the events contained in a prior inconsistent statement, the reliability of the statement is increased, since "a witness is less likely to repeat another's statement if he witnessed the event and knows the statement is untrue." …By, contrast, if the witness is merely narrating a third-party statement about which the witness has no personal knowledge, cross-examination gives the jury no insight into the truth of that statement, making it more difficult to judge its reliability.[64]

Acknowledged Prior Inconsistent Statements

In addition to allowing written or recorded prior inconsistent statements to be admitted for their truth in criminal cases, the Illinois evidence rules permit substantive use of prior inconsistencies "acknowledged under oath."[65] The acknowledgement provision, therefore is the only potential avenue for admitting unrecorded oral inconsistent statements of a testifying witness substantively in a criminal case.

The court addressed the appropriate procedure for obtaining the witness acknowledgement required by the rule in *People v. Brothers*.[66] In that case, an alleged rape victim made a lengthy and detailed oral statement to a police officer recounting the circumstances of the rape. When called to testify against the defendant, her former boyfriend, the victim testified that she had no memory of the incident. While she admitted speaking to a police officer on the night in question, she claimed no memory of her conversation with the officer. She did testify that she spoke to an officer and would not lie to police. Based upon this testimony, the trial court found that the witness had "acknowledged" her prior inconsistent statement such that it could be related to the jury by the officer and relied upon for its truth.

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[63] *Id.* at 610 (listing numerous decisions); *see also* People v. McCarter, 897 N.E.2d 265, 276-77 (Ill. App. First District 2008)(video-recorded prior inconsistent statement relating defendant confession inadmissible where declarant-witness did not observe murder and getaway described by defendant); People v. Wilson, 966 N.E.2d 1215, 1224 (Ill. App. First District 2012)(trial court erred in admitting substantively portions of witness's audio-taped and handwritten statements that recounted the defendant's alleged statements about shooting); People v. Crowder, 2016 IL App (3d) 140030-U at *10 (Ill. App. Third District July 11, 2016) (unpublished opinion)(recorded prior inconsistent statement of State's witness relating incriminating admission defendant made directly to witness was inadmissible because the witness had no personal knowledge of the underlying events the defendant was describing); People v. Lofton, 42 N.E.3d 885, 894 (Ill. App. Second District 2015)(same); People v. Morgason, 726 N.E.2d 749, 751 (Ill. App. Fifth District 2000) (same);

[64] People v. McCarter, 897 N.E.2d at 276-277 (citations omitted).

[65] The acknowledgement by the declarant-witness may be made at the trial itself or during a prior trial, hearing, deposition, or other proceeding.

[66] People v. Brothers, 39 N.E.3d 1101 (Ill. App. Fourth District 2015).

Following his conviction the defendant appealed, arguing that the witness's prior statement to the officer should not have been admitted substantively because it was not acknowledged adequately by the witness. The appellate court agreed and set out in detail the appropriate procedure for obtaining a witness's acknowledgement of her prior statement prior to admitting it substantively.[67] The court explained that a proponent of an "acknowledged" prior inconsistent statement may not admit it through the testimony of a live witness other than the declarant. In order to obtain the requisite acknowledgement from the declarant-witness at trial, the proponent must confront that witness with each and every part of a prior inconsistent statement. It is not enough to have the witness acknowledge a general statement on the particular subject at issue.[68] Because prior inconsistencies by the prosecution's own witness are unlikely to be admissible even to impeach the witness, this acknowledgement process must be performed outside the presence of the jury.[69] Whether the witness has acknowledged a particular statement during such a hearing is left to the discretion of the trial judge.[70] Only after the trial judge has decided that there has been an appropriate acknowledgement of a particular statement may the witness be confronted with that statement in front of the jury.[71] The Illinois appellate court acknowledged that this procedure will prove "laborious" in the course of a jury trial, but emphasized that the need for a witness acknowledgment at trial is eliminated by providing a written or recorded prior inconsistent statement.[72]

III. No Reliability Analysis for Substantive Admissibility of Prior Inconsistent Statements

Pennsylvania

Pennsylvania Rule of Evidence 803.1 governs substantive admissibility of prior inconsistent witness statements. The Rule was first adopted in 1998 to codify holdings of the Pennsylvania Supreme Court. Pa. Rule 803.1 provides:

> The following statements are not excluded by the rule against hearsay if the declarant testifies and is subject to cross-examination about the prior statement:

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[67] The court reversed the defendant's conviction on the single count supported by the oral statement alone, but upheld the other counts that were supported by other admissible evidence. *Id.* at 1136.

[68] *Id.* at 1122 ("[T]he prosecutor would establish the time, place and date of the statement and then ask the witness whether she made the statement at issue…this process must be repeated for *all* of the witness's *specific* prior statements that the proponent may wish to offer as substantive evidence … this acknowledgement must be linked to the contents of a specific statement. It is not sufficient … if the witness merely acknowledges the subject matter of a prior conversation.").

[69] *Id.* at 1122 (a prior inconsistent statement that is incriminating to the defendant is not admissible to impeach unless the witness's trial testimony "affirmatively damages" the State's case."). *But see* People v. Sykes, 968 N.E.2d 174 (Ill. App. Fourth District 2012)(dispensing with need for hearing in a bench trial and upholding trial court's decision to allow officer to testify to inconsistent oral statements of testifying witnesses after witness stated that it would "not be inaccurate" to say that she had told a police officer that she had seen defendant shooting a gun).

[70] *Id.* at 1125.

[71] *Id.* at 1123.

[72] *Id.* at 1126 ("the need to conduct acknowledgement hearings will usually arise because police officers in the field have failed to preserve a witness's statements by using one of the [other] methods, … such as obtaining a written or signed statement or creating an electronic recording.").

(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.

In order to be substantively admissible, the Pennsylvania rule requires inconsistent statements to be made in a formal proceeding, in a writing signed and adopted by the declarant, or in a verbatim contemporaneous electronic recording. The purpose of these limitations is "to ensure that the prior inconsistent statement was in fact made by the witness."[73] As in other jurisdictions, the Pennsylvania cases reveal claims by recanting witnesses that they were pressured into making their prior statements by law enforcement officers. Notwithstanding some early references to the voluntariness and reliability of prior inconsistencies, the Pennsylvania courts do not analyze the reliability of the circumstances surrounding the statement independently of the requirements of the hearsay exception.[74]

The Pennsylvania Supreme Court first accepted the substantive admissibility of a witness's prior inconsistent statement in *Commonwealth v. Brady*.[75] In that case, the court approved the substantive admissibility of a tape-recorded statement made by the defendant's girlfriend to police in which she implicated the defendant in a stabbing after the girlfriend recanted at trial. At trial, the girlfriend claimed that she had been pressured and "lead" by police to make the statement and that she had lied to give the police what they wanted. The court held that the tape-recorded statement deserved to be admitted for its truth where it was given under highly reliable circumstances assuring that it was voluntarily given[76] and where the declarant-witness was subject to cross-examination at trial, giving the jury an opportunity to assess her demeanor and to evaluate her credibility. The court did not specify in what other circumstances a prior inconsistent statement of a testifying witness would be admissible for its truth.

In *Commonwealth v. Lively*, the Pennsylvania Supreme Court emphasized that the *Brady* rule required prior inconsistent statements to be given "under highly reliable circumstances" and required that "the non-party declarant be subject to cross-examination in the proceeding where the prior statement is to be admitted."[77] With these principles in mind, the court held that prior inconsistencies could be substantively received only when those statements were made under

[73] See Commonwealth v. Wilson, 707 A.2d 1114, 1117 (Pa. 1998) ("If the Commonwealth is to be allowed to introduce a prior inconsistent statement as substantive evidence to prove that the defendant committed the crime, there should be no dispute as to whether the statement was ever made.").
[74] See e.g., Commonweath v. Lively, 610 A.2d 7, 8 (Pa. 1992).
[75] Commonwealth v. Brady, 507 A.2d 66 (Pa. 1986).
[76] The court noted that both the girlfriend-declarant's mother and attorney were present when she gave her statement.
[77] Commonweath v. Lively, 610 A.2d 7, 9 (Pa. 1992).

oath at a formal legal proceeding, reduced to a writing signed and adopted by the declarant, or "recorded verbatim contemporaneously with the making of the statement."[78] The *Lively* court found that a police officer's testimony relating an oral prior inconsistent statement of one witness was inadmissible substantively under this rule. The court also rejected the admissibility of an officer's memorandum summarizing prior inconsistent statements by a recanting witness because the writing was not signed or adopted by the recanting witness and was not a verbatim contemporaneous recording made during the interview with the witness. The court held that a signed written prior inconsistent statement by another witness was admissible for its truth notwithstanding that witness's claims that the statement had been "coerced by the Commonwealth." The court made no inquiry into this alleged coercion in finding the prior inconsistent statement admissible.[79]

Following *Lively*, the question arose whether a written transcript of a witness's statement made by a police officer during a witness interview (that was not signed or adopted by the witness) could qualify for substantive admissibility as a "verbatim" "contemporaneous recording" under the third prong of the rule. In *Commonwealth v. Wilson*, the Pennsylvania Supreme Court noted that "only those hearsay declarations that are demonstrably reliable and trustworthy" should be considered as substantive evidence. Accordingly, the court clarified that a recording must be an electronic audio or video recording in order to be substantively admissible under the rule.[80] The court emphasized that the reason for the recording requirement was to eliminate any dispute as to whether the statement was made and noted that a witness could easily dispute making a statement contained in a written record by an officer that was not signed or adopted by the witness, notwithstanding the officer's testimony that he recorded "verbatim" and "contemporaneously." Therefore, the Pennsylvania Supreme Court insisted upon an electronic recording and Pa. Rule 803.1 has since followed suit.

Hawaii

Hawaii Rule of Evidence 802.1 was enacted in 1981 to provide substantive admissibility of prior inconsistent statements by testifying witnesses. The Rule was enacted to deal with the problem of turncoat witnesses and is intended to allow substantive use of *all* inconsistent "written or recorded statements that can fairly be attributed to the witness declarant."[81]

HRE 802.1 provides:

> The following statements previously made by witnesses who testify at the trial or hearing are not excluded by the hearsay rule:

[78] Id. at 8.

[79] Id.; see also Commonwealth v. Stays, 70 A.3d 1256, 1261-62 (Pa. Super. 2013)(upholding substantive admissibility of prior inconsistent written and signed statements of witness at preliminary hearing after witness recanted his prior statement and then permitting substantive admissibility of prior written and signed statement under former testimony exception at trial after witness-declarant was murdered).

[80] Commonwealth v. Wilson, 707 A.2d 1114, 1118 (Pa. 1998).

[81] State v. Eastman, 913 P.2d 57, 62 and n.4 (Hawaii 1996) (referencing legislative history concerning the problem of the turncoat witness).

(1) Inconsistent statement. The declarant is subject to cross-examination concerning the subject matter of the declarant's statement, the statement is inconsistent with the declarant's testimony, the statement is offered in compliance with rule 613(b), and the statement was:

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

(B) Reduced to writing and signed or otherwise adopted or approved by the declarant; or

(C) Recorded in substantially verbatim fashion by stenographic, mechanical, electrical, or other means contemporaneously with the making of the statement.[82]

Thus, the Hawaii Rule permits written or contemporaneously recorded prior inconsistent statements to be admitted substantively, in addition to those made under oath and in a prior trial, hearing, deposition or other proceeding. The Hawaii courts have upheld admission of both written and audio-recorded inconsistencies in the face of contrary trial testimony by the declarant, primarily in the context of domestic violence cases.[83] The Hawaii cases reveal no concern or issue with the circumstances surrounding the recording of the prior inconsistent statement. The Hawaii courts perform no independent assessment of the reliability of a prior inconsistency beyond the requirements of HRE 802.1. In addition to allowing all written or recorded inconsistent witness statements to be used substantively, the Hawaii Rule differs from FRE 801(d)(1)(A) by requiring that the declarant give trial testimony concerning the "events" underlying the prior statement. Thus, prior written or recorded statements made by witnesses who prove forgetful at trial may not be admitted for their truth.[84]

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[82] Haw. Rev. Stat. Ann. § 626-1, Rule 802.1 (West). "The intent is to include in paragraph (1) all written or recorded statements that can fairly be attributed to the witness-declarant" and noting that additional categories of substantively admissible statements are designed to track the Jencks Act. Haw. Rev. Stat. Ann. § 626-1, Rule 802.1 (West).

[83] See State v. Eastman, 913 P.2d at 62 (upholding substantive admission of victim's written "Voluntary Victim Statement Form" which she filled out with police and signed on the night of the argument, in which she stated that her husband hit her in the head and eye after she testified at trial that she inflicted the injuries upon herself); State v. Clark, 926 P.2d 194 (Hawaii 1996)(prior audio-recorded statement of domestic violence victim was substantively admissible under HRE 802.1(C) where victim testified about events at issue, was subject to cross-examination and acknowledged making statement, testified that she inflicted the stab wound upon herself in contrast to her prior statement accusing defendant, and where her statement was contemporaneously recorded); State v. Tomas, 933 P.2d 90 (Hawaii App. 1996)(written statement of domestic violence victim describing abuse was substantively admissible after victim testified inconsistently about the events at issue at trial and prior inconsistent statement alone was sufficient to support defendant's conviction using substantial evidence standard), *overruled on other grounds by* State v. Gonsales, 984 P.2d 1272 (Hawaii App. 1999); State v. Zukevich, 932 P.2d 340 (Hawaii App. 1997)(written statement of defendant's daughter was substantively admissible where she testified inconsistently at trial and was subject to cross-examination).

[84] The language of the Hawaii rules suggests that the trial witness must be able to testify about the *events* underlying her prior inconsistent statement in order to be "subject to cross-examination" in contrast to Fed. R. Evid. 801(d)(1)(A) which requires cross concerning the prior statement. Therefore, Hawaii does not allow the prior inconsistent statement of a forgetful trial witness to be used substantively. See State v. Apagoa, 59 P.3d 931 (Hawaii 2002)(unpublished nonbinding opinion)(majority concludes that audio-taped inconsistent statement was

properly admitted and that trial witness was subject to cross because she did end up testifying about the underlying incidents notwithstanding contradictory claims of forgetfulness, with dissent arguing that she was not subject to cross because she could not recall the events giving rise to the prosecution); State v. Canady, 911 P.2d 104 (Hawaii App. 1996)(contrasting requirements of FRE 801(d)(1)(A) with requirements of Hawaii rule and finding prior inconsistent statement not admissible substantively because witness could not recall *events* described in the statement and was, therefore, not "subject to cross-examination" about the events).

TAB 4

FORDHAM

University School of Law

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

Daniel J. Capra
Philip Reed Professor of Law

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

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Supreme Court decision affecting Fed.R.Evid. 606(b)
Date: April 1, 2017

Attached to the end of this memorandum is the Supreme Court's decision in *Pena-Rodriguez v. Colorado.* It was handed down on March 6, 2017. The Court's decision has an impact on Evidence Rule 606(b). Essentially it holds that the rule is subject to unconstitutional application in a certain limited situation.

Rule 606(b) provides that a juror's statement about deliberations cannot be used to attack the validity of the verdict. Specifically it provides as follows:

> **(b) During an Inquiry into the Validity of a Verdict or Indictment.**
> **(1)** ***Prohibited Testimony or Other Evidence.*** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
> **(2)** ***Exceptions*.** A juror may testify about whether:
> **(A)** extraneous prejudicial information was improperly brought to the jury's attention;
> **(B)** an outside influence was improperly brought to bear on any juror; or
> **(C)** a mistake was made in entering the verdict on the verdict form.

Pena-Rodriguez involved racist statements made by a juror during deliberations. The Court held that applying Rule 606(b) to exclude a juror's statement about these racist comments violated the defendant's Sixth Amendment right to a fair trial. [The case involved Colorado Rule 606(b), but that rule is virtually identical to the Federal Rule.] **The specific holding of the case is as follows:**

> For the reasons explained above, the Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.
>
> Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

It should be noted, though, that even though the Court found a constitutional violation, it had good things to say about Rule 606(b) as a general matter. The Court stated that the bar on juror testimony imposed by Rule 606(b) "has substantial merit. It promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict. The rule gives stability and finality to verdicts."

The question for the Committee is whether Rule 606(b) should be amended to respond to the Court's decision in *Pena-Rodriguez*. There are four possibilities: 1) Do nothing; 2) Add another exception to (b)(2) that would allow juror testimony about racially biased statements made during deliberations; 3) Add an exception that would go beyond the result in *Pena-Rodriguez* and allow juror testimony insofar as it would cover other matters that might affect the right to a fair trial; or 4) Add another exception to (b)(2) that would provide a generic reference to constitutional limitations. Each of these options will be discussed in turn.

1. Doing Nothing

It surely can be argued that no amendment to Rule 606(b) is necessary in response to *Pena-Rodriguez.* No amendment is needed to remove the Rule 606(b) bar on testimony about racist statements during deliberation. The Sixth Amendment has already removed that bar.

But the contrary argument, in favor of some action, is that the Evidence Rules Committee has always sought to avoid a situation in which a Rule could be applied in violation of the Constitution. This has been true going back to the original Advisory Committee --- the original rules are replete with attempts to avoid unconstitutional applications. See, e.g., Rule 201(f) (judicial notice in criminal cases); Rule 803(8) (law enforcement reports in criminal cases); 804(b)(1) (prior testimony in criminal cases).

And the abiding interest in preventing unconstitutional applications has carried over to the reconstituted Advisory Committee. See, e.g., Rule 412(b)(1)(C)(constitutional right of an accused to an effective defense); Rule 803(10)(amendment to protect the right to confrontation).

One reason for avoiding the possibility of unconstitutional applications is simply that the optics are bad. Good rulemaking should mean that a rule could never plausibly be applied to violate a constitutional right. But another reason is to avoid a trap for the unwary. Any lawyer, even a neophyte, should be able to look at a rule and know what it means; ideally the lawyer should not have to look outside the rule to determine the scope of its application. Certainly many lawyers approach rules that way--- thinking that the language of the rule is controlling and they need look no further. And the client of such a lawyer can be unfairly surprised when the rule is subject to an unconstitutional application. For example, an unwary lawyer (not having read the latest Supreme Court opinion) might think that he could not use juror statements to attack a verdict, even if he hears from a juror that someone in deliberations made racist comments. After all, looking at the Rule, there is no exception that would allow the proof. And the client would suffer because the Rule as written is different from the Rule as applied.

So both policy and rulemaking history support taking action in response to the Supreme Court's decision finding an unconstitutional application of Rule 606(b). The question is, what action is appropriate when an opinion raises problems of line-drawing, as *Pena-Rodriguez* undoubtedly does.

2. Codifying the Result

If action is to be taken, one possibility is essentially to codify the result in *Pena-Rodriguez* by adding a new exception to the no-impeachment rule in Rule 606(b)(2). A codification might look like this:

> **(2)** ***Exceptions.*** A juror may testify about whether:
>
> **(A)** extraneous prejudicial information was improperly brought to the jury's attention;
>
> **(B)** an outside influence was improperly brought to bear on any juror; ~~or~~
>
> **(C)** a mistake was made in entering the verdict on the verdict form.; or
>
> **(D)** a juror made a clear statement indicating that the juror relied on racial stereotypes or animus to convict a defendant in a criminal case.[1]

[1] The *Pena-Rodriguez* Court noted that a number of states provide an exception to the no-impeachment rule for racially-based comments. It is notable, though, that none of those states has rule text leading to that result. It has all been done by case law. So there are no state models to work from. The attempt here is simply to codify what the Court wrote.

The Committee Note can be short:

> Rule 606(b) has been amended to provide an exception allowing juror testimony that another juror made a clear statement indicating that the juror relied on racial stereotypes or animus to convict a defendant in a criminal case. The intent is to make the rule consistent with the guarantees provided by the Sixth Amendment in criminal cases. *See Pena-Rodriguez v. Colorado*, [cite].[2]

This proposal would be akin to the 2013 amendment to Rule 803(10). That amendment added a notice-and-demand provision to the Rule, in order to comply with the accused's right to confrontation as established in *Melendez-Diaz v. Massachusetts.* After *Melendez-Diaz*, Rule 803(10) was subject to unconstitutional application, as it permitted the government to prove the absence of a public record by way of affidavit. The Court in *Melendez-Diaz* stated that the solution to the potential unconstitutionality was to implement a notice-and-demand procedure. The 2013 amendment did exactly that: it added a notice-and-demand procedure, which is essentially a way to establish that the defendant waived the right to require production of a witness to testify. The text of the notice-and-demand procedure was lifted directly from *Melendez-Diaz.*

There is one difference between the codification here and that in Rule 803(10), though. The notice-and-demand procedure by definition answers any question about the unconstitutionality (as applied) of Rule 803(10). There is no real chance that the Court, in subsequent decisions, will require *more* of the government than that. (There is a fair chance that *Melendez-Diaz* will be overruled, but no real chance that it will be extended, and no chance at all that a notice-and-demand procedure will be found ineffective to protect the constitutional right.). In contrast, there is a possibility that the constitutional right found in *Pena-Rodriguez* could be extended --- for example, to statements that indicate a sexual bias, or a religious bias, or a bias against old people, or a failure to respect the defendant's right not to testify, and so forth. *Everyone* has a Sixth Amendment right to a fair trial, and while the Court bent over backwards to say that race was unique, it is hard to know whether, in a future case, the Court will extend the right of inquiry to other types of statements. Certainly the dissenters were of the view that the line drawn by the Court was arbitrary and subject to extension.

There is also a pretty fair possibility that the holding in *Pena-Rodriguez* could be extended to civil cases. The holding is stated as applicable only to a criminal case. But many of the cases cited by the Court are civil, including its last case on Rule 606(b) before this one --- *Warger v. Shauers.* And it was in *Warger* where the Court stated that the no-impeachment rule may admit of exceptions for "juror bias so extreme that, almost by definition, the jury trial right has been abridged." While the Sixth Amendment --- on which *Pena-Rodriguez* is grounded --- is limited to criminal cases, civil parties have a due process right to a fair trial and a right to a jury trial. There would appear to be no reason why the rule in *Pena-Rodriguez* would not be extendable to civil cases.

[2] While citing cases is now usually verboten in Committee Notes, there appears to be an exception when the Committee Note is explaining a change that was required by a change in the law. See the 2013 amendment to Rule 803(10), which cites *Melendez-Diaz v. Massachusetts* as the reason for amending the rule.

This means that if the Committee proposes an amendment that codifies the specific result in *Pena-Rodriguez*, there is a possibility that not very far down the road it will have to revisit the rule when the Court extends its exception to other kinds of problematic juror statements, or to civil cases. That is a big downside to codification of the specific holding in *Pena-Rodriguez*.

3. Broadening the Exception Beyond the Pena-Rodriguez Result

One possible way to get ahead of the problem of possible expansion of the Constitutional right is to craft an exception that would provide rule-protection for other types of objectionable statements that might be made by a juror --- and also to extend the amendment to civil cases. In other words, the Committee might as a matter of policy propose a substantive amendment that would allow jurors to testify to statements made in deliberations that would implicate a fair trial, civil or criminal.

The problem with this venture is, of course, line-drawing. Just what kind of statements are a serious enough threat that the protection for jury deliberations should be discarded? The states have established various types of expanded exceptions, as seen in the appendix to the majority's opinion:

Codified Exceptions in Addition to Those Enumerated in Fed. Rule Evid. 606(b)

> Ariz. Rules Crim. Proc. 24.1(c)(3), (d) (2011) (exception for evidence of misconduct, including verdict by game of chance or intoxication); Idaho Rule Evid. 606(b) (2016) (game of chance); Ind. Rule Evid. 606(b)(2)(A) (Burns 2014) (drug or alcohol use); Minn. Rule Evid. 606(b) (2014) (threats of violence or violent acts); Mont. Rule Evid. 606(b) (2015) (game of chance); N.D. Rule Evid. 606(b)(2)(C) (2016–2017) (same); Tenn. Rule Evid. 606(b) (2016) (quotient verdict or game of chance); Tex. Rule Evid. 606(b)(2)(B) (West 2016) (rebutting claim juror was unqualified); Vt. Rule Evid. 606(b) (Cum.Supp.2016) (juror communication with nonjuror).

It is pretty obvious that significant research and study and Committee discussion will have to occur before a reasoned decision could be made on whether to adopt any of the above exceptions, or more broadly any other exceptions that are more related to bias, such as religious-based or sex-based statements. Or for that matter whether the exception should cover obese-animus, or age-animus, or New England Patriots-animus.

Another point of research and discussion is whether there should be an exception for statements made during deliberations that comment negatively on the defendant's right not to testify. A statement like, "I am voting guilty because the defendant must be hiding something. He could have taken the stand and didn't" is an incursion on the defendant's Fifth Amendment right. It is hard to see how that injury --- of constitutional stature --- is any less serious than a statement evoking racial prejudice.

It is not just a problem of line-drawing, however. It is a problem of balancing the right to a fair trial against the public interest in the sanctity of jury verdicts and the finality of judgments. Rule 606(b) strikes that balance largely in favor of protecting the jury process. Even after *Pena-Rodriguez*, it is not obvious that the balance should be recast in such a way that jury deliberations generally should be subject to more

openness. The Supreme Court essentially approved the balance that was struck in Rule 606(b) but for one (allegedly) unique exception.

If the Committee does wish to consider an expansion of exceptions to the no-impeachment rule beyond that one carved out by the Supreme Court in *Pena-Rodriguez*, then the Reporter will prepare a detailed memorandum on the possible options and issues for the next meeting.

4. A Generic Reference to Constitutional Considerations

The final possibility for responding to *Pena-Rodriguez* is to add generic "warning" language that the Constitution might require an exception that is not set forth in the Rule itself. This was the solution implemented in Rule 412, after the Committee determined that a criminal defendant's right to an effective defense could, with some frequency, require admission of evidence that was barred by the terms of Rule 412. That same type of solution was implemented in Rule 615, after Congress passed a Victim's Bill of Rights that barred victim-witnesses from being sequestered even though the terms of Rule 615 mandated sequestration.

Here is the language from Rule 412:

(b) Exceptions.

(1) ***Criminal Cases.*** The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) *evidence whose exclusion would violate the defendant's constitutional rights.*

Here is the language from Rule 615:

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or

(d) *a person authorized by statute to be present.*

There are definite advantages to adding generic language referring to constitutional law that would create an exception to the text of an Evidence Rule. The first is that it warns the unwary to be on the lookout for a possible constitutional problem. The second is that it assures that the rule will never be unconstitutional as applied—the exception makes the rule contiguous with the Constitution. The third advantage is flexibility. The rule works no matter how far the Court expands the constitutional protection. It never has to be changed.

The downside of such a generic addition is that it changes no result. It states the obvious --- that the rule must bend to the Constitution. But on the other hand, as a practical matter it is a flag that may be useful to practitioners for rules that are likely to run up against constitutional guarantees. As to Rule 606(b), that likelihood has been documented.

One response might be, if you are going to flag a constitutional issue in Rule 606(b), why not put such a flag in every rule? Arguably every evidence rule is subject to an unconstitutional application if you think hard enough about it. The best answer to this argument is that there is a difference between a random possibility and an actuality. In Rule 803(10), and now in Rule 606(b), the Court has actually *found* the Evidence Rule to be unconstitutional as applied. The working principle could be --- there is no reason to raise a constitutional flag until the Supreme Court declares a rule unconstitutional as applied. Under that reasonable standard, flagging the constitutional issue in Rule 606(b) makes sense while mentioning the Constitution in, say, Rule 803(4) does not.

Here is what the generic change would look like:

(2) ***Exceptions.*** A juror may testify if:

(A) the testimony is about whether:

~~**(A)**~~ **(i)** extraneous prejudicial information was improperly brought to the jury's attention;

~~**(B)**~~ **(ii)** an outside influence was improperly brought to bear on any juror; ~~or~~

~~**(C)**~~ **(iii)** a mistake was made in entering the verdict on the verdict form~~.~~; or

(B) excluding the testimony would violate a party's constitutional right.

Reporter's comments:

The reference to the constitution does not work in the list of exceptions --- as it does in Rule 412. That's because the exceptions are currently stated in terms of what a witness may "testify about." Joe Kimble, our stylist, came up with the above solution.

The exception refers to "a party's constitutional right" as opposed to the constitutional right of a defendant in a criminal case. This leaves the language more flexible to cover the possibility that *Pena-Rodriguez* will be applied in civil cases.

The Committee Note to the Rule could look like this:

The amendment recognizes that the bar on juror testimony to impeach a verdict can sometimes conflict with constitutional right. See *Pena-Rodriguez v. Colorado* [cite].

2017 WL 855760
Only the Westlaw citation is currently available.
Supreme Court of the United States

Miguel Angel **PENA**–**RODRIGUEZ**, Petitioner
v.
COLORADO.

No. 15–606.
|
Argued Oct. 11, 2016.
|
Decided March 6, 2017.

Syllabus[*]

***1** A Colorado jury convicted petitioner Peã–Rodriguez of harassment and unlawful sexual contact. Following the discharge of the jury, two jurors told defense counsel that, during deliberations, Juror H.C. had expressed anti-Hispanic bias toward petitioner and petitioner's alibi witness. Counsel, with the trial court's supervision, obtained affidavits from the two jurors describing a number of biased statements by H.C. The court acknowledged H. C.'s apparent bias but denied petitioner's motion for a new trial on the ground that Colorado Rule of Evidence 606(b) generally prohibits a juror from testifying as to statements made during deliberations in a proceeding inquiring into the validity of the verdict. The Colorado Court of Appeals affirmed, agreeing that H. C.'s alleged statements did not fall within an exception to Rule 606(b). The Colorado Supreme Court also affirmed, relying on *Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90, and *Warger v. Shauers*, 574 U.S. ——, both of which rejected constitutional challenges to the federal no-impeachment rule as applied to evidence of juror misconduct or bias.

Held : Where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee. Pp. —— – ——.

(a) At common law jurors were forbidden to impeach their verdict, either by affidavit or live testimony. Some American jurisdictions adopted a more flexible version of the no-impeachment bar, known as the "Iowa rule," which prevented jurors from testifying only about their own subjective beliefs, thoughts, or motives during deliberations. An alternative approach, later referred to as the federal approach, permitted an exception only for events extraneous to the deliberative process. This Court's early decisions did not establish a clear preference for a particular version of the no-impeachment rule, appearing open to the Iowa rule in *United States v. Reid*, 12 How. 361, 13 L.Ed. 1023, and *Mattox v. United States*, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917, but rejecting that approach in *McDonald v. Pless*, 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300.

The common-law development of the rule reached a milestone in 1975 when Congress adopted Federal Rule of Evidence 606(b), which sets out a broad no-impeachment rule, with only limited exceptions. This version of the no-impeachment rule has substantial merit, promoting full and vigorous discussion by jurors and providing considerable assurance that after being discharged they will not be summoned to recount their deliberations or otherwise harassed. The rule gives stability and finality to verdicts. Pp. —— – ——.

(b) Some version of the no-impeachment rule is followed in every State and the District of Columbia, most of which follow the Federal Rule. At least 16 jurisdictions have recognized an exception for juror testimony about racial bias in deliberations. Three Federal Courts of Appeals have also held or suggested there is a constitutional exception for evidence of racial bias.

***2** In addressing the common-law no-impeachment rule, this Court noted the possibility of an exception in the "gravest and most important cases." *United States v. Reid*, *supra*, at 366; *McDonald v. Pless*, *supra*, at 269. The Court has addressed the question whether the Constitution mandates an exception to Rule 606(b) just twice, rejecting an exception each time. In *Tanner*, where the evidence showed that some jurors were under the influence of drugs and alcohol during the trial, the Court identified "long-recognized and very substantial concerns" supporting the no-impeachment rule. 483 U.S., at 127. The Court also outlined existing, significant safeguards for the defendant's right to an impartial and competent jury beyond post-trial juror testimony: members of the venire can be examined for impartiality during *voir dire* ; juror misconduct may be observed the court, counsel, and court personnel during the trial; and jurors themselves can report misconduct to the court before a verdict is rendered. In *Warger*, a civil case where the evidence indicated that the jury forewoman failed to disclose a prodefendant bias during *voir dire*, the Court again put substantial reliance on existing safeguards for a fair trial. But the Court also warned, as in *Reid* and *McDonald*, that the no-impeachment rule may admit of exceptions for "juror bias so extreme that, almost by definition, the jury trial right has been abridged." 574 U.S., at ——-——, n. 3.

Reid, *McDonald*, and *Warger* left open the question here: whether the Constitution requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt. Pp. —— – ——.

(c) The imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments. "[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *McLaughlin v. Florida*, 379 U.S. 184, 192, 85 S.Ct. 283, 13 L.Ed.2d 222. Time and again, this Court has enforced the Constitution's guarantee against state-sponsored racial discrimination in the jury system. The Court has interpreted the Fourteenth Amendment to prohibit the exclusion of jurors based on race, *Strauder v. West Virginia*, 100 U.S. 303, 305–309, 25 L.Ed. 664; struck down laws and practices that systematically exclude racial minorities from juries, see, *e.g.*, *Neal v. Delaware*, 103 U.S. 370, 26 L.Ed. 567; ruled that no litigant may exclude a prospective juror based on race, see, *e.g.*, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69; and held that defendants may at times be entitled to ask about racial bias during *voir dire*, see, *e.g.*, *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46. The unmistakable principle of these precedents is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice," *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S.Ct. 2993, 61 L.Ed.2d 739, damaging "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State," *Powers v. Ohio*, 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411. Pp. —— – ——.

(d) This case lies at the intersection of the Court's decisions endorsing the no-impeachment rule and those seeking to eliminate racial bias in the jury system. Those lines of precedent need not conflict. Racial bias, unlike the behavior in *McDonald*, *Tanner*, or *Warger*, implicates unique historical, constitutional, and institutional concerns and, if left unaddressed, would risk systemic injury to the administration of justice. It is also distinct in a pragmatic sense, for the *Tanner* safeguards may be less effective in rooting out racial bias. But while all forms of improper bias pose challenges to the trial process, there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after a verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right. Pp. —— – ——.

***3** (e) Before the no-impeachment bar can be set aside to allow further judicial inquiry, there must be a threshold showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether the threshold showing has been satisfied is committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

The practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors. The experience of those jurisdictions that have already recognized a racial-bias exception to the no-impeachment rule, and the experience of courts going forward, will inform the proper exercise of trial judge discretion. The Court need not address what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias or the appropriate standard for determining when such evidence is sufficient to require that the verdict be set aside and a new trial be granted. Standard and existing safeguards may also help prevent racial bias in jury deliberations, including careful *voir dire* and a trial court's instructions to jurors about their duty to review the evidence, deliberate together, and reach a verdict in a fair and impartial way, free from bias of any kind. Pp. —— – ——.

350 P. 3d 287, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which ROBERTS, C.J., and THOMAS, J., joined.

CERTIORARI TO THE SUPREME COURT OF COLORADO

Attorneys and Law Firms

Jonathan D. Rosen, Denver, CO, Jeffrey L. Fisher, Pamela S. Karlan, Brian Wolfman, Stanford Law School, Supreme Court, Stanford, CA, for petitioner.

Cynthia H. Coffman, Attorney General, Office of the Colorado, Attorney General, Denver, CO, Frederick R. Yarger, Solicitor General, Glenn E. Roper, Deputy

Solicitor General, Majid Yazdi, Assistant Attorney General, for respondent.

Opinion

Justice KENNEDY delivered the opinion of the Court.

***4** The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on governmental power. The jury, over the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases. Over the long course its judgments find acceptance in the community, an acceptance essential to respect for the rule of law. The jury is a tangible implementation of the principle that the law comes from the people.

In the era of our Nation's founding, the right to a jury trial already had existed and evolved for centuries, through and alongside the common law. The jury was considered a fundamental safeguard of individual liberty. See The Federalist No. 83, p. 451 (B. Warner ed. 1818) (A.Hamilton). The right to a jury trial in criminal cases was part of the Constitution as first drawn, and it was restated in the Sixth Amendment. Art. III, § 2, cl. 3; Amdt. 6. By operation of the Fourteenth Amendment, it is applicable to the States. *Duncan v. Louisiana*, 391 U.S. 145, 149–150, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

Like all human institutions, the jury system has its flaws, yet experience shows that fair and impartial verdicts can be reached if the jury follows the court's instructions and undertakes deliberations that are honest, candid, robust, and based on common sense. A general rule has evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations. This principle, itself centuries old, is often referred to as the no-impeachment rule. The instant case presents the question whether there is an exception to the no-impeachment rule when, after the jury is discharged, a juror comes forward with compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict.

I

State prosecutors in Colorado brought criminal charges against petitioner, Miguel Angel Peã–Rodriguez, based on the following allegations. In 2007, in the bathroom of a Colorado horse-racing facility, a man sexually assaulted two teenage sisters. The girls told their father and identified the man as an employee of the racetrack. The police located and arrested petitioner. Each girl separately identified petitioner as the man who had assaulted her.

The State charged petitioner with harassment, unlawful sexual contact, and attempted sexual assault on a child. Before the jury was empaneled, members of the venire were repeatedly asked whether they believed that they could be fair and impartial in the case. A written questionnaire asked if there was "anything about you that you feel would make it difficult for you to be a fair juror." App. 14. The court repeated the question to the panel of prospective jurors and encouraged jurors to speak in private with the court if they had any concerns about their impartiality. Defense counsel likewise asked whether anyone felt that "this is simply not a good case" for them to be a fair juror. *Id.*, at 34. None of the empaneled jurors expressed any reservations based on racial or any other bias. And none asked to speak with the trial judge.

***5** After a 3–day trial, the jury found petitioner guilty of unlawful sexual contact and harassment, but it failed to reach a verdict on the attempted sexual assault charge. When the jury was discharged, the court gave them this instruction, as mandated by Colorado law:

> "The question may arise whether you may now discuss this case with the lawyers, defendant, or other persons. For your guidance the court instructs you that whether you talk to anyone is entirely your own decision.... If any person persists in discussing the case over your objection, or becomes critical of your service either before or after any discussion has begun, please report it to me." *Id.*, at 85–86.

Following the discharge of the jury, petitioner's counsel entered the jury room to discuss the trial with the jurors. As the room was emptying, two jurors remained to speak with counsel in private. They stated that, during deliberations, another juror had expressed anti-Hispanic bias toward petitioner and petitioner's alibi witness. Petitioner's counsel reported this to the court and, with the court's supervision, obtained sworn affidavits from the two jurors.

The affidavits by the two jurors described a number of biased statements made by another juror, identified as Juror H.C. According to the two jurors, H.C. told the other jurors that he "believed the defendant was guilty because, in [H. C.'s] experience as an ex-law enforcement officer,

Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." *Id.*, at 110. The jurors reported that H.C. stated his belief that Mexican men are physically controlling of women because of their sense of entitlement, and further stated, " 'I think he did it because he's Mexican and Mexican men take whatever they want.' " *Id.*, at 109. According to the jurors, H.C. further explained that, in his experience, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." *Id.*, at 110. Finally, the jurors recounted that Juror H.C. said that he did not find petitioner's alibi witness credible because, among other things, the witness was " 'an illegal.' " *Ibid.* (In fact, the witness testified during trial that he was a legal resident of the United States.)

After reviewing the affidavits, the trial court acknowledged H. C.'s apparent bias. But the court denied petitioner's motion for a new trial, noting that "[t]he actual deliberations that occur among the jurors are protected from inquiry under [Colorado Rule of Evidence] 606(b)." *Id*., at 90. Like its federal counterpart, Colorado's Rule 606(b) generally prohibits a juror from testifying as to any statement made during deliberations in a proceeding inquiring into the validity of the verdict. See Fed. Rule Evid. 606(b). The Colorado Rule reads as follows:

> ***6** "(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying." Colo. Rule Evid. 606(b) (2016).

The verdict deemed final, petitioner was sentenced to two years' probation and was required to register as a sex offender. A divided panel of the Colorado Court of Appeals affirmed petitioner's conviction, agreeing that H. C.'s alleged statements did not fall within an exception to Rule 606(b) and so were inadmissible to undermine the validity of the verdict. —— P.3d ——, 2012 WL 5457362.

The Colorado Supreme Court affirmed by a vote of 4 to 3. 350 P.3d 287 (2015). The prevailing opinion relied on two decisions of this Court rejecting constitutional challenges to the federal no-impeachment rule as applied to evidence of juror misconduct or bias. See *Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987); *Warger v. Shauers*, 574 U.S. —— (2014). After reviewing those precedents, the court could find no "dividing line between different *types* of juror bias or misconduct," and thus no basis for permitting impeachment of the verdicts in petitioner's trial, notwithstanding H. C.'s apparent racial bias. 350 P.3d, at 293. This Court granted certiorari to decide whether there is a constitutional exception to the no-impeachment rule for instances of racial bias. 578 U.S. —— (2016).

Juror H. C.'s bias was based on petitioner's Hispanic identity, which the Court in prior cases has referred to as ethnicity, and that may be an instructive term here. See, *e.g., Hernandez v. New York*, 500 U.S. 352, 355, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion). Yet we have also used the language of race when discussing the relevant constitutional principles in cases involving Hispanic persons. See, *e.g., ibid.*; *Fisher v. University of Tex. at Austin*, 570 U.S. —— (2013); *Rosales–Lopez v. United States*, 451 U.S. 182, 189–190, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981) (plurality opinion). Petitioner and respondent both refer to race, or to race and ethnicity, in this more expansive sense in their briefs to the Court. This opinion refers to the nature of the bias as racial in keeping with the primary terminology employed by the parties and used in our precedents.

II

A

***7** At common law jurors were forbidden to impeach their verdict, either by affidavit or live testimony. This rule originated in *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B.1785). There, Lord Mansfield excluded juror testimony that the jury had decided the case through a game of chance. The Mansfield rule, as it came to be known, prohibited jurors, after the verdict was entered, from testifying either about their subjective mental processes or about objective events that occurred during deliberations.

American courts adopted the Mansfield rule as a matter of common law, though not in every detail. Some

jurisdictions adopted a different, more flexible version of the no-impeachment bar known as the "Iowa rule." Under that rule, jurors were prevented only from testifying about their own subjective beliefs, thoughts, or motives during deliberations. See *Wright v. Illinois & Miss. Tel. Co.*, 20 Iowa 195 (1866). Jurors could, however, testify about objective facts and events occurring during deliberations, in part because other jurors could corroborate that testimony.

An alternative approach, later referred to as the federal approach, stayed closer to the original Mansfield rule. See *Warger, supra,* at —— (slip op., at 5). Under this version of the rule, the no-impeachment bar permitted an exception only for testimony about events extraneous to the deliberative process, such as reliance on outside evidence—newspapers, dictionaries, and the like—or personal investigation of the facts.

This Court's early decisions did not establish a clear preference for a particular version of the no-impeachment rule. In *United States v. Reid,* 12 How. 361, 13 L.Ed. 1023 (1852), the Court appeared open to the admission of juror testimony that the jurors had consulted newspapers during deliberations, but in the end it barred the evidence because the newspapers "had not the slightest influence" on the verdict. *Id.,* at 366. The *Reid* Court warned that juror testimony "ought always to be received with great caution." *Ibid.* Yet it added an important admonition: "cases might arise in which it would be impossible to refuse" juror testimony "without violating the plainest principles of justice." *Ibid.*

In a following case the Court required the admission of juror affidavits stating that the jury consulted information that was not in evidence, including a prejudicial newspaper article. *Mattox v. United States,* 146 U.S. 140, 151, 13 S.Ct. 50, 36 L.Ed. 917 (1892). The Court suggested, furthermore, that the admission of juror testimony might be governed by a more flexible rule, one permitting jury testimony even where it did not involve consultation of prejudicial extraneous information. *Id.,* at 148–149; see also *Hyde v. United States,* 225 U.S. 347, 382–384, 32 S.Ct. 793, 56 L.Ed. 1114 (1912) (stating that the more flexible Iowa rule "should apply," but excluding evidence that the jury reached the verdict by trading certain defendants' acquittals for others' convictions).

Later, however, the Court rejected the more lenient Iowa rule. In *McDonald v. Pless,* 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915), the Court affirmed the exclusion of juror testimony about objective events in the jury room. There, the jury allegedly had calculated a damages award by averaging the numerical submissions of each member. *Id.,* at 265–266. As the Court explained, admitting that evidence would have "dangerous consequences": "no verdict would be safe" and the practice would "open the door to the most pernicious arts and tampering with jurors." *Id.,* at 268 (internal quotation marks omitted). Yet the Court reiterated its admonition from *Reid,* again cautioning that the no-impeachment rule might recognize exceptions "in the gravest and most important cases" where exclusion of juror affidavits might well violate "the plainest principles of justice." 238 U. S., at 269 (quoting *Reid, supra,* at 366; internal quotation marks omitted).

***8** The common-law development of the no-impeachment rule reached a milestone in 1975, when Congress adopted the Federal Rules of Evidence, including Rule 606(b). Congress, like the *McDonald* Court, rejected the Iowa rule. Instead it endorsed a broad no-impeachment rule, with only limited exceptions.

The version of the rule that Congress adopted was "no accident." *Warger,* 574 U.S., at —— (slip op., at 7). The Advisory Committee at first drafted a rule reflecting the Iowa approach, prohibiting admission of juror testimony only as it related to jurors' mental processes in reaching a verdict. The Department of Justice, however, expressed concern over the preliminary rule. The Advisory Committee then drafted the more stringent version now in effect, prohibiting all juror testimony, with exceptions only where the jury had considered prejudicial extraneous evidence or was subject to other outside influence. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 265 (1972). The Court adopted this second version and transmitted it to Congress.

The House favored the Iowa approach, but the Senate expressed concern that it did not sufficiently address the public policy interest in the finality of verdicts. S.Rep. No. 93–1277, pp. 13–14 (1974). Siding with the Senate, the Conference Committee adopted, Congress enacted, and the President signed the Court's proposed rule. The substance of the Rule has not changed since 1975, except for a 2006 modification permitting evidence of a clerical mistake on the verdict form. See 574 U.S., at ——.

The current version of Rule 606(b) states as follows:

> "(1) *Prohibited Testimony or Other Evidence*. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on

these matters.

"(2) *Exceptions.* A juror may testify about whether:

***9** "(A) extraneous prejudicial information was improperly brought to the jury's attention;

"(B) an outside influence was improperly brought to bear on any juror; or

"(C) a mistake was made in entering the verdict on the verdict form."

This version of the no-impeachment rule has substantial merit. It promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict. The rule gives stability and finality to verdicts.

B

Some version of the no-impeachment rule is followed in every State and the District of Columbia. Variations make classification imprecise, but, as a general matter, it appears that 42 jurisdictions follow the Federal Rule, while 9 follow the Iowa Rule. Within both classifications there is a diversity of approaches. Nine jurisdictions that follow the Federal Rule have codified exceptions other than those listed in Federal Rule 606(b). See Appendix, *infra*. At least 16 jurisdictions, 11 of which follow the Federal Rule, have recognized an exception to the no-impeachment bar under the circumstances the Court faces here: juror testimony that racial bias played a part in deliberations. *Ibid.* According to the parties and *amici*, only one State other than Colorado has addressed this issue and declined to recognize an exception for racial bias. See *Commonwealth v. Steele*, 599 Pa. 341, 377–379, 961 A.2d 786, 807–808 (2012).

The federal courts, for their part, are governed by Federal Rule 606(b), but their interpretations deserve further comment. Various Courts of Appeals have had occasion to consider a racial bias exception and have reached different conclusions. Three have held or suggested there is a constitutional exception for evidence of racial bias. See *United States v. Villar*, 586 F.3d 76, 87–88 (C.A.1 2009) (holding the Constitution demands a racial-bias exception); *United States v. Henley*, 238 F.3d 1111, 1119–1121 (C.A.9 2001) (finding persuasive arguments in favor of an exception but not deciding the issue); *Shillcutt v. Gagnon*, 827 F.2d 1155, 1158–1160 (C.A.7 1987) (observing that in some cases fundamental fairness could require an exception). One Court of Appeals has declined to find an exception, reasoning that other safeguards inherent in the trial process suffice to protect defendants' constitutional interests. See *United States v. Benally*, 546 F.3d 1230, 1240–1241 (C.A.10 2008). Another has suggested as much, holding in the habeas context that an exception for racial bias was not clearly established but indicating in dicta that no such exception exists. See *Williams v. Price*, 343 F.3d 223, 237–239 (C.A.3 2003) (Alito, J.). And one Court of Appeals has held that evidence of racial bias is excluded by Rule 606(b), without addressing whether the Constitution may at times demand an exception. See *Martinez v. Food City, Inc.*, 658 F.2d 369, 373–374 (C.A.5 1981).

C

***10** In addressing the scope of the common-law no-impeachment rule before Rule 606(b)'s adoption, the *Reid* and *McDonald* Courts noted the possibility of an exception to the rule in the "gravest and most important cases." *Reid*, 12 How., at 366, 13 L.Ed. 1023; *McDonald*, 238 U.S., at 269. Yet since the enactment of Rule 606(b), the Court has addressed the precise question whether the Constitution mandates an exception to it in just two instances.

In its first case, *Tanner*, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90, the Court rejected a Sixth Amendment exception for evidence that some jurors were under the influence of drugs and alcohol during the trial. *Id.*, at 125. Central to the Court's reasoning were the "long-recognized and very substantial concerns" supporting "the protection of jury deliberations from intrusive inquiry." *Id.*, at 127. The *Tanner* Court echoed *McDonald* 's concern that, if attorneys could use juror testimony to attack verdicts, jurors would be "harassed and beset by the defeated party," thus destroying "all frankness and freedom of discussion and conference." 483 U.S., at 120 (quoting *McDonald*, *supra*, at 267–268). The Court was concerned, moreover, that attempts to impeach a verdict would "disrupt the finality of the process" and undermine both "jurors' willingness to return an unpopular verdict" and "the community's trust in a system that relies on the decisions of laypeople." 483 U.S., at 120–121.

The *Tanner* Court outlined existing, significant safeguards for the defendant's right to an impartial and competent jury beyond post-trial juror testimony. At the outset of the trial process, *voir dire* provides an opportunity for the court and

counsel to examine members of the venire for impartiality. As a trial proceeds, the court, counsel, and court personnel have some opportunity to learn of any juror misconduct. And, before the verdict, jurors themselves can report misconduct to the court. These procedures do not undermine the stability of a verdict once rendered. Even after the trial, evidence of misconduct other than juror testimony can be used to attempt to impeach the verdict. *Id.,* at 127. Balancing these interests and safeguards against the defendant's Sixth Amendment interest in that case, the Court affirmed the exclusion of affidavits pertaining to the jury's inebriated state. *Ibid.*

The second case to consider the general issue presented here was *Warger,* 574 U.S. ——. The Court again rejected the argument that, in the circumstances there, the jury trial right required an exception to the no-impeachment rule. *Warger* involved a civil case where, after the verdict was entered, the losing party sought to proffer evidence that the jury forewoman had failed to disclose prodefendant bias during *voir dire*. As in *Tanner,* the Court put substantial reliance on existing safeguards for a fair trial. The Court stated: "Even if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered." 574 U.S., at –– (slip op., at 10).

In *Warger,* however, the Court did reiterate that the no-impeachment rule may admit exceptions. As in *Reid* and *McDonald,* the Court warned of "juror bias so extreme that, almost by definition, the jury trial right has been abridged." 574 U.S., at ——-——, n. 3 (slip op., at 10–11, n. 3). "If and when such a case arises," the Court indicated it would "consider whether the usual safeguards are or are not sufficient to protect the integrity of the process." *Ibid.*

***11** The recognition in *Warger* that there may be extreme cases where the jury trial right requires an exception to the no-impeachment rule must be interpreted in context as a guarded, cautious statement. This caution is warranted to avoid formulating an exception that might undermine the jury dynamics and finality interests the no-impeachment rule seeks to protect. Today, however, the Court faces the question that *Reid, McDonald,* and *Warger* left open. The Court must decide whether the Constitution requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt.

III

It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons. This imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments.

"[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *McLaughlin v. Florida,* 379 U.S. 184, 192, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964). In the years before and after the ratification of the Fourteenth Amendment, it became clear that racial discrimination in the jury system posed a particular threat both to the promise of the Amendment and to the integrity of the jury trial. "Almost immediately after the Civil War, the South began a practice that would continue for many decades: All-white juries punished black defendants particularly harshly, while simultaneously refusing to punish violence by whites, including Ku Klux Klan members, against blacks and Republicans." Forman, Juries and Race in the Nineteenth Century, 113 Yale L.J. 895, 909–910 (2004). To take one example, just in the years 1865 and 1866, all-white juries in Texas decided a total of 500 prosecutions of white defendants charged with killing African–Americans. All 500 were acquitted. *Id.,* at 916. The stark and unapologetic nature of race-motivated outcomes challenged the American belief that "the jury was a bulwark of liberty," *id.,* at 909, and prompted Congress to pass legislation to integrate the jury system and to bar persons from eligibility for jury service if they had conspired to deny the civil rights of African–Americans, *id.,* at 920–930. Members of Congress stressed that the legislation was necessary to preserve the right to a fair trial and to guarantee the equal protection of the laws. *Ibid.*

The duty to confront racial animus in the justice system is not the legislature's alone. Time and again, this Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system. Beginning in 1880, the Court interpreted the Fourteenth Amendment to prohibit the exclusion of jurors on the basis of race. *Strauder v. West Virginia,* 100 U.S. 303, 305–309, 25 L.Ed. 664 (1880). The Court has repeatedly struck down laws and practices that systematically exclude racial minorities from juries. See, *e.g., Neal v. Delaware,* 103 U.S. 370, 26 L.Ed. 567 (1881); *Hollins v. Oklahoma,* 295 U.S. 394, 55 S.Ct. 784, 79 L.Ed. 1500 (1935) (*per curiam*); *Avery v. Georgia,* 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1953); *Hernandez v. Texas,* 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954); *Castaneda v. Partida,* 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977). To guard against discrimination in

jury selection, the Court has ruled that no litigant may exclude a prospective juror on the basis of race. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992). In an effort to ensure that individuals who sit on juries are free of racial bias, the Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias during *voir dire*. *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973); *Rosales–Lopez*, 451 U.S. 182, 101 S.Ct. 1629, 68 L.Ed.2d 22; *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986).

***12** The unmistakable principle underlying these precedents is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). The jury is to be "a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.' " *McCleskey v. Kemp*, 481 U.S. 279, 310, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (quoting *Strauder, supra*, at 309). Permitting racial prejudice in the jury system damages "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State." *Powers v. Ohio*, 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); cf. *Aldridge v. United States*, 283 U.S. 308, 315, 51 S.Ct. 470, 75 L.Ed. 1054 (1931); *Buck v. Davis*, *ante*, at 22.

IV

A

***13** This case lies at the intersection of the Court's decisions endorsing the no-impeachment rule and its decisions seeking to eliminate racial bias in the jury system. The two lines of precedent, however, need not conflict.

Racial bias of the kind alleged in this case differs in critical ways from the compromise verdict in *McDonald*, the drug and alcohol abuse in *Tanner*, or the pro-defendant bias in *Warger*. The behavior in those cases is troubling and unacceptable, but each involved anomalous behavior from a single jury—or juror—gone off course. Jurors are presumed to follow their oath, cf. *Penry v. Johnson*, 532 U.S. 782, 799, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001), and neither history nor common experience show that the jury system is rife with mischief of these or similar kinds. To attempt to rid the jury of every irregularity of this sort would be to expose it to unrelenting scrutiny. "It is not at all clear ... that the jury system could survive such efforts to perfect it." *Tanner*, 483 U.S., at 120.

The same cannot be said about racial bias, a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice. This Court's decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns. An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.

Racial bias is distinct in a pragmatic sense as well. In past cases this Court has relied on other safeguards to protect the right to an impartial jury. Some of those safeguards, to be sure, can disclose racial bias. *Voir dire* at the outset of trial, observation of juror demeanor and conduct during trial, juror reports before the verdict, and nonjuror evidence after trial are important mechanisms for discovering bias. Yet their operation may be compromised, or they may prove insufficient. For instance, this Court has noted the dilemma faced by trial court judges and counsel in deciding whether to explore potential racial bias at *voir dire*. See *Rosales–Lopez, supra* ; *Ristaino v. Ross*, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976). Generic questions about juror impartiality may not expose specific attitudes or biases that can poison jury deliberations. Yet more pointed questions "could well exacerbate whatever prejudice might exist without substantially aiding in exposing it." *Rosales–Lopez, supra*, at 195 (Rehnquist, J., concurring in result).

The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations. It is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case, as would have been required in *Warger*. It is quite another to call her a bigot.

The recognition that certain of the *Tanner* safeguards may be less effective in rooting out racial bias than other kinds of bias is not dispositive. All forms of improper bias pose challenges to the trial process. But there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central

premise of the Sixth Amendment trial right.

B

***14** For the reasons explained above, the Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

The practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors. See 27 C. Wright & V. Gold, Federal Practice and Procedure: Evidence § 6076, pp. 580–583 (2d ed. 2007) (Wright); see also Variations of ABA Model Rules of Professional Conduct, Rule 3.5 (Sept. 15, 2016) (overview of state ethics rules); 2 Jurywork Systematic Techniques § 13:18 (2016–2017) (overview of Federal District Court rules). These limits seek to provide jurors some protection when they return to their daily affairs after the verdict has been entered. But while a juror can always tell counsel they do not wish to discuss the case, jurors in some instances may come forward of their own accord.

That is what happened here. In this case the alleged statements by a juror were egregious and unmistakable in their reliance on racial bias. Not only did juror H.C. deploy a dangerous racial stereotype to conclude petitioner was guilty and his alibi witness should not be believed, but he also encouraged other jurors to join him in convicting on that basis.

Petitioner's counsel did not seek out the two jurors' allegations of racial bias. Pursuant to Colorado's mandatory jury instruction, the trial court had set limits on juror contact and encouraged jurors to inform the court if anyone harassed them about their role in the case. Similar limits on juror contact can be found in other jurisdictions that recognize a racial-bias exception. See, *e.g.*, Fla. Standard Jury Instrs. in Crim. Cases No. 4.2 (West 2016) ("Although you are at liberty to speak with anyone about your deliberations, you are also at liberty to refuse to speak to anyone"); Mass. Office of Jury Comm'r, Trial Juror's Handbook (Dec.2015) ("You are not required to speak with anyone once the trial is over.... If anyone tries to learn this confidential information from you, or if you feel harassed or embarrassed in any way, you should report it to the court ... immediately"); N.J.Crim. Model Jury Charges, Non 2C Charges, Dismissal of Jury (2014) ("It will be up to each of you to decide whether to speak about your service as a juror").

With the understanding that they were under no obligation to speak out, the jurors approached petitioner's counsel, within a short time after the verdict, to relay their concerns about H. C.'s statements. App. 77. A similar pattern is common in cases involving juror allegations of racial bias. See, *e.g.*, *Villar*, 586 F.3d, at 78 (juror e-mailed defense counsel within hours of the verdict); *Kittle v. United States*, 65 A.3d 1144, 1147 (D.C.2013) (juror wrote a letter to the judge the same day the court discharged the jury); *Benally*, 546 F.3d, at 1231 (juror approached defense counsel the day after the jury announced its verdict). Pursuant to local court rules, petitioner's counsel then sought and received permission from the court to contact the two jurors and obtain affidavits limited to recounting the exact statements made by H.C. that exhibited racial bias.

***15** While the trial court concluded that Colorado's Rule 606(b) did not permit it even to consider the resulting affidavits, the Court's holding today removes that bar. When jurors disclose an instance of racial bias as serious as the one involved in this case, the law must not wholly disregard its occurrence.

C

As the preceding discussion makes clear, the Court relies on the experiences of the 17 jurisdictions that have recognized a racial-bias exception to the no-impeachment rule—some for over half a century—with no signs of an increase in juror harassment or a loss of juror willingness to engage in searching and candid deliberations.

The experience of these jurisdictions, and the experience of

the courts going forward, will inform the proper exercise of trial judge discretion in these and related matters. This case does not ask, and the Court need not address, what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias. See 27 Wright 575–578 (noting a divergence of authority over the necessity and scope of an evidentiary hearing on alleged juror misconduct). The Court also does not decide the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted. Compare, *e.g., Shillcutt*, 827 F.2d, at 1159 (inquiring whether racial bias "pervaded the jury room"), with, *e.g., Henley*, 238 F.3d, at 1120 ("One racist juror would be enough").

D

It is proper to observe as well that there are standard and existing processes designed to prevent racial bias in jury deliberations. The advantages of careful *voir dire* have already been noted. And other safeguards deserve mention.

Trial courts, often at the outset of the case and again in their final jury instructions, explain the jurors' duty to review the evidence and reach a verdict in a fair and impartial way, free from bias of any kind. Some instructions are framed by trial judges based on their own learning and experience. Model jury instructions likely take into account these continuing developments and are common across jurisdictions. See, *e.g.*, 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal § 10:01, p. 22 (6th ed. 2008) ("Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way"). Instructions may emphasize the group dynamic of deliberations by urging jurors to share their questions and conclusions with their colleagues. See, *e.g., id*., § 20:01, at 841 ("It is your duty as jurors to consult with one another and to deliberate with one another with a view towards reaching an agreement if you can do so without violence to individual judgment").

Probing and thoughtful deliberation improves the likelihood that other jurors can confront the flawed nature of reasoning that is prompted or influenced by improper biases, whether racial or otherwise. These dynamics can help ensure that the exception is limited to rare cases.

***16** * * *

The Nation must continue to make strides to overcome race-based discrimination. The progress that has already been made underlies the Court's insistence that blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one despite the general bar of the no-impeachment rule. It is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history. The Court now seeks to strengthen the broader principle that society can and must move forward by achieving the thoughtful, rational dialogue at the foundation of both the jury system and the free society that sustains our Constitution.

The judgment of the Supreme Court of Colorado is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice THOMAS, dissenting.

***16** The Court today holds that the Sixth Amendment requires the States to provide a criminal defendant the opportunity to impeach a jury's guilty verdict with juror testimony about a juror's alleged racial bias, notwithstanding a state procedural rule forbidding such testimony. I agree with Justice ALITO that the Court's decision is incompatible with the text of the Amendment it purports to interpret and with our precedents. I write separately to explain that the Court's holding also cannot be squared with the original understanding of the Sixth or Fourteenth Amendments.

I

The Sixth Amendment's protection of the right, "[i]n all criminal prosecutions," to a "trial, by an impartial jury," is limited to the protections that existed at common law when the Amendment was ratified. See, *e.g., Apprendi v. New Jersey*, 530 U.S. 466, 500, and n. 1, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (THOMAS, J., concurring); 3 J. Story, Commentaries on the Constitution of the United States § 1773, pp. 652–653 (1833) (Story) (explaining that "the trial by jury in criminal cases" protected by the Constitution is the same "great privilege" that was "a part of that admirable common law" of England); cf. 5 St. G. Tucker, Blackstone's Commentaries 349, n. 2 (1803). It is therefore "entirely proper to look to the common law" to ascertain whether the Sixth Amendment requires the result

the Court today reaches. *Apprendi, supra,* at 500, n. 1.

The Sixth Amendment's specific guarantee of impartiality incorporates the common-law understanding of that term. See, *e.g.,* 3 W. Blackstone, Commentaries on the Laws of England 365 (1769) (Blackstone) (describing English trials as "impartially just" because of their "caution against all partiality and bias" in the jury). The common law required a juror to have "freedome of mind" and to be "indifferent as hee stands unsworne." 1 E. Coke, First Part of the Institutes of the Laws of England § 234, p. 155a (16th ed. 1809); accord, 3 M. Bacon, A New Abridgment of the Law 258 (3d ed. 1768); cf. T. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 319 (1868) ("The jury must be indifferent between the prisoner and the commonwealth"). Impartial jurors could "have no interest of their own affected, and no personal bias, or pre-possession, in favor [of] or against either party." *Pettis v. Warren,* 1 Kirby 426, 427 (Conn.Super.1788).

II

***17** The common-law right to a jury trial did not, however, guarantee a defendant the right to impeach a jury verdict with juror testimony about juror misconduct, including "a principal species of [juror] misbehaviour"—"notorious partiality." 3 Blackstone 388. Although partiality was a ground for setting aside a jury verdict, *ibid.,* the English common-law rule at the time the Sixth Amendment was ratified did not allow jurors to supply evidence of that misconduct. In 1770, Lord Mansfield refused to receive a juror's affidavit to impeach a verdict, declaring that such an affidavit "can't be read." *Rex v. Almon,* 5 Burr. 2687, 98 Eng. Rep. 411 (K.B.). And in 1785, Lord Mansfield solidified the doctrine, holding that "[t]he Court [could not] receive such an affidavit from any of the jurymen" to prove that the jury had cast lots to reach a verdict. *Vaise v. Delaval,* 1 T.R. 11, 99 Eng. Rep. 944 (K.B.).[1]

At the time of the founding, the States took mixed approaches to this issue. See *Cluggage v. Swan,* 4 Binn. 150, 156 (Pa.1811) (opinion of Yeates, J.) ("The opinions of *American* judges ... have greatly differed on the point in question"); *Bishop v. Georgia,* 9 Ga. 121, 126 (1850) (describing the common law in 1776 on this question as "in a *transition* state"). Many States followed Lord Mansfield's no-impeachment rule and refused to receive juror affidavits. See, *e.g., Brewster v. Thompson,* 1 N.J.L. 32 (1790) (*per curiam*); *Robbins v. Windover,* 2 Tyl. 11, 14 (Vt.1802); *Taylor v. Giger,* 3 Ky. 586, 597–598 (1808); *Price v. McIlvain,* 2 Tread. 503, 504 (S.C. 1815); *Tyler v. Stevens,* 4 N.H. 116, 117 (1827); 1 Z. Swift, A Digest of the Laws of the State of Connecticut 775 (1822) ("In England, and in the courts of the United States, jurors are not permitted to be witnesses respecting the misconduct of the jury ... and this is, most unquestionably, the correct principle"). Some States, however, permitted juror affidavits about juror misconduct. See, *e.g., Crawford v. State,* 10 Tenn. 60, 68 (1821); *Cochran v. Street,* 1 Va. 79, 81 (1792). And others initially permitted such evidence but quickly reversed course. Compare, *e.g., Smith v. Cheetham,* 3 Cai. R. 57, 59–60 (N. Y.1805) (opinion of Livingston, J.) (permitting juror testimony), with *Dana v. Tucker,* 4 Johns. 487, 488–489 (N. Y.1809) (*per curiam*) (overturning *Cheetham*); compare also *Bradley's Lessee v. Bradley,* 4 Dall. 112, 1 L.Ed. 763 (Pa.1792) (permitting juror affidavits), with, *e.g., Cluggage, supra,* at 156–158 (opinion of Yeates, J.) (explaining that *Bradley* was incorrectly reported and rejecting affidavits); compare also *Talmadge v. Northrop,* 1 Root 522 (Conn.1793) (admitting juror testimony), with *State v. Freeman,* 5 Conn. 348, 350–352 (1824) ("The opinion of almost the whole legal world is adverse to the reception of the testimony in question; and, in my opinion, on invincible foundations").

By the time the Fourteenth Amendment was ratified, Lord Mansfield's no-impeachment rule had become firmly entrenched in American law. See Lettow, New Trial for Verdict Against Law: Judge–Jury Relations in Early–Nineteenth Century America, 71 Notre Dame L.Rev. 505, 536 (1996) ("[O]pponents of juror affidavits had largely won out by the middle of the century"); 8 J. Wigmore, Evidence in Trials at Common Law § 2352, p. 697 (J. McNaughton rev. 1961) (Wigmore) (Lord Mansfield's rule "came to receive in the United States an adherence almost unquestioned"); J. Proffatt, A Treatise on Trial by Jury § 408, p. 467 (1877) ("It is a well established rule of law that no affidavit shall be received from a juror to impeach his verdict"). The vast majority of States adopted the no-impeachment rule as a matter of common law. See, *e.g., Bull v. Commonwealth,* 55 Va. 613, 627–628 (1857) ("[T]he practice appears to be now generally settled, to reject the testimony of jurors when offered to impeach their verdict. The cases on the subject are too numerous to be cited"); *Tucker v. Town Council of South Kingstown,* 5 R.I. 558, 560 (1859) (collecting cases); *State v. Coupenhaver,* 39 Mo. 430 (1867) ("The law is well settled that a traverse juror cannot be a witness to prove misbehavior in the jury in regard to their verdict"); *Peck v. Brewer,* 48 Ill. 54, 63 (1868) ("So far back as ... 1823, the doctrine was held that the affidavits of jurors cannot be heard to impeach their verdict"); *Heffron v. Gallupe,* 55 Me. 563, 566 (1868) (ruling inadmissible "depositions of ... jurors as to what transpired in the jury room"); *Withers v. Fiscus,* 40 Ind. 131, 131–132 (1872) ("In the United

States it seems to be settled, notwithstanding a few adjudications to the contrary ..., that such affidavits cannot be received").[2]

***18** The Court today acknowledges that the States "adopted the Mansfield rule as a matter of common law," *ante*, at 6, but ascribes no significance to that fact. I would hold that it is dispositive. Our common-law history does not establish that—in either 1791 (when the Sixth Amendment was ratified) or 1868 (when the Fourteenth Amendment was ratified)—a defendant had the right to impeach a verdict with juror testimony of juror misconduct. In fact, it strongly suggests that such evidence was prohibited. In the absence of a definitive common-law tradition permitting impeachment by juror testimony, we have no basis to invoke a constitutional provision that merely "follow[s] out the established course of the common law in all trials for crimes," 3 Story § 1785, at 662, to overturn Colorado's decision to preserve the no-impeachment rule, cf. *Boumediene v. Bush*, 553 U.S. 723, 832–833, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008) (Scalia, J., dissenting).

* * *

***19** Perhaps good reasons exist to curtail or abandon the no-impeachment rule. Some States have done so, see Appendix to majority opinion, *ante*, and others have not. Ultimately, that question is not for us to decide. It should be left to the political process described by Justice ALITO. See *post*, at 5–7 (dissenting opinion). In its attempt to stimulate a "thoughtful, rational dialogue" on race relations, *ante*, at 21, the Court today ends the political process and imposes a uniform, national rule. The Constitution does not require such a rule. Neither should we.

I respectfully dissent.

Justice ALITO, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.

Our legal system has many rules that restrict the admission of evidence of statements made under circumstances in which confidentiality is thought to be essential. Statements made to an attorney in obtaining legal advice, statements to a treating physician, and statements made to a spouse or member of the clergy are familiar examples. See *Trammel* v. *United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980). Even if a criminal defendant whose constitutional rights are at stake has a critical need to obtain and introduce evidence of such statements, long-established rules stand in the way. The goal of avoiding interference with confidential communications of great value has long been thought to justify the loss of important evidence and the effect on our justice system that this loss entails.

The present case concerns a rule like those just mentioned, namely, the age-old rule against attempting to overturn or "impeach" a jury's verdict by offering statements made by jurors during the course of deliberations. For centuries, it has been the judgment of experienced judges, trial attorneys, scholars, and lawmakers that allowing jurors to testify after a trial about what took place in the jury room would undermine the system of trial by jury that is integral to our legal system.

Juries occupy a unique place in our justice system. The other participants in a trial—the presiding judge, the attorneys, the witnesses—function in an arena governed by strict rules of law. Their every word is recorded and may be closely scrutinized for missteps.

When jurors retire to deliberate, however, they enter a space that is not regulated in the same way. Jurors are ordinary people. They are expected to speak, debate, argue, and make decisions the way ordinary people do in their daily lives. Our Constitution places great value on this way of thinking, speaking, and deciding. The jury trial right protects parties in court cases from being judged by a special class of trained professionals who do not speak the language of ordinary people and may not understand or appreciate the way ordinary people live their lives. To protect that right, the door to the jury room has been locked, and the confidentiality of jury deliberations has been closely guarded.

Today, with the admirable intention of providing justice for one criminal defendant, the Court not only pries open the door; it rules that respecting the privacy of the jury room, as our legal system has done for centuries, violates the Constitution. This is a startling development, and although the Court tries to limit the degree of intrusion, it is doubtful that there are principled grounds for preventing the expansion of today's holding.

***20** The Court justifies its decision on the ground that the nature of the confidential communication at issue in this particular case—a clear expression of what the Court terms racial bias[1]—is uniquely harmful to our criminal justice system. And the Court is surely correct that even a tincture of racial bias can inflict great damage on that system, which is dependent on the public's trust. But until today, the argument that the Court now finds convincing has not been thought to be sufficient to overcome confidentiality rules like the one at issue here.

Suppose that a prosecution witness gives devastating but false testimony against a defendant, and suppose that the witness's motivation is racial bias. Suppose that the witness admits this to his attorney, his spouse, and a member of the clergy. Suppose that the defendant, threatened with conviction for a serious crime and a lengthy term of imprisonment, seeks to compel the attorney, the spouse, or the member of the clergy to testify about the witness's admissions. Even though the constitutional rights of the defendant hang in the balance, the defendant's efforts to obtain the testimony would fail. The Court provides no good reason why the result in this case should not be the same.

I

Rules barring the admission of juror testimony to impeach a verdict (so-called "no-impeachment rules") have a long history. Indeed, they pre-date the ratification of the Constitution. They are typically traced back to *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B.1785), in which Lord Mansfield declined to consider an affidavit from two jurors who claimed that the jury had reached its verdict by lot. See *Warger v. Shauers*, 574 U.S. ——, —— (2014) (slip op., at 4). Lord Mansfield's approach "soon took root in the United States," *ibid.*, and "[b]y the beginning of [the 20th] century, if not earlier, the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict," *Tanner v. United States*, 483 U.S. 107, 117, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987); see 27 C. Wright & V. Gold, Federal Practice and Procedure: Evidence § 6071, p. 431 (2d ed. 2007) (Wright & Gold) (noting that the Mansfield approach "came to be accepted in almost all states").

In *McDonald v. Pless*, 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915), this Court adopted a strict no-impeachment rule for cases in federal court. *McDonald* involved allegations that the jury had entered a quotient verdict—that is, that it had calculated a damages award by taking the average of the jurors' suggestions. *Id.*, at 265–266. The Court held that evidence of this misconduct could not be used. *Id.*, at 269. It applied what it said was "unquestionably the general rule, that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict." *Ibid.* The Court recognized that the defendant had a powerful interest in demonstrating that the jury had "adopted an arbitrary and unjust method in arriving at their verdict." *Id.*, at 267. "But," the Court warned, "let it once be established that verdicts ... can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding." *Ibid.* This would lead to "harass [ment]" of jurors and "the destruction of all frankness and freedom of discussion and conference." *Id.*, at 267–268. Ultimately, even though the no-impeachment rule "may often exclude the only possible evidence of misconduct," relaxing the rule "would open the door to the most pernicious arts and tampering with jurors." *Id.*, at 268 (internal quotation marks omitted).

The firm no-impeachment approach taken in *McDonald* came to be known as "the federal rule." This approach categorically bars testimony about jury deliberations, except where it is offered to demonstrate that the jury was subjected to an extraneous influence (for example, an attempt to bribe a juror). *Warger, supra*, at —— (slip op., at 5); *Tanner, supra*, at 117;[2] see 27 Wright & Gold § 6071, at 432–433.

***21** Some jurisdictions, notably Iowa, adopted a more permissive rule. Under the Iowa rule, jurors were generally permitted to testify about any subject except their "subjective intentions and thought processes in reaching a verdict." *Warger, supra*, at —— (slip op., at 4). Accordingly, the Iowa rule allowed jurors to "testify as to events or conditions which might have improperly influenced the verdict, even if these took place during deliberations within the jury room." 27 Wright & Gold § 6071, at 432.

Debate between proponents of the federal rule and the Iowa rule emerged during the framing and adoption of Federal Rule of Evidence 606(b). Both sides had their supporters. The contending arguments were heard and considered, and in the end the strict federal approach was retained.

An early draft of the Advisory Committee on the Federal Rules of Evidence included a version of the Iowa rule, 51 F.R.D. 315, 387–388 (1971). That draft was forcefully criticized, however,[3] and the Committee ultimately produced a revised draft that retained the well-established federal approach. *Tanner, supra*, at 122; see Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates 73 (Oct.1971). Expressly repudiating the Iowa rule, the new draft provided that jurors generally could not testify "as to any matter or statement occurring during the course of the jury's deliberations." *Ibid.* This new version was approved by the Judicial Conference and sent to this Court, which

adopted the rule and referred it to Congress. 56 F.R.D. 183, 265–266 (1972).

Initially, the House rejected this Court's version of Rule 606(b) and instead reverted to the earlier (and narrower) Advisory Committee draft. *Tanner, supra,* at 123; see H.R.Rep. No. 93–650, pp. 9–10 (1973) (criticizing the Supreme Court draft for preventing jurors from testifying about "quotient verdict[s]" and other "irregularities which occurred in the jury room"). In the Senate, however, the Judiciary Committee favored this Court's rule. The Committee Report observed that the House draft broke with "long-accepted Federal law" by allowing verdicts to be "challenge[d] on the basis of what happened during the jury's internal deliberations." S.Rep. No. 93–1277, p. 13 (1974) (S.Rep.). In the view of the Senate Committee, the House rule would have "permit[ted] the harassment of former jurors" as well as "the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors." *Id.*, at 14. This result would have undermined the finality of verdicts, violated "common fairness," and prevented jurors from "function[ing] effectively." *Ibid.* The Senate rejected the House version of the rule and returned to the Court's rule. A Conference Committee adopted the Senate version, see H.R. Conf. Rep. No. 93–1597, p. 8 (1974), and this version was passed by both Houses and was signed into law by the President.

As this summary shows, the process that culminated in the adoption of Federal Rule of Evidence 606(b) was the epitome of reasoned democratic rulemaking. The "distinguished, Supreme Court-appointed" members of the Advisory Committee went through a 7–year drafting process, "produced two well-circulated drafts," and "considered numerous comments from persons involved in nearly every area of court-related law." Rothstein, The Proposed Amendments to the Federal Rules of Evidence, 62 Geo. L.J. 125 (1973). The work of the Committee was considered and approved by the experienced appellate and trial judges serving on the Judicial Conference and by our predecessors on this Court. After that, the matter went to Congress, which "specifically understood, considered, and rejected a version of [the rule] that would have allowed jurors to testify on juror conduct during deliberations." *Tanner,* 483 U.S., at 125. The judgment of all these participants in the process, which was informed by their assessment of an empirical issue, *i.e.*, the effect that the competing Iowa rule would have had on the jury system, is entitled to great respect.

***22** Colorado considered this same question, made the same judgment as the participants in the federal process, and adopted a very similar rule. In doing so, it joined the overwhelming majority of States. *Ante,* at 9. In the great majority of jurisdictions, strong no-impeachment rules continue to be "viewed as both promoting the finality of verdicts and insulating the jury from outside influences." *Warger,* 574 U.S., at —— (slip op., at 4).

II

A

Recognizing the importance of Rule 606(b), this Court has twice rebuffed efforts to create a Sixth Amendment exception—first in *Tanner* and then, just two Terms ago, in *Warger.*

The *Tanner* petitioners were convicted of committing mail fraud and conspiring to defraud the United States. 483 U.S., at 109–110, 112–113. After the trial, two jurors came forward with disturbing stories of juror misconduct. One claimed that several jurors "consumed alcohol during lunch breaks ... causing them to sleep through the afternoons." *Id.,* at 113. The second added that jurors also smoked marijuana and ingested cocaine during the trial. *Id.,* at 115–116. This Court held that evidence of this bacchanalia could properly be excluded under Rule 606(b). *Id.,* at 127.

The Court noted that "[s]ubstantial policy considerations support the common-law rule against the admission of jury testimony to impeach a verdict." *Id.,* at 119. While there is "little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior," the Court observed, it is "not at all clear ... that the jury system could survive such efforts to perfect it." *Id.*, at 120. Allowing such post-verdict inquiries would "seriously disrupt the finality of the process." *Ibid.* It would also undermine "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople." *Id.*, at 120–121.

The *Tanner* petitioners, of course, had a Sixth Amendment right "to 'a tribunal both impartial and mentally competent to afford a hearing.' " *Id.*, at 126 (quoting *Jordan v. Massachusetts,* 225 U.S. 167, 176, 32 S.Ct. 651, 56 L.Ed. 1038 (1912)). The question, however, was whether they also had a right to an evidentiary hearing featuring "one particular kind of evidence inadmissible under the Federal Rules." 483 U.S., at 126–127. Turning to that question, the Court noted again that "long-recognized and very

substantial concerns support the protection of jury deliberations from intrusive inquiry." *Id*., at 127. By contrast, "[p]etitioners' Sixth Amendment interests in an unimpaired jury ... [were] protected by several aspects of the trial process." *Ibid.*

***23** The Court identified four mechanisms that protect defendants' Sixth Amendment rights. First, jurors can be "examined during *voir dire." Ibid.* Second, "during the trial the jury is observable by the court, by counsel, and by court personnel." *Ibid.* Third, "jurors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict." *Ibid.* And fourth, "after the trial a party may seek to impeach the verdict by nonjuror evidence of misconduct." *Ibid.* These "other sources of protection of petitioners' right to a competent jury" convinced the Court that the juror testimony was properly excluded. *Ibid*.

Warger involved a negligence suit arising from a motorcycle crash. 574 U.S., at —— (slip op., at 1). During *voir dire*, the individual who eventually became the jury's foreperson said that she could decide the case fairly and impartially. *Id.*, at —— (slip op., at 2). After the jury returned a verdict in favor of the defendant, one of the jurors came forward with evidence that called into question the truthfulness of the foreperson's responses during *voir dire*. According to this juror, the foreperson revealed during the deliberations that her daughter had once caused a deadly car crash, and the foreperson expressed the belief that a lawsuit would have ruined her daughter's life. *Ibid.*

In seeking to use this testimony to overturn the jury's verdict, the plaintiff's primary contention was that Rule 606(b) does not apply to evidence concerning a juror's alleged misrepresentations during *voir dire*. If otherwise interpreted, the plaintiff maintained, the rule would threaten his right to trial by an impartial jury.[4] The Court disagreed, in part because "any claim that Rule 606(b) is unconstitutional in circumstances such as these is foreclosed by our decision in *Tanner*." *Id.*, at —— (slip op., at 10). The Court explained that "[e]ven if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by" two of the other *Tanner* safeguards: pre-verdict reports by the jurors and non-juror evidence. 574 U.S., at —— (slip op., at 10).

Tanner and *Warger* fit neatly into this Court's broader jurisprudence concerning the constitutionality of evidence rules. As the Court has explained, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (internal quotation marks and alteration omitted). Thus, evidence rules of this sort have been invalidated only if they "serve no legitimate purpose or ... are disproportionate to the ends that they are asserted to promote." *Id.*, at 326. *Tanner* and *Warger* recognized that Rule 606(b) serves vital purposes and does not impose a disproportionate burden on the jury trial right.

***24** Today, for the first time, the Court creates a constitutional exception to no-impeachment rules. Specifically, the Court holds that no-impeachment rules violate the Sixth Amendment to the extent that they preclude courts from considering evidence of a juror's racially biased comments. *Ante*, at 17. The Court attempts to distinguish *Tanner* and *Warger*, but its efforts fail.

Tanner and *Warger* rested on two basic propositions. First, no-impeachment rules advance crucial interests. Second, the right to trial by an impartial jury is adequately protected by mechanisms other than the use of juror testimony regarding jury deliberations. The first of these propositions applies regardless of the nature of the juror misconduct, and the Court does not argue otherwise. Instead, it contends that, in cases involving racially biased jurors, the *Tanner* safeguards are less effective and the defendant's Sixth Amendment interests are more profound. Neither argument is persuasive.

B

As noted above, *Tanner* identified four "aspects of the trial process" that protect a defendant's Sixth Amendment rights: (1) *voir dire* ; (2) observation by the court, counsel, and court personnel; (3) pre-verdict reports by the jurors; and (4) non-juror evidence. 483 U.S., at 127.[5] Although the Court insists that that these mechanisms "may be compromised" in cases involving allegations of racial bias, it addresses only two of them and fails to make a sustained argument about either. *Ante*, at 16.

1

First, the Court contends that the effectiveness of *voir dire* is questionable in cases involving racial bias because pointed questioning about racial attitudes may highlight racial issues and thereby exacerbate prejudice. *Ibid.* It is far from clear, however, that careful *voir dire* cannot surmount this problem. Lawyers may use questionnaires or individual questioning of prospective jurors[6] in order to elicit frank answers that a juror might be reluctant to voice

in the presence of other prospective jurors.[7] Moreover, practice guides are replete with advice on conducting effective *voir dire* on the subject of race. They outline a variety of subtle and nuanced approaches that avoid pointed questions.[8] And of course, if an attorney is concerned that a juror is concealing bias, a peremptory strike may be used.[9]

The suggestion that *voir dire* is ineffective in unearthing bias runs counter to decisions of this Court holding that *voir dire* on the subject of race is constitutionally required in some cases, mandated as a matter of federal supervisory authority in others, and typically advisable in any case if a defendant requests it. See *Turner v. Murray,* 476 U.S. 28, 36–37, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986); *Rosales–Lopez v. United States,* 451 U.S. 182, 192, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981) (plurality opinion); *Ristaino v. Ross,* 424 U.S. 589, 597, n. 9, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976). If *voir dire* were not useful in identifying racial prejudice, those decisions would be pointless. Cf. *Turner, supra,* at 36 (plurality opinion) (noting "the ease with which [the] risk [of racial bias] could have been minimized" through *voir dire*). Even the majority recognizes the "advantages of careful *voir dire* " as a "proces[s] designed to prevent racial bias in jury deliberations." *Ante,* at 20. And reported decisions substantiate that *voir dire* can be effective in this regard. *E.g., Brewer* v. *Marshall,* 119 F.3d 993, 995–996 (C.A.1 1997); *United States v. Hasting,* 739 F.2d 1269, 1271 (C.A.7 1984); *People v. Harlan,* 8 P.3d 448, 500 (Colo.2000); see Brief for Respondent 23–24, n. 7 (listing additional cases). Thus, while *voir dire* is not a magic cure, there are good reasons to think that it is a valuable tool.

***25** In any event, the critical point for present purposes is that the effectiveness of *voir dire* is a debatable empirical proposition. Its assessment should be addressed in the process of developing federal and state evidence rules. Federal and state rulemakers can try a variety of approaches, and they can make changes in response to the insights provided by experience and research. The approach taken by today's majority—imposing a federal constitutional rule on the entire country—prevents experimentation and makes change exceedingly hard.[10]

2

The majority also argues—even more cursorily—that "racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations." *Ante,* at 16. This is so, we are told, because it is difficult to "call [another juror] a bigot." *Ibid.*

Since the Court's decision mandates the admission of the testimony of one juror about a statement made by another juror during deliberations, what the Court must mean in making this argument is that jurors are less willing to report biased comments by fellow jurors prior to the beginning of deliberations (while they are still sitting with the biased juror) than they are after the verdict is announced and the jurors have gone home. But this is also a questionable empirical assessment, and the Court's seat-of-the-pants judgment is no better than that of those with the responsibility of drafting and adopting federal and state evidence rules. There is no question that jurors *do* report biased comments made by fellow jurors prior to the beginning of deliberations. See, *e.g., United States v. McClinton,* 135 F.3d 1178, 1184–1185 (C.A.7 1998); *United States v. Heller,* 785 F.2d 1524, 1525–1529 (C.A.11 1986); *Tavares v. Holbrook,* 779 F.2d 1, 1–3 (C.A.1 1985) (Breyer, J.); see Brief for Respondent 31–32, n. 10; Brief for United States as *Amicus Curiae* 31. And the Court marshals no evidence that such pre-deliberation reporting is rarer than the post-verdict variety.

Even if there is something to the distinction that the Court makes between pre- and post-verdict reporting, it is debatable whether the difference is significant enough to merit different treatment. This is especially so because post-verdict reporting is both more disruptive and may be the result of extraneous influences. A juror who is initially in the minority but is ultimately persuaded by other jurors may have second thoughts after the verdict is announced and may be angry with others on the panel who pressed for unanimity. In addition, if a verdict is unpopular with a particular juror's family, friends, employer, co-workers, or neighbors, the juror may regret his or her vote and may feel pressured to rectify what the jury has done.

***26** In short, the Court provides no good reason to depart from the calculus made in *Tanner* and *Warger*. Indeed, the majority itself uses hedged language and appears to recognize that this "pragmatic" argument is something of a makeweight. *Ante,* at 16–17 (noting that the argument is "not dispositive"); *ante,* at 16 (stating that the operation of the safeguards "may be compromised, or they may prove insufficient").

III

A

The real thrust of the majority opinion is that the Constitution is less tolerant of racial bias than other forms of juror misconduct, but it is hard to square this argument with the nature of the Sixth Amendment right on which petitioner's argument and the Court's holding are based. What the Sixth Amendment protects is the right to an "impartial jury." Nothing in the text or history of the Amendment or in the inherent nature of the jury trial right suggests that the extent of the protection provided by the Amendment depends on the nature of a jury's partiality or bias. As the Colorado Supreme Court aptly put it, it is hard to "discern a dividing line between different *types* of juror bias or misconduct, whereby one form of partiality would implicate a party's Sixth Amendment right while another would not." 350 P.3d 287, 293 (2015).[11]

Nor has the Court found any decision of this Court suggesting that the Sixth Amendment recognizes some sort of hierarchy of partiality or bias. The Court points to a line of cases holding that, in some narrow circumstances, the Constitution requires trial courts to conduct *voir dire* on the subject of race. Those decisions, however, were not based on a ranking of types of partiality but on the Court's conclusion that in certain cases racial bias was especially likely. See *Turner*, 476 U.S., at 38, n. 12 (plurality opinion) (requiring *voir dire* on the subject of race where there is "a particularly compelling need to inquire into racial prejudice" because of a qualitatively higher "risk of racial bias"); *Ristaino*, 424 U.S., at 596 (explaining that the requirement applies only if there is a "constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be [impartial]").[12] Thus, this line of cases does not advance the majority's argument.

It is undoubtedly true that "racial bias implicates unique historical, constitutional, and institutional concerns." *Ante*, at 16. But it is hard to see what that has to do with the scope of an *individual criminal defendant's* Sixth Amendment right to be judged impartially. The Court's efforts to reconcile its decision with *McDonald*, *Tanner*, and *Warger* illustrate the problem. The Court writes that the misconduct in those cases, while "troubling and unacceptable," was "anomalous." *Ante*, at 15. By contrast, racial bias, the Court says, is a "familiar and recurring evil" that causes "systemic injury to the administration of justice." *Ante*, at 15–16.

***27** Imagine two cellmates serving lengthy prison terms. Both were convicted for homicides committed in unrelated barroom fights. At the trial of the first prisoner, a juror, during deliberations, expressed animosity toward the defendant because of his race. At the trial of the second prisoner, a juror, during deliberations, expressed animosity toward the defendant because he was wearing the jersey of a hated football team. In both cases, jurors come forward after the trial and reveal what the biased juror said in the jury room. The Court would say to the first prisoner: "You are entitled to introduce the jurors' testimony, because racial bias is damaging to our society." To the second, the Court would say: "Even if you did not have an impartial jury, you must stay in prison because sports rivalries are not a major societal issue."

This disparate treatment is unsupportable under the Sixth Amendment. If the Sixth Amendment requires the admission of juror testimony about statements or conduct during deliberations that show one type of juror partiality, then statements or conduct showing any type of partiality should be treated the same way.

B

Recasting this as an equal protection case would not provide a ground for limiting the holding to cases involving racial bias. At a minimum, cases involving bias based on any suspect classification—such as national origin[13] or religion[14]—would merit equal treatment. So, I think, would bias based on sex, *United States* v. *Virginia*, 518 U.S. 515, 531, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996), or the exercise of the First Amendment right to freedom of expression or association. See *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540, 545, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983). Indeed, convicting a defendant on the basis of any irrational classification would violate the Equal Protection Clause.

Attempting to limit the damage worked by its decision, the Court says that only "clear" expressions of bias must be admitted, *ante*, at 17, but judging whether a statement is sufficiently "clear" will often not be easy. Suppose that the allegedly biased juror in this case never made reference to Peã–Rodriguez's race or national origin but said that he had a lot of experience with "this macho type" and knew that men of this kind felt that they could get their way with women. Suppose that other jurors testified that they were certain that "this macho type" was meant to refer to Mexican or Hispanic men. Many other similarly suggestive statements can easily be imagined, and under today's decision it will be difficult for judges to discern the dividing line between those that are "clear[ly]" based on racial or ethnic bias and those that are at least somewhat ambiguous.

IV

***28** Today's decision—especially if it is expanded in the ways that seem likely—will invite the harms that no-impeachment rules were designed to prevent.

First, as the Court explained in *Tanner*, "postverdict scrutiny of juror conduct" will inhibit "full and frank discussion in the jury room." 483 U.S., at 120–121; see also *McDonald*, 238 U.S., at 267–268 (warning that the use of juror testimony about misconduct during deliberations would "make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference"). Or, as the Senate Report put it: "[C]ommon fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation." S. Rep., at 14.

Today's ruling will also prompt losing parties and their friends, supporters, and attorneys to contact and seek to question jurors, and this pestering may erode citizens' willingness to serve on juries. Many jurisdictions now have rules that prohibit or restrict post-verdict contact with jurors, but whether those rules will survive today's decision is an open question—as is the effect of this decision on privilege rules such as those noted at the outset of this opinion.[15]

Where post-verdict approaches are permitted or occur, there is almost certain to be an increase in harassment, arm-twisting, and outright coercion. See *McDonald*, *supra*, at 267; S. Rep., at 14 (explaining that a laxer rule "would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors"); 350 P.3d, at 293. As one treatise explains, "[a] juror who reluctantly joined a verdict is likely to be sympathetic to overtures by the loser, and persuadable to the view that his own consent rested on false or impermissible considerations, and the truth will be hard to know." 3 C. Mueller & L. Kirkpatrick, Federal Evidence § 6:16, p. 75 (4th ed.2013).

The majority's approach will also undermine the finality of verdicts. "Public policy requires a finality to litigation." S. Rep., at 14. And accusations of juror bias—which may be "raised for the first time days, weeks, or months after the verdict"—can "seriously disrupt the finality of the process." *Tanner*, *supra*, at 120. This threatens to "degrad[e] the prominence of the trial itself" and to send the message that juror misconduct need not be dealt with promptly. *Engle v. Isaac*, 456 U.S. 107, 127, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). See H.R. Conf. Rep. No. 93–1597, at 8 ("The Conferees believe that jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations").

The Court itself acknowledges that strict no-impeachment rules "promot[e] full and vigorous discussion," protect jurors from "be[ing] harassed or annoyed by litigants seeking to challenge the verdict," and "giv[e] stability and finality to verdicts." *Ante*, at 9. By the majority's own logic, then, imposing exceptions on no-impeachment rules will tend to defeat full and vigorous discussion, expose jurors to harassment, and deprive verdicts of stability.

***29** The Court's only response is that some jurisdictions already make an exception for racial bias, and the Court detects no signs of "a loss of juror willingness to engage in searching and candid deliberations." *Ante*, at 19. One wonders what sort of outward signs the Court would expect to see if jurors in these jurisdictions do not speak as freely in the jury room as their counterparts in jurisdictions with strict no-impeachment rules. Gathering and assessing evidence regarding the quality of jury deliberations in different jurisdictions would be a daunting enterprise, and the Court offers no indication that anybody has undertaken that task.

In short, the majority barely bothers to engage with the policy issues implicated by no-impeachment rules. But even if it had carefully grappled with those issues, it still would have no basis for exalting its own judgment over that of the many expert policymakers who have endorsed broad no-impeachment rules.

V

The Court's decision is well-intentioned. It seeks to remedy a flaw in the jury trial system, but as this Court said some years ago, it is questionable whether our system of trial by jury can endure this attempt to perfect it. *Tanner*, 483 U.S., at 120.

I respectfully dissent.

APPENDIX

Codified Exceptions in Addition to Those Enumerated in Fed. Rule Evid. 606(b)

See Ariz. Rules Crim. Proc. 24.1(c)(3), (d) (2011) (exception for evidence of misconduct, including verdict by game of chance or intoxication); Idaho Rule Evid. 606(b) (2016) (game of chance); Ind. Rule Evid. 606(b)(2)(A) (Burns 2014) (drug or alcohol use); Minn. Rule Evid. 606(b) (2014) (threats of violence or violent acts); Mont. Rule Evid. 606(b) (2015) (game of chance); N.D. Rule Evid. 606(b)(2)(C) (2016–2017) (same); Tenn. Rule Evid. 606(b) (2016) (quotient verdict or game of chance); Tex. Rule Evid. 606(b)(2)(B) (West 2016) (rebutting claim juror was unqualified); Vt. Rule Evid. 606(b) (Cum.Supp.2016) (juror communication with nonjuror); see also 27 C. Wright & V. Gold, Federal Practice and Procedure: Evidence § 6071, p. 447, and n. 66 (2d ed.2007); *id.*, at 451, and n. 70; *id.*, at 452, and n. 72.

Judicially Recognized Exceptions for Evidence of Racial Bias

See *State v. Santiago,* 245 Conn. 301, 323–340, 715 A.2d 1, 14–22 (1998); *Kittle v. United States,* 65 A.3d 1144, 1154–1556 (D.C.2013); *Fisher v. State,* 690 A.2d 917, 919–921, and n. 4 (Del.1996) (Appendix to opinion), *Powell v. Allstate Ins. Co.,* 652 So.2d 354, 357–358 (Fla.1995); *Spencer v. State,* 260 Ga. 640, 643–644, 398 S.E.2d 179, 184–185 (1990); *State v. Jackson,* 81 Hawai'i 39, 48–49, 912 P.2d 71, 80–81 (1996); *Commonwealth v. Laguer,* 410 Mass. 89, 97–98, 571 N.E.2d 371, 376 (1991); *State v. Callender,* 297 N.W.2d 744, 746 (Minn.1980); *Fleshner v. Pepose Vision Inst., P. C.,* 304 S.W.3d 81, 87–90 (Mo.2010); *State v. Levitt,* 36 N.J. 266, 271–273, 176 A.2d 465, 467–468 (1961); *People v. Rukaj,* 123 App. Div.2d 277, 280–281, 506 N.Y.S.2d 677, 679–680 (1986); *State v. Hidanovic,* 2008 ND 66, ¶¶ 21–26, 747 N.W.2d 463, 472–474; *State v. Brown,* 62 A.3d 1099, 1110 (R.I.2013); *State v. Hunter,* 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995); *Seattle v. Jackson,* 70 Wash.2d 733, 738, 425 P.2d 385, 389 (1967); *After Hour Welding, Inc. v. Laneil Management Co.,* 108 Wis.2d 734, 739–740, 324 N.W.2d 686, 690 (1982).

All Citations

--- S.Ct. ----, 2017 WL 855760

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Prior to 1770, it appears that juror affidavits were sometimes received to impeach a verdict on the ground of juror misbehavior, although only "with great caution." *McDonald v. Pless,* 238 U.S. 264, 268, 35 S.Ct. 783, 59 L.Ed. 1300 (1915); see, *e.g., Dent v. The Hundred of Hertford,* 2 Salk. 645, 91 Eng. Rep. 546 (K.B.1696); *Philips v. Fowler,* Barnes. 441, 94 Eng. Rep. 994 (K.B.1735). But "previous to our Revolution, and at least as early as 1770, the doctrine in England was distinctly ruled the other way, and has so stood ever since." 3 T. Waterman, A Treatise on the Principles of Law and Equity Which Govern Courts in the Granting of New Trials in Cases Civil and Criminal 1429 (1855).

2 Although two States declined to follow the rule in the mid–19th century, see *Wright v. Illinois & Miss. Tel. Co.,* 20 Iowa 195, 210 (1866); *Perry v. Bailey,* 12 Kan. 539, 544–545 (1874), "most of the state courts" had already "committed themselves upon the subject," 8 Wigmore § 2354, at 702.

1 The bias at issue in this case was a "bias against Mexican men." App. 160. This might be described as bias based on national origin or ethnicity. Cf. *Hernandez v. New York,* 500 U.S. 352, 355, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion); *Hernandez v. Texas,* 347 U.S. 475, 479, 74 S.Ct. 667, 98 L.Ed. 866 (1954). However, no party has suggested that these distinctions make a substantive difference in this case.

2 As this Court has explained, the extraneous influence exception "do[es] not detract from, but rather harmonize[s] with, the weighty government interest in insulating the jury's deliberative process." *Tanner,* 483 U.S., at 120. The extraneous influence exception, like the no-impeachment rule itself, is directed at protecting jury deliberations against unwarranted interference. *Ibid.*

3 In particular, the Justice Department observed that "[s]trong policy considerations continue to support" the federal approach and that "[r]ecent experience has shown that the danger of harassment of jurors by unsuccessful litigants warrants a rule which imposes strict limitations on the instances in which jurors may be questioned about their verdict."

Letter from R. Kliendienst, Deputy Attorney General, to Judge A. Maris (Aug. 9, 1971), 117 Cong. Rec. 33648, 33655 (1971). And Senator McClellan, an influential member of the Senate Judiciary Committee, insisted that the "mischief in this Rule ought to be plain for all to see" and that it would be impossible "to conduct trials, particularly criminal prosecutions, as we know them today, if every verdict were followed by a post-trial hearing into the conduct of the juror's deliberations." Letter from Sen. J. McClellan to Judge A. Maris (Aug. 12, 1971), *id.,* at 33642, 33645.

4 Although *Warger* was a civil case, we wrote that "[t]he Constitution guarantees both criminal and civil litigants a right to an impartial jury." 574 U.S., at —— (slip op., at 9).

5 The majority opinion in this case identifies a fifth mechanism: jury instructions. It observes that, by explaining the jurors' responsibilities, appropriate jury instructions can promote "[p]robing and thoughtful deliberation," which in turn "improves the likelihood that other jurors can confront the flawed nature of reasoning that is prompted or influenced by improper biases." *Ante,* at 20–21. This mechanism, like those listed in *Tanner,* can help to prevent bias from infecting a verdict.

6 Both of those techniques were used in this case for other purposes. App. 13–14; Tr. 56–78 (Feb. 23, 2010, morning session).

7 See *People v. Harlan,* 8 P.3d 448, 500 (Colo.2000) ("The trial court took precautions at the outset of the trial to foreclose the injection of improper racial considerations by including questions concerning racial issues in the jury questionnaire"); *Brewer* v. *Marshall,* 119 F.3d 993, 996 (C.A.1 1997) ("The judge asked each juror, out of the presence of other jurors, whether they had any bias or prejudice for or against black persons or persons of Hispanic origin"); 6 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 22.3(a), p. 92 (4th ed.2015) (noting that "[j]udges commonly allow jurors to approach the bench and discuss sensitive matters there" and are also free to conduct "in chambers discussions").

8 See, *e.g.,* J. Gobert, E. Kreitzberg, & C. Rose, Jury Selection: The Law, Art, and Science of Selecting a Jury § 7:41, pp. 357–358 (3d ed.2014) (explaining that "the issue should be approached more indirectly" and suggesting the use of "[o]pen-ended questions" on subjects like "the composition of the neighborhood in which the juror lives, the juror's relationship with co-workers or neighbors of different races, or the juror's past experiences with persons of other races"); W. Jordan, Jury Selection § 8.11, p. 237 (1980) (explaining that "the whole matter of prejudice" should be approached "delicately and cautiously" and giving an example of an indirect question that avoids the word "prejudice"); R. Wenke, The Art of Selecting a Jury 67 (1979) (discussing questions that could identify biased jurors when "your client is a member of a minority group"); *id*., at 66 (suggesting that instead of "asking a juror if he is 'prejudiced' " the attorney should "inquire about his 'feeling,' 'belief' or 'opinion' "); 2 National Jury Project, Inc., Jurywork: Systematic Techniques § 17.23 (E. Krauss ed., 2d ed.2010) (listing sample questions about racial prejudice); A. Grine & E. Coward, Raising Issues of Race in North Carolina Criminal Cases, p. 8–14 (2014) (suggesting that attorneys "share a brief example about a judgment shaped by a racial stereotype" to make it easier for jurors to share their own biased views), http://defendermanuals.sog.unc.edu/race/8–addressing–race–trial (as last visited Mar. 3, 2017); *id*., at 8–15 to 8–17 (suggesting additional strategies and providing sample questions); T. Mauet, Trial Techniques 44 (8th ed.2010) (suggesting that "likely beliefs and attitudes are more accurately learned through indirection"); J. Lieberman & B. Sales, Scientific Jury Selection 114–115 (2007) (discussing research suggesting that "participants were more likely to admit they were unable to abide by legal due process guarantees when asked open-ended questions that did not direct their responses").

9 To the extent race does become salient during *voir dire,* there is social science research suggesting that this may actually combat rather than reinforce the jurors' biases. See, *e.g*., Lee, A New Approach to *Voir Dire* on Racial Bias, 5 U.C. Irvine L.Rev. 843, 861 (2015) ("A wealth of fairly recent empirical research has shown that when race is made salient either through pretrial publicity, voir dire questioning of prospective jurors, opening and closing arguments, or witness testimony, White jurors are more likely to treat similarly situated Black and White defendants the same way"). See also Sommers & Ellsworth, White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom, 7 Psychology, Pub. Pol'y, & L. 201, 222 (2001); Sommers & Ellsworth, How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research, 78 Chi.-Kent L.Rev. 997, 1013–1014, 1027 (2003); Schuller, Kazoleas, & Kawakami, The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom, 33 Law & Human Behavior 320, 326 (2009); Cohn, Bucolo, Pride, & Somers, Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes, 39 J. Applied Soc. Psychology 1953, 1964–1965 (2009).

10 It is worth noting that, even if *voir dire* were entirely ineffective at detecting racial bias (a proposition no one defends), that still would not suffice to distinguish this case from *Warger v. Shauers,* 574 U.S. —— (2014). After all, the allegation in *Warger* was that the foreperson had entirely circumvented *voir dire* by lying in order to shield her bias. The Court, nevertheless, concluded that even where "jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured" through other means. *Id.,* at —— (slip op., at 10).

[11] The majority's reliance on footnote 3 of *Warger, ante,* at 12–13, is unavailing. In that footnote, the Court noted that some "cases of juror bias" might be "so extreme" as to prompt the Court to "*consider* whether the usual safeguards are or are not sufficient to protect the integrity of the process." 574 U.S., at ————————, n. 3 (slip op., at 10–11, n. 3) (emphasis added). Considering this question is very different from adopting a constitutionally based exception to long-established no-impeachment rules.

[12] In addition, those cases did not involve a challenge to a long-established evidence rule. As such, they offer little guidance in performing the analysis required by this case.

[13] See *Cleburne* v. *Cleburne Living Center, Inc.,* 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

[14] See, *e.g., United States* v. *Armstrong,* 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996); *Burlington Northern R. Co.* v. *Ford,* 504 U.S. 648, 651, 112 S.Ct. 2184, 119 L.Ed.2d 432 (1992); *New Orleans* v. *Dukes,* 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (*per curiam*).

[15] The majority's emphasis on the unique harms of racial bias will not succeed at cabining the novel exception to no-impeachment rules, but it may succeed at putting other kinds of rules under threat. For example, the majority approvingly refers to the widespread rules limiting attorneys' contact with jurors. *Ante,* at 17–18. But under the reasoning of the majority opinion, it is not clear why such rules should be enforced when they come into conflict with a defendant's attempt to introduce evidence of racial bias. For instance, what will happen when a lawyer obtains clear evidence of racist statements by contacting jurors in violation of a local rule? (Something similar happened in *Tanner*. 483 U.S., at 126.) It remains to be seen whether rules of this type—or other rules which exclude probative evidence, such as evidentiary privileges—will be allowed to stand in the way of the "imperative to purge racial prejudice from the administration of justice." *Ante,* at 13.

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TAB 5

FORDHAM

University School of Law

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

Daniel J. Capra
Philip Reed Professor of Law

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

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Consideration of Possible Changes to Rule 404(b)
Date: April 1, 2017

The Pepperdine Conference in Fall 2016 was largely devoted to the important case law developments regarding the use of Rule 404(b), especially in criminal cases. This case law trends essentially seek to assure that Rule 404(b) arguments are scrutinized so that the rule is not used as a device to admit evidence that is in fact offered for propensity. The fact that some courts --- mainly the Seventh and Third Circuits --- are taking a fresh look at the scope and meaning of Rule 404(b) raises questions about whether the rule can or should be amended to accommodate these new developments. It also raises questions about what, if anything should be done about the conflict between the circuits that are looking more closely at Rule 404(b) and those that are still taking the traditional approach.

This memorandum is in four parts. Part One summarizes the Committee's discussion and direction regarding Rule 404(b) at the last meeting. Part Two discusses the recent case law imposing more rigor in the Rule 404(b) analysis. Part Three sets forth and discusses drafting alternatives suggested at the last meeting. Part Four sets forth the proposed amendment to the notice provision of Rule 404(b) that the Committee has already approved unanimously. That amendment would delete the provision stating that the defendant must request notice before the government is required to provide it.

It should be emphasized that nothing in this memorandum necessarily involves an action item. Given the frequent use of Rule 404(b), and its importance especially in criminal trials, any major amendment to that Rule requires substantial discussion and consideration. It of course is for the Committee to decide whether to recommend a proposed amendment for public comment.

I. Committee Discussion and Directives at the Last Meeting

At the last meeting, after the Conference concluded, the Committee engaged in a wide-ranging discussion about Rule 404(b). The Minutes of the meeting describe the points made by various members during this discussion:

● Committee members agreed that it is important that bad acts be excluded if they are probative for a "proper" purpose only by proceeding through a propensity inference. Committee members also agreed that at some point the prosecution should have to articulate, and the court should have to find, that the stated proper purpose is shown through non-propensity inferences. But Committee members were not in agreement about whether Rule 404(b) should be amended to implement a more careful procedure than is being employed currently in some courts. One member stated that the solution should be to allow courts to be influenced by the cases decided by the Seventh and Third Circuits --- the two circuits in the forefront of requiring a more careful analysis under Rule 404(b). But another member stated that there was no assurance at all that other circuits would follow suit, and that any such process even were it to occur might take decades.

● Some members thought that a change should be made to the notice provision of Rule 404(b). That change would require the government to articulate specifically the purpose for which the bad act evidence is offered. That kind of notice might get trial judges to focus on evaluating the evidence for a proper purpose at the outset of the case. Judge Campbell responded that an expanded notice provision might not end up to be effective in attuning the court to the issue, because the prosecution might articulate every possible purpose in order to avoid being precluded from some proper purpose at a later point. Thus the expanded notice provision might simply result in front-loaded makework. Another member noted that the real problem is not that the government fails to articulate a specific proper purpose, but rather that the purpose proffered is often dependent on an assumption that the defendant has a propensity.

●The Reporter stated that if the rule is to be amended to require a showing of non-propensity inferences, that might be accomplished by adding language as follows:

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

● One member suggested a more comprehensive amendment that would delete the provision in Rule 404(b) that sets forth the proper purposes, and that would add the following to the notice provision:

> <u>If a prosecutor intends to use such evidence at trial, the prosecutor must:</u>

(A) provide reasonable notice of the evidence that the prosecutor intends to offer at trial;

(B) do so at least two weeks before trial, unless the court, for good cause, excuses this requirement;

(C) articulate in the notice the non-propensity purpose for which the prosecution intends to offer the evidence; and

(D) articulate the chain of reasoning supporting the purpose for offering the evidence.

● Judge Campbell noted that an effort to move up the timing of the notice (as provided in the above proposal) could be useful because it would make the court aware at an early point of the necessity to focus on whether the asserted purpose for the evidence proceeds through a non-propensity inference. He suggested that such a change could be accompanied by a Committee Note explaining that the timing of the notice is moved up because it is important to discuss and evaluate the purpose for which the evidence is offered at an early point in the proceedings.

● A member of the Committee suggested that if the government were required to state the purpose for the evidence in the notice, there should be a good cause exception for situations in which a proper purpose comes to light at some later point.

● Another member stated that the current notice provision is problematic because it allows the government to give only a vague indication of the evidence it intends to offer. The rule currently states that the government must inform the defendant of the "general nature" of the Rule 404(b) evidence. This member argued that in many cases the disclosure is so vague that it is impossible for the defendant to prepare arguments about the proper purpose of the evidence, if any. He suggested that the notice provision be amended to delete the term "general nature"--- so that the government would be required to "provide reasonable notice of any such evidence." The Reporter noted that the Committee had already agreed on a description of what needed to be disclosed under a proposed amendment to Rule 807 --- the "substance" of the evidence. Perhaps using the term "substance" in Rule 404(b) would require more specificity than the current "general nature," and would also provide uniformity with the notice provision in Rule 807.

The Minutes of the Fall, 2016 meeting summarize the Committee's interest in considering possible changes to Rule 404(b) at the Spring, 2017 meeting:

After this extensive discussion, the Reporter was directed to prepare a memo for the next meeting that would present several drafting alternatives for a possible amendment to Rule 404(b), in light of the issues raised at the Conference. These alternatives include:

● deleting the reference in the notice provision to the "general nature" of the evidence (and perhaps substituting the word "substance");

● accelerating the timing of notice;

● requiring the government to provide in the notice a statement of the proper purpose for the evidence and how the evidence is probative for that purpose by proceeding through non-propensity inferences.

● adding a clause to Rule 404(b)(2) that would specify that the probative value for the articulated proper purpose must proceed through a non-propensity inference.

II. Case Law Developments Imposing More Rigor on the Rule 404(b) Determination

Rule 404(b) currently provides as follows:

(b) Crimes, Wrongs, or Other Acts.

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

(2) ***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.

Traditionally, the analysis of Rule 404(b) issues has not been rigorous. Typically a court presented with a Rule 404(b) objection would take three quick steps:

1. Emphasize that Rule 404(b) is a rule of inclusion, not exclusion.

2. Find that the proffered bad act is probative of one (and often more than one) not-for-character purpose, regardless of whether the defendant actually contested the purpose for which the bad act was purportedly relevant.

3. Find that the probative value for the proper purpose was not substantially outweighed by the prejudicial effect.

One of hundreds of examples of the traditional, "knee-jerk" approach to Rule 404(b) is found in *United States v. Geddes,* 844 F.3d 983, 989 (8th Cir. 2017).[1] The defendant was charged with aiding and abetting sex trafficking by force, fraud or coercion. He moved to exclude testimony that four years earlier, he had physically assaulted and threatened to kill his girlfriend because of a text message that he found on her phone. The court stated first that there is no error under Rule 404(b) "unless the evidence clearly had no bearing on the case and was introduced solely to prove the defendant's propensity to commit criminal acts." It stated that Rule 404(b) is a rule of "inclusion rather than exclusion and admits evidence of other crimes or acts relevant to any issue in the trial, unless it tends to prove only criminal disposition." The court found that the prior act was probative of knowledge and intent, both of which were called into question because the statute required proof of knowing transportation in interstate commerce and intent to coerce. Those elements were in issue because of the defendant's not guilty plea --- regardless of whether they were actively contested by the defendant. Finally, the court noted that a limiting instruction was given and so the danger of unfair prejudice did not substantially outweigh the probative value of the act in proving knowledge and intent.[2]

The Rule 404(b) analysis in *Geddes* is arguably thin for a number of reasons. First, threatening to kill his girlfriend is relevant to prove intent to coerce the alleged victim only if you go through a propensity inference. Saying "if he had an intent to hurt his girlfriend it is more likely he had an intent to coerce the alleged victim" is just another way of saying that threatening his girlfriend shows a propensity to threaten women. Thus, the bad act is not truly offered for a non-propensity purpose. Second, the defendant was not actively contesting intent. He argued that he never made any threat at all. If simply pleading not guilty is enough to put intent into issue for purposes of Rule 404(b), then virtually any act somewhat similar to the charged act will be admissible. Third, the court's statement that the government overcomes a Rule 404(b) objection by coming up with one non-propensity purpose for which evidence is at all relevant ignores the work that Rule 403 is supposed to do when the probative value for the non-propensity purpose is weak.

Finally, the *Geddes* court's emphasis that Rule 404(b) is a "rule of inclusion" mischaracterizes the rule. It is true that Rule 404(b) directs the court to non-propensity purposes. But it remains the case that the bad act is excluded if the bad act is in fact offered to prove propensity. Calling Rule 404(b) a rule of inclusion distracts the court from analyzing whether the

[1] The Federal Rules of Evidence Manual contains more than 300 pages of summarized circuit court cases that treat Rule 404(b) as a "rule of inclusion" and find bad acts admissible essentially whenever they are found probative of some not-for-character purpose, even if that purpose is not actively contested --- and even when the probative value for the purpose proceeds through a character inference.

[2] For another typical case involving drug charges, see *United States v. Smith,* 741 F.3d 1211 (11th Cir. 2013). The defendant was charged with cocaine distribution, and his prior convictions for *possessing* cocaine were admitted at trial. The court found no error, reasoning that 1) Rule 404(b) is a "rule of inclusion"; 2) "a not guilty plea in a drug conspiracy case makes intent a material issue and opens the door to admission of prior drug-related offenses"; and 3) prior convictions for possession were sufficiently probative of intent to distribute.

evidence is really being offered to prove propensity, even though the government has thrown in a non-propensity purpose. The Third Circuit, in *United States v. Caldwell*, 760 F.3d 267, 275 (3rd Cir. 2014) had an arguably more honest take on what it might mean for Rule 404(b) to be a "rule of inclusion":

> Throughout the nineteenth century and into the twentieth, American courts differed as to whether the common law rule was "exclusionary" or "inclusionary." Both of these descriptors can be misleading. To be sure, no one doubted that evidence relevant only for the limited purpose of showing a defendant's general propensity to commit the charged offense was inadmissible. Instead, the debate concerned whether the list of previously recognized non-propensity purposes was exhaustive (or "exclusive"), or whether *any* non-propensity purpose, even if not previously recognized, could support admission of the prior act evidence (the "inclusive" approach). *See* David P. Leonard, *The New Wigmore: Evidence of Other Misconduct and Similar Events* § 4.3.2, at 224 (2009) ("[T]he real question ... is whether the courts actually confine admissibility to a set of enumerated purposes.").
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> The matter was settled in 1975 with the adoption of the Federal Rules of Evidence. * * * By introducing the list of permissible purposes with the words "such as," the drafters made clear that the list was not exclusive or otherwise limited to a strictly defined class.
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> We have on occasion noted that Rule 404(b) adopted an inclusionary approach. Our use of the term "inclusionary" merely reiterates the drafters' decision to not restrict the non-propensity uses of evidence. It does not suggest that prior offense evidence is presumptively admissible. On this point, let us be clear: Rule 404(b) is a rule of general exclusion, and carries with it "no presumption of admissibility." 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:28, at 731 (4th ed.2013). The Rule reflects the revered and longstanding policy that, under our system of justice, an accused is tried for *what* he did, not *who* he is. And in recognition that prior offense evidence is generally more prejudicial than probative, Rule 404(b) directs that evidence of prior bad acts be excluded—*unless* the proponent can demonstrate that the evidence is admissible for a non-propensity purpose.

So to the *Caldwell* court, Rule 404(b) as a rule of inclusion simply means that the list of proper purposes in the rule is not exclusive. The peril in following the traditional interpretation of "rule of inclusion" --- in *Geddes* and like cases --- is that the court will treat Rule 404(b) as a rule providing for presumptive admissibility of uncharged misconduct.

In addition to the more nuanced view of "rule of inclusion" found in *Caldwell,* there are three major case law developments that have challenged what could be considered the "traditional" evaluation of other bad act evidence that most courts have employed. They are as follows:

1. Some courts require the proponent to demonstrate precisely how the probative value for the asserted proper purpose for the evidence actually proceeds through an inference other than propensity. So it is not enough to find that the evidence is probative for one of the permissible purposes. It must be found that it is probative for some other reason than that the defendant has a propensity to do a particular act. Thus, a bad act is not probative of, say, motive, if the reasoning is that, because the defendant is a violent person as shown by a prior act, he had the motive to commit the act charged.

2. Some courts are conditioning admissibility of bad act evidence on the defendant actively disputing the purpose for which it is offered --- beyond simply pleading not guilty. So a bad act would not be admissible in these courts to prove intent if the defendant was claiming that he did not commit the act charged.

3. Some courts are limiting the scope of the "intextricably intertwined" doctrine --- under which bad acts are not evaluated under Rule 404(b) if they are "inextricably intertwined" with the acts charged.

Each of these developments in the case law will be discussed in turn, and some analysis will be provided on how amendments to Rule 404(b) might embrace these developments.[3]

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

Under Rule 404(b), uncharged misconduct evidence is inadmissible if offered to prove that the defendant committed the charged conduct because he has the propensity to do so. But the evidence "may be admissible" if offered for a non-character purpose. Once the prosecution articulates a proper purpose, then the court assesses whether the probative value for the proper purpose is substantially outweighed by the risk of prejudicial effect, i.e., that the jury will 1) impermissibly use the evidence for the propensity purpose or 2) convict the defendant just for being a bad person, regardless of whether he has a propensity to commit the crime charged.

At this time there is a dispute in the courts about how to assess the probative value of bad acts offered for a proper purpose. Some circuits have recently pointed out that in assessing probative value for the non-character purpose, the court must assure itself that the inferences to be derived from the act are *independent of any propensity inference*. Other courts, like *Geddes* and *Smith*, discussed above, tend to find it sufficient that the bad act evidence is probative of one of the listed purposes, without worrying too much about whether the probative value is dependent on a propensity inference. The leading example of the more careful approach is the Seventh Circuit's decision in *United States v. Gomez*, 763 F.3d 845, 862-63 (7th Cir. 2014) (en banc). In *Gomez*, the government had evidence that someone nicknamed "Guero" was a reseller

[3] The case law discussion largely replicates the materials that were distributed as preparation for the Pepperdine Conference.

of drugs. The government claimed that Gomez was Guero. Gomez claimed that it was his brother-in-law who was the drug dealer Guero. The trial court admitted evidence of the defendant's prior cocaine possession, ostensibly for the proper, non-character purpose of proving identity. The court of appeals instructed that it was not enough for the bad act evidence to be relevant for a non-character purpose. Rather, "the district court should not just ask whether the proposed other-act evidence is relevant to a non-propensity purpose *but how exactly the evidence is relevant to that purpose*—or more specifically, how the evidence is relevant without relying on a propensity inference. Careful attention to these questions will help identify evidence that serves no permissible purpose." (emphasis added) The *Gomez* court concluded that the cocaine possession was improperly admitted to prove identity, because the probative value for identity was dependent on an inference that because the defendant sold drugs before, he sold them again. It explained as follows:

> Because the proponent of the other-act evidence must explain how it is relevant to a non-propensity purpose, the government needed a rationale for connecting the cocaine found in Gomez's bedroom to his identity as Guero *without relying on the forbidden propensity inference.* * * * Gomez's mistaken-identity defense singled out another person—his brother-in-law and housemate Victor Reyes—as the "real" Guero. The government introduced the user quantity of cocaine found in Gomez's bedroom for the purpose of showing that as between the two, it was more likely that Gomez was Guero. * * * [But] the evidence of the defendant's history of drug dealing tended to prove his identity as a participant in the charged drug deal only by way of a forbidden propensity inference: Once a drug dealer, always a drug dealer. * * *
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> * * * The government's sole theory is that Gomez's possession of a user quantity of cocaine 26 days *after* the conspiracy ended shows that he, rather than Reyes, was Guero. That argument is extraordinarily weak, but the more important point is that it rests on pure propensity: Because Gomez possessed a small quantity of cocaine at the time of his arrest, he must have been involved in the cocaine-distribution conspiracy. The district court should not have admitted this evidence.

Another illustration of a case holding that prior misconduct must be excluded where its probative value for the expressed purpose proceeds through the propensity inference is the Third Circuit's decision in *United States v. Smith*, 725 F.3d 340, 342 (3d Cir. 2013). Smith was charged with threatening a federal officer with a gun and possessing a firearm during a crime of violence. The trial court admitted evidence that two years before Smith allegedly committed the charged crimes, he had been observed dealing drugs at the same location. The court of appeals found that the prior bad act evidence "violates our long standing requirement that, when seeking to introduce evidence of prior bad acts under Rule 404 (b), the proponent must set forth 'a chain of logical inferences, *no link of which* can be the inference that because the defendant committed … offenses before, he therefore is more likely to have committed this one.' *United States v. Sampson*, 980 F.2d 883, 887 (3d Cir. 1982) (emphasis added)." The government argued that the prior drug dealing at the location was probative of the defendant's motive to commit the charged crime, i.e., it was evidence that he was protecting his turf. The court rejected that argument because, "for the evidence of the 2008 drug sale to speak to Smith's motives in 2010, one must

necessarily (a) assume something about Smith's character based on the 2008 evidence (that he was a drug dealer) and (b) infer that Smith acted in conformity with that character in 2010 by dealing drugs and therefore had a motive to defend his turf." Thus, the mere fact that the government *articulated* a non-character purpose was not enough to admit the evidence for that purpose—that was because the evidence was probative of motive only under the assumption that the defendant had a bad character. The government was proceeding through a propensity inference.

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

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

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

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

See also United States v. Logan, 121 F.3d 1172 (8th Cir. 1997) (evidence of prior possession of drugs was probative of knowledge and intent to distribute, with no analysis of how the bad act

was probative for those purposes independent of any propensity inference); *United States v. Gadison*, 8 F.3d 186 (5th Cir. 1993) (same). *See generally* Ranaldo, *Is Every Drug User a Dealer?: Federal Courts are Split in Applying Fed.R.Evid. 404(b)*, 8 Fed. Cts. L.Rev. 147 (2014) (noting the dispute in the courts on whether prior acts of possession are probative of intent to distribute, and characterizing the difference as whether or not the court is considering whether the probative value for intent proceeds through a propensity inference).

Most of the cases involving bad acts that proceed through the propensity inference are, like *Matthews*, cases involving use of prior drug activity in drug cases, with the prosecution arguing that the prior drug activity is offered for intent. Many have argued that when bad acts are offered, "intent" cannot be readily separated from the propensity inference. See Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 Creighton L.Rev. 215, 218 (2011) ("What chain of reasoning can link the prior drug history to the charged crime other than one that infers that the defendant has a drug-related propensity * * *? The earlier drug use, which is behavioral evidence, can be relevant only if we assume that the defendant's behavior forms an unchanging pattern.").

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

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

A possible textual change:

If the Committee decides that it wants to address the conflict in the courts over how probative value of a bad act is assessed, a textual change to the rule is possible. It might also be possible to address the problem by way of a note, but that would of course depend on what textual amendments might be proposed. The note cannot establish rules that are not found in the text. The problem is such a profound one (with such a substantial impact on litigation) that if it is going to be addressed, it should probably be addressed in text, with an explanatory note in

support. An attempt to address the question of probative value and propensity inference, in the text and with the supporting note, is set forth in Part Three of this memo.

B. Conditioning admissibility of bad act evidence on the defendant actively contesting the purpose for which the evidence is offered --- beyond simply pleading not guilty.

As discussed in the previous section, there is difficulty and confusion in trying to figure out the line between state of mind and propensity: and this is especially so with respect to the proper purposes of intent and knowledge.[4]

One recent innovation in dealing with the possible abuse of bad acts offered for these mental states is to prohibit the prosecution from admitting such evidence until it is apparent that the defendant is *actively contesting* the mental state.[5] The court in *Gomez, supra*, explains this "active contest" approach, apparently placing it in Rule 403, i.e., once a court has determined that there is a proper purpose for which the evidence is relevant without proceeding through a propensity inference:

> One important issue in Rule 403 balancing in this context is the extent to which the non-propensity factual proposition actually is contested in the case. For example, if a defendant offers to concede or stipulate to the fact for which the evidence is offered, additional evidence may have little probative value. *See, e.g., Old Chief v. United States,* 519 U.S. 172, 191–92 (1997) (holding that a defendant's stipulation to a prior felony conviction removes its probative value in a prosecution for unlawful possession of a firearm by a felon). Of course, there are various degrees of factual disagreement in a trial, and stipulations are at one end of that spectrum. * * * The general guiding principle is that the degree to which the non-propensity issue actually is disputed in the case will affect the probative value of the other-act evidence.
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> Our circuit * * * requires special caution when other-act evidence is offered to prove intent, which though a permissible non-propensity purpose is nonetheless most likely to blend with improper propensity uses. In cases involving general-intent crimes—e.g., drug-distribution offenses (as distinct from drug conspiracies or possession of drugs with intent to distribute)—we have adopted a rule that other-act evidence is not

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

[5] An active contest requirement has usually been applied to evidence offered to prove a mental state, but logically it can be applied to other purposes such as identity and motive.

admissible to show intent unless the defendant puts intent "at issue" beyond a general denial of guilt. * * * The critical point is that for general-intent crimes, the defendant's intent can be inferred from the act itself, so intent is not "automatically" at issue. The paradigm case involves a charge of distribution of drugs, * * * a general-intent crime for which the government need only show that the defendant physically transferred the drugs; the jury can infer from that act that the defendant's intent was to distribute them. Hence our rule that "[b]ecause unlawful distribution [of drugs] is a general intent crime, in order for the government to introduce prior bad acts to show intent, the defendant must put his intent at issue first."

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

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

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

It is helpful to distinguish between two aspects of the relevance inquiry. The first aspect concerns whether a Rule 404(b) exception, like intent, is "at issue"—that is, whether the issue is relevant to the case. For example, knowledge may not be at issue at all where the charge is a strict liability offense, so that knowledge is not even an element of the crime. Similarly, while intent is at least formally relevant to all specific intent crimes, intent becomes more relevant, and evidence tending to prove intent becomes more probative, when the defense actually works to deny intent, joining the issue by

contesting it. When, as in this case, the drugs in question were clearly a distribution quantity, the packages had price tags, and the defendant did not deny they were intended for distribution by someone, intent was "at issue" in only the most attenuated sense.

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

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

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

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

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

> Finally, we believe it necessary to address the District Court's suggestion that Caldwell "put his knowledge at issue by claiming innocence." It is unclear whether the District Court understood Caldwell to have "claimed innocence" by testifying at trial, or more broadly by pleading not guilty. Either way, we believe this line of reasoning is improper.
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> Situations may indeed arise where the content of a defendant's trial testimony transforms a previously irrelevant 404(b) purpose into a material issue in a case. For example, if Caldwell had testified that he thought the object in his hand was something other than a gun, then it would immediately become critical for the prosecution to rebut his claim of mistake and to show his knowledge of the true nature of the thing possessed. We disagree, however, with the proposition that, merely by denying guilt of an offense with a knowledge-based mens rea, a defendant opens the door to admissibility of prior convictions of the same crime. Such a holding would eviscerate Rule 404(b)'s protection and completely swallow the general rule against admission of prior bad acts. See *United States v. Miller*, 673 F.3d 688, 697 (7th Cir.2012) (explaining that "if a mere claim of innocence were enough to automatically put intent at issue, the resulting exception would swallow the general rule against admission of prior bad acts"). Accordingly, we reject the suggestion that "claiming innocence" is sufficient to place knowledge at issue for purposes of Rule 404(b).

See also United States v. Ford, 839 F.3d 94 (1st Cir. 2016)(in a case involving marijuana, the court expressed concern about the trial court's admission of evidence of the defendant's prior acts of marijuana growing; the fact that the defendant did not contest intent meant that the probative value of testimony concerning the defendant's prior marijuana growing in another state was "significantly reduced" and there was a "high risk" that the jury would use the prior act evidence for an impermissible character inference); *United States v. Sampson*, 385 F.3d 183 (2nd Cir. 2004) (evidence of uncharged drug activity was not admissible to prove intent because the defendant "unequivocally" relied on a defense that he did not do the act at all).

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

burden of proving the mental elements beyond a reasonable doubt); *United States v. Olguin*, 643 F.3d 384 (5th Cir. 2011) ("a defendant's guilty plea intuitively puts his intent and knowledge into issue"); *United States v. Hardy*, 643 F.3d 143 (6th Cir. 2011) (where a crime requires proof of specific intent, the government is entitled to offer bad acts to prove that intent regardless of the defendant's defense); *United States v. Jones*, 982 F.2d 380 (9th Cir. 1992), *amended* (1993) (prior marijuana smuggling was properly admitted to prove intent; while the defendant did not contest intent at trial, the government retained the burden of proving intent beyond a reasonable doubt).

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

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

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

Does this mean that a defendant's offer to stipulate the mental element is *not* a means for keeping out bad acts offered to prove that element? And if so, why should the defendant be allowed to keep bad acts out simply by not actively contesting the element? It would seem that stipulation would be the stronger indication of no active contest. For this reason, if a court (or the Committee) decides to require "active contest", it should be relevant that the defendant offers to stipulate to the mental element. It is notable that the *Gomez* court, *supra*, cites *Old Chief* apparently for the proposition that a defendant's stipulation on the mental element means that the element is no longer actively disputed and therefore bad acts would not be admissible. The court does not discuss the *Old Chief* Court's Rule 404(b) dictum, but clearly the court did not find it controlling.[6]

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

A possible textual change:

Adding a requirement that an element must be actively contested before bad acts can be admitted to prove it will require some careful language, at a minimum. A case by case approach might be needed because there are various shades of "actively contesting" an element. For example, is arguing that the government has not proven every element of the offense beyond a reasonable doubt an "active contest" of all the elements? If a witness testifies in a way that tends to prove intent to commit the charged crime, and the defendant simply attacks the witness's credibility, is that an "active contest" of intent? At the outset it seems difficult to draft text that will accurately cover all these nuances. And, as discussed above, there is the matter of whether stipulations can forestall the proof of the bad act.

Moreover, questions arise about what happens if a defendant *delays* actively contesting a mental state until a late point in the case. For example, if the defendant doesn't contest, say, intent until calling witnesses in its case-in-chief, the prosecution will need to have rebuttal. And what if the defendant does not contest intent until closing argument? Can a court require a statement on the record about contesting an element at an *in limine* hearing --- and then bind the defendant to that statement?

Are these timing questions matters that should be discussed in the text of a rule change? Or are these kinds of matters best left to the judge's discretion --- with perhaps a Committee Note highlighting the issue?

An attempt to establish an "active contest" through an amendment requirement is set forth in Part Three.

C. Limiting the "inextricably intertwined" doctrine:

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

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

Rule 403 will still apply to the evidence. [7] However, it would be the rare case in which proof of an inextricably intertwined act could be considered so prejudicial as to justify exclusion under Rule 403.

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

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

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

The notion of "inextricably intertwined" evidence becomes more complicated when it is examined in cases such as *United States v. Hilgeford*, 7 F.3d 1340, 1346 (7th Cir. 1993). Hilgeford suffered what the court described as "hard times." He had borrowed over one million dollars from a bank and the Farmer's Home Administration using the two farms he owned as security for the debt. When he suffered financial difficulties, the bank foreclosed on the mortgage it held on one of his farms. The bank then bought the farm at the foreclosure sale and evicted Hilgeford. The United States foreclosed on his other farm.

Hilgeford retaliated by sending bills to employees of the bank and the FHA and then taking deductions on his tax return for the unpaid bills. Among the charges brought against him were counts alleging willful filing of false tax returns. To prove the tax counts, the government offered evidence that in the years prior to the challenged tax returns, Hilgeford had generated "a blizzard of complicated and groundless litigation, primarily involving his fruitless attempts to regain his two farms." Hilgeford objected at trial under Rule 404(b). The court held that Rule

[7] See *United States v. Hilgeford*, 7 F.3d 1340, 1344 (7th Cir. 1993):

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

404(b) was not applicable to this evidence, because it was "intricately related to the fact of the case at hand."

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

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

It gets even more confusing in some courts that have more than one doctrine for determining whether the bad acts are "other" acts outside Rule 404(b). Consider *United States v. Loftis*, 843 F.3d 1173 (9th Cir. 2016). In a wire fraud prosecution, the government sought interlocutory relief after the trial judge, in an in limine motion, held that evidence of frauds not specified in the indictment would be evaluated under Rule 404(b). The Court of Appeals held that Rule 404(b) was inapplicable for two separate reasons. First, the frauds not specified in the indictment were not "other" acts because the crime charged included not only the specific executions of the fraud scheme alleged in the indictment, but also "the overall scheme." Thus the acts were part of the charged conduct. This was because an element of the crime of wire fraud is "the existence of a scheme to defraud." Second, the uncharged acts were "inextricably intertwined" with the frauds specified in the indictment because the uncharged transactions were "part of the overall scheme" and "part of the same transaction." The Court did not explain why it had two separate doctrines that found this evidence to be outside Rule 404(b), when the reason that both doctrines applied was exactly the same.

One noted commentator has summed up the "inextricably intertwined" doctrine with the following criticism:

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

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

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

> The first is that the test creates confusion because, quite simply, no one knows what it means. Such an impediment stands as an obstacle to helpful analysis. Indeed, we have criticized the "inextricably intertwined" standard as "a definition that elucidates little." * * * Whether evidence qualifies as intrinsic in a particular case may well depend on which version of the test one employs. For example, Green's threat to kill A.G. would qualify as intrinsic if the test is whether it "pertain[s] to the chain of events explaining the context" of the crime * * * . The same threat would not be intrinsic, however, if the test were whether that threat was "an integral part of the immediate context of the crime charged." * * * We see no principled way to choose among these competing incarnations of the test, yet that choice could well be determinative. * * *
>
> The second problem with the inextricably intertwined test is that resort to it is unnecessary. The most common justification for admitting evidence of "intertwined" acts is to allow a witness to testify freely and coherently; we do not want him to have to tiptoe around uncharged bad acts by the defendant, and thereby risk distorting his narrative. This is a worthy goal, but it can be accomplished without circumventing Rule 404(b). * * * [T]he same evidence would also be admissible within the framework of that rule because allowing the jury to understand the circumstances surrounding the charged crime—completing the story—is a proper, non-propensity purpose under Rule 404(b). * * * All that is accomplished by labeling evidence "intrinsic" is relieving the government from providing a defendant with the procedural protections of Rule 404(b).
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> The third problem with the inextricably intertwined test is that some of its broader formulations, taken at face value, classify evidence of virtually any bad act as intrinsic.

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

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

> [W]e will reserve the "intrinsic" label for two narrow categories of evidence. First, evidence is intrinsic if it "directly proves" the charged offense. This gives effect to Rule 404(b)'s applicability only to evidence of "*other* crimes, wrongs, or acts." If uncharged misconduct directly proves the charged offense, it is not evidence of some "other" crime. Second, uncharged acts performed contemporaneously with the charged crime may be termed intrinsic if they facilitate the commission of the charged crime. But all else must be analyzed under Rule 404(b).

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

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

> There traditionally have been subtle distinctions between direct evidence of a charged crime, inextricable intertwinement evidence, and Rule 404(b) evidence, but our case law has not often focused on these fine distinctions. We have often lumped together these kinds of evidence, and this has only served to further cloud the already murky waters of the inextricable intertwinement doctrine.
>
> There is now so much overlap between the theories of admissibility that the intertwinement doctrine often serves as the basis for admission even when it is unnecessary [because the act is direct evidence of the crime]. Thus, although this fine distinction has traditionally existed, the inextricable intertwinement doctrine has since become overused, vague and quite unhelpful. To ensure that there are no more doubts about the court's position on this issue—the inextricable intertwinement doctrine has outlived its usefulness.

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

first instance. Therefore, this evidence was properly admitted, albeit as direct evidence rather than under the inextricable intertwinement doctrine." The court noted that "any confusion of the proper channel of admissibility" was "insignificant" to the ultimate outcome of admissibility.[8]

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

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

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

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

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

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

Restyling and the "Inextricably Intertwined Doctrine"

As seen above in the discussion of the *Green* case, the linchpin of the "inextricably intertwined" doctrine is that Rule 404(b) applies to "*other* crimes, wrongs or acts." Specifically the original rule provided that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." That phrase is quoted in *Green* to indicate that acts that are actually part of the crime charged are not "other" and so are not covered by Rule 404(b).

Green was decided before the rules were restyled. And the restyling made a change to the phrase. The first sentence of Rule 404(b) now states that "[e]vidence 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." This change was raised at the last Committee meeting as one that might have affected the scope of any "inextricably intertwined" doctrine. It can be argued that the relocation of the word "other" makes a substantive change, because now "other" is just describing acts that are neither crimes nor wrongs --- it is no longer describing the kind of evidence that is covered by Rule 404(b) *because it is not part of the charged crime*.

That argument would lead to the conclusion that the restyling made a substantive change to the coverage of Rule 404(b). There are two responses to that argument. The first is that any inference of a substantive change is forestalled by the restyling committee note, which says that no substantive change is intended. The second and more important response is that the substantive change described would make no sense. It would mean that *all* bad act evidence is covered by Rule 404(b), even the evidence of the charged crime itself. That is to say, the rule would mean that evidence of *any "*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." And it makes no sense for Rule 404(b) to cover evidence of the crime itself, because that evidence by definition is not offered to prove the defendant's character. For example, in a murder case, could the restyling be interpreted to mean that evidence of the murder itself is covered by Rule 404(b)? Literally, perhaps, because it is evidence of a "crime, wrong, or other act." But the coverage is silly because the charged act of murder is not offered to prove character; it's offered to prove the murder.

Ultimately, then, it would seem that the restyling had no effect on the scope of Rule 404(b)'s coverage of bad act evidence. That said, the phrase "other crimes, wrongs, or acts" is *different* from the phrase "crimes, wrongs, or other acts." It seems to describe something that is different. And the former seems a better way to capture the point that the rule is covering acts that are "other" --- and so not part of the crime charged. So the Committee may wish to consider changing the language back to the original as part of a broader amendment. Though the counterargument is that it might be taken as a concession that there was an error in the restyling, and the differential here does not really amount to an error --- not an error with any practical effect, at any rate.

Drafting Possibilities

Trying to regulate the "inextricably intertwined" doctrine through a textual change is fraught with difficulty. Assume that the Committee agrees that it should be abolished. Can it ever really *be* abolished? Won't there always be some line-drawing required between the acts that are charged in an indictment and those that are not but yet appear pretty "close" to the charged acts or covered by the indictment? The courts above that try to reject the doctrine are still left to define the line between the crime charges and "other" acts --- either by way of a distinction between direct and indirect evidence as in *Gorman* and *Green,* or some other test that can be difficult and fuzzy to apply. Any line-drawing here would be highly contextual. Perhaps a test that distinguishes direct and indirect evidence of the crime could be workable if its application was addressed in detail in a committee note. Perhaps not.

In Part Three, an attempt is made to codify a limitation on the "inextricably intertwined" doctrine.

III. Drafting Alternatives

This section considers drafting alternatives for addressing the three case law trends discussed in Part Two, as well as other suggestions that were raised at the last Committee meeting. The changes will be taken, and commented upon, one by one. And then at the end of the section there will be a valiant attempt to put (almost) everything together.

A. Requiring the probative value of the bad act to proceed through a non-propensity inference.

Alternative 1. Adding to the substantive provision.

(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. But the probative value for the other purpose may not depend on a propensity inference.

(3) Notice in a Criminal Case. 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 comment:

If the sentence is added as above, it makes sense to drop the notice provision to another section. Frankly, including the notice provision together with the most important substantive provision of Rule 404(b) --- a decision made in the Restyling --- was not an elegant choice. And it would be most inelegant to retain the current structure if another sentence is added to the middle of the provision.

Committee Note for this change:

The amendment emphasizes that it is not enough simply to articulate a non-character purpose for evidence of other crimes, wrongs or acts. In order for Rule 404(b) to protect in accordance with its intent, the probative value of the evidence for the proper purpose cannot be dependent on a propensity inference. For example, if evidence of uncharged misconduct is offered to prove intent, it cannot be admitted for that purpose if the inference is, "because the bad act shows he has a propensity to commit a crime like the one charged, it tends to prove he had the intent to commit the charged crime." The proponent must therefore articulate to the court the chain of inferences from the bad act evidence to the purpose for which it is offered, and explain how that chain of inferences does not depend on the actor's propensity.

Alternative 2: Adding to the notice provision:

One of the suggestions at the last Committee meeting was that an emphasis on non-propensity inferences could be accomplished by amending the notice provision. The suggestion was as follows:

(b) Crimes, Wrongs, or Other Acts.

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

(2) ***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.;

(C) articulate in the notice the non-propensity purpose for which the prosecution intends to offer the evidence; and

(D) articulate the chain of reasoning supporting the purpose for offering the evidence.

Reporter's Comments:

1. The suggested change above is only part of what was proposed at the last meeting. Other parts of the proposal --- specifically, deleting the first sentence of Rule 404(b)(2) and changing some procedural particularities of the notice requirement --- will be discussed later as they are not pertinent to the non-propensity inference question now being addressed.

2. There are two important differences between adding a new sentence to the substantive provision (alternative 1) and addressing the problem in a notice provision (alternative 2).

The first difference is that if the provision is one of notice, it will not apply in civil cases. Perhaps that is a permissible result because most of the problems of overbroad application of Rule 404(b) have occurred in criminal cases. But there have been complaints that bad acts ostensibly admitted for non-character purposes in civil cases are actually nothing but propensity evidence. One commentator has noted the following problem of motive shown through propensity inferences in Title VII cases:

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

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

It would seem that there is no principled basis for distinguishing civil and criminal cases when it comes to the requirement that probative value for a proper purpose must proceed through a non-propensity inference. The goal in both criminal and civil cases is to prohibit proof of propensity. Therefore, limiting the requirement of establishing non-propensity inference to criminal cases only seems difficult to justify.

It might be argued that the solution is to retain the added requirements to the notice provision and simply extend the Rule 404(b) notice requirement to civil cases. The reason given by the Advisory Committee for limiting the notice requirement to criminal cases was that the Civil Rules already contain broad discovery provisions, which are likely to result in full disclosure of all bad acts that the proponent would seek to admit. So at first glance a notice

requirement for civil cases in Rule 404(b) would be superfluous at best and might be confusing. But if the "articulation" requirements are added to the notice provision, then the overlap with civil discovery rules is not so clear. That is, the proposed *addition* to the Rule 404(b) notice requirement --- which is not about production but about articulating a proper purpose --- will in fact add something important to what the Civil Rules already provide. Therefore, if the Committee does decide to add an articulation requirement to the Rule 404(b) notice provision, it should also consider extending the provision to civil cases.

Extending the proposal to civil cases would look like this:

(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~~ The proponent must:

(A) provide reasonable notice of the general nature of any such 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~~.~~;

(C) articulate in the notice the non-propensity purpose for which the proponent intends to offer the evidence; and

(D) articulate the chain of reasoning supporting the purpose for offering the evidence.

It should be noted that the above changes to the notice requirement would also result in a criminal defendant having an obligation to provide pretrial notice of "reverse 404(b)" evidence. That is of course a judgment call for the Committee. On a drafting level, it gets awkward to state that the notice requirement applies in civil cases and to the prosecutor in criminal cases, but not to the criminal defendant. On the merits, there is no obvious reason to exclude criminal defendants from having to articulate how evidence of other acts is probative to a proper purpose without proceeding through a propensity inference. Moreover, the extension would not result in a dramatic change because "reverse 404(b)" evidence is rarely offered.

The second difference between a substantive provision and a notice provision is that a substantive provision actually governs the admissibility of evidence. A violation of a substantive provision means that the evidence is inadmissible. A violation of the notice provision, in this instance, means only that the proponent failed to timely articulate a non-propensity purpose. Whether that results in exclusion of evidence is within the discretion of the court, which may instead impose other sanctions or even excuse the violation under the circumstances. The point is that a notice provision does not itself guarantee that the bad act evidence will have to proceed through non-propensity inferences; rather it guarantees only a timely articulation of the proponent's arguments.

This discussion leads pretty clearly to a third alternative: adding the substantive requirement that the evidence must proceed through non-propensity inferences, *and* adding to the notice provisions to require the proponent to *articulate* those inferences. Adding both provisions will assure that the non-propensity arguments are laid out for the court early on, and also will provide specific authority for the court to exclude the bad act evidence if the probative value for the asserted purpose actually proceeds through a propensity inference. The court can and must exclude the bad act evidence that proceeds through a propensity inference, even if the proponent satisfies the notice provision by articulating a chain of inferences. That is because the proponent's act of articulating a chain of inferences doesn't preclude the possibility that in fact the probative value is based on a propensity inference.

Combining both alternatives:

For ease of reference, a change that would add the requirement that the probative value proceed through non-propensity inferences, and would also add the requirement that the proponent articulate those inferences, could look like this --- with the inclusion of extending the notice requirement to a civil case, and deleting the request requirement (a point that has already been approved by the Committee):

(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. But the probative value for the other purpose may not depend on a propensity inference.

(3) Notice ~~in a Criminal Case.~~ ~~On request by a defendant in a criminal case, the prosecutor~~ The proponent must:

(A) provide reasonable notice of the general nature of any such 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~~.~~;

(C) articulate in the notice the non-propensity purpose for which the proponent intends to offer the evidence; and

(D) articulate the chain of reasoning supporting the purpose for offering the evidence.

Concern expressed about pretrial notification of proper purposes:

At the last meeting, two concerns were expressed about requiring the proponent, in advance of trial, to disclose a proper purpose and articulate a chain of inferences that does not proceed through propensity. The first concern is that the proponent will over-notify; that is, the proponent will articulate every proper purpose under the sun so as not to be caught short for failing to articulate the purpose at a later date. It seems, though, that the risk of over-designation is not high because under the proposal the proponent must not only articulate a proper purpose but must also explain how, exactly, the bad act is probative for such a purpose without proceeding through a propensity inference. That required explanation is likely to temper the incentive to over-declare permissible purposes --- because if the purpose is way off, the explanation of probative value should fail in the making. For example, take a felon-firearm case in which a prosecution witness says he saw the defendant with a gun and the defendant denies it. If a previous act of gun possession is offered, a prosecutor's designation of "knowledge" would have to be followed by an explanation something like "the prior act shows he has familiarity with guns and so it makes it more likely that the defendant knew he was possessing a gun on the night in question." But the probative value under that explanation is close to zero, because nobody is arguing that the defendant didn't know what a gun was. The only probative value is that because he had a gun once he is more likely to have had one on the night in question. Thus, the potential over-designation of "knowledge" in this circumstance would be "outed" by the need to explain its true probative value.

Another concern about a pretrial "articulation" requirement is that the proponent might not be aware at the early stages of all the possible ways in which a bad act might become relevant. Proper purposes may reveal themselves as the case further develops. That is a legitimate point, and surely a rule that imposes a requirement of advance articulation of a proper purpose needs to have some flexibility. That flexibility can be provided by a good cause exception. Of course, the Rule 404(b) notice requirement currently has a good cause exception. But as drafted above, there is a possible argument that the good cause requirement could be interpreted as applying only to providing the notice, not to the new articulation requirements. That reading is possible because the good cause exception is placed ahead of the new requirements. The problem looks like it is solved if the provisions are rearranged, as follows:

Extending the good cause protection to the requirement that the proponent articulate a proper purpose and a non-propensity chain of reasoning:

(3) Notice ~~in a Criminal Case.~~ ~~On request by a defendant in a criminal case, the prosecutor~~ The proponent must:

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

(B) articulate in the notice the non-propensity purpose for which the proponent intends to offer the evidence;

(C) articulate the chain of reasoning supporting the purpose for offering the evidence; and

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

This rearrangement could be coupled with a Committee Note providing that the good cause exception will apply to cases in which a proper purpose for the evidence does not become evident until after the trial begins. That excerpt of a Committee Note could look like this:

> As restructured, the good cause exception applies not only to the timing of the notice but also to the obligations to articulate a non-propensity purpose and explain how the evidence leads to that purpose independent of a propensity inference. A good cause exception for the articulation requirements is necessary because in some cases a permissible purpose for the evidence may not become clear until just before, or even during, trial.

B. Requiring the Proper Purpose to be Actively Contested

As discussed above, adding an "active contest" requirement to Rule 404(b) might be difficult because whether a proper purpose is actively contested will be context-dependent and lines will be hard to draw. For example, when a witness testifies to intent, and the defendant attacks the witness's credibility, is intent now actively contested so that the government now can offer bad acts to show intent? What if defense counsel argues that the evidence does not prove all elements of the crime beyond a reasonable doubt? Given the difficulty of line-drawing, it may be preferable to leave the matter to judicial discretion, with perhaps a reference in a Committee Note to the importance of active contest of the proper purpose.[9]

A second problem with amending Rule 404(b) to include an active contest requirement is that the requirement itself appears not to be grounded in Rule 404(b). Rather it is more logically grounded in Rule 403; and most (but not all) courts, such as *Gomez*, place the requirement in Rule 403. Rule 404(b) requires the proponent to articulate a purpose for the evidence that does not proceed through a propensity inference. Once that is done, the analysis shifts to Rule 403, at which point the question is whether the probative value for that purpose is substantially

[9] The problem of line-drawing here is analogous to the situation in which the defendant, at a proffer session, signs an agreement that his statements can be used in contradiction of a position that the defense takes at trial. Just recently, the Second Circuit, in a lengthy opinion, analyzed a variety of arguments that the defendant could make without opening the door, and also described a number of arguments the making of which would open the door to allow admission of the proffer statements. See *United States v. Rosemond*, 841 F.3d 95 (2d Cir. 2016). The length and specificity of the analysis is most helpful. But it is the kind of analysis that is probably better found in a lengthy opinion than in the text of an Evidence Rule.

outweighed by the prejudicial effect (i.e., the risk that the evidence will actually be considered for propensity). The reason an active contest requirement is important is that the probative value for the proper purpose is significantly diminished if the defendant is not actively contesting that purpose. Put another way, the evidence may be probative of, say, knowledge, without proceeding through any propensity inference, but even so the probative value will be weak if knowledge is not an actively contested element of the crime, e.g., when the defendant is arguing not lack of knowledge but that he never committed the crime at all. It would be odd to amend a rule where its major effect would be on a different rule. See, e.g., *United States v. Ford,* 839 F.3d 94, 109 (1st Cir. 2016) (prior bad act was relevant to intent and therefore satisfied Rule 404(b); but the fact that the defendant did not contest intent "renders the probative value of [the bad act] significantly reduced" under Rule 403).

It might be argued in response that the solution is to add the active contest requirement to Rule 403, but that is a non-starter. Rule 403 is iconic and moreover it applies to all sorts of evidentiary determinations. Amending Rule 403 to cover one of the many situations in which it applies would be disruptive and confusing.

A third problem with amending Rule 404(b) to include an active contest requirement is that a determination would have to be made on whether that amendment would apply to civil cases. Theoretically it should, because the principle that probative value is diminished if the proper purpose is not actively contested is one that applies to any evidentiary determination in which other acts are offered. But before extending the textual amendment to civil cases on that theoretical ground, it would be prudent to conduct research on how the provision might apply in civil cases, whether it is necessary to regulate civil cases on this point, etc.

If the Committee decides to proceed with a textual change to Rule 404(b) to codify an active contest requirement, the change might look like this:

(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 --- where that purpose has been actively contested by the opponent. But the probative value for that purpose may not depend on a propensity inference.

The other alternative is to add a short statement to the Committee Note as part of a broader amendment to the Rule:

Even if the proponent articulates a proper purpose for the other act evidence, and the probative value for that purpose proceeds through non-propensity inferences, the court must still balance the probative value of the evidence against the risk of unfair prejudice. Where the evidence is offered for a proper purpose but the opponent does not actively contest that purpose, its probative value is diminished. For example, assume a defendant is charged with an act of drug distribution, and the government has evidence that the defendant distributed drugs on other occasions. That evidence might be probative of intent. But if the defendant's defense is that he was not in the country on the night of the charged drug deal, intent is not being actively contested; the defendant is arguing that he did not commit the act at all. The probative value of the prior act is accordingly diminished, and its prejudicial effect may well substantially outweigh that diminished probative value.

C. Amendment to Deal with the "Inextricably Intertwined" Doctrine

As discussed above, there is much to dislike about the "inextricably intertwined" doctrine --- it is fuzzy, it overlaps with Rule 404(b) for such matters as "context" and "background", and it is not at all uniformly applied by the courts. But that said, there must be some line drawn between acts that are part of the charged crime and acts that are "other" and so covered by Rule 404(b). Otherwise Rule 404(b) would be applicable to eyewitness testimony such as "I saw the defendant rob the bank he is charged with robbing."

It is unclear that any textual fix would do much better than the courts have done in delineating what is covered by Rule 404(b) and what is not. One possibility is to try a "direct/indirect" distinction --- indirect evidence would be covered by Rule 404(b) while direct evidence would be proof of the crime itself. Yet that distinction may not provide a broad enough exception to Rule 404(b) coverage. For example, what about evidence that a defendant, charged with bank robbery, was seen the day after the robbery burning a ski mask in a trash can in his back yard. That is not direct evidence of the robbery itself, but should that mean that it has to proceed through Rule 404(b)? On the other hand, does evidence that the defendant shot a witness two days after the robbery, which is also indirect evidence, look more like it should proceed under Rule 404(b)? These are difficult questions, and it is unclear whether a "direct/indirect" line would be helpful or confusing in assisting the courts in determining the coverage of Rule 404(b). On the other hand, a "direct/indirect" line --- currently employed by some reform-minded courts, as discussed above ---seems miles better than other possible fixes. For example, adding language that Rule 404(b) doesn't apply to evidence of acts "inextricably intertwined" with the charged crime adds nothing to the enterprise. Also, courts are obviously familiar with the direct/indirect terminology. And finally, if applying Rule 404(b) to all indirect evidence would end up expanding the rule's coverage in some courts, the consequences are not terrible. All that happens is that the notice requirement of Rule 404(b) will apply --- that is because indirect evidence that is close to the crime will almost certainly fit a non-character purpose like "background" or "context" and so will be admissible even if Rule 404(b) applies to it.

Another problem that would be encountered in addressing the "inextricably intertwined" doctrine is how it might apply to civil cases. Again, in theory there is no reason to distinguish

civil and criminal cases in determining whether bad acts are "other" acts or whether they are part of the claim or defense. But research would have to be conducted on whether an amendment addressing civil cases would do more harm than good, and whether courts in civil cases are having any problem with this line-drawing.

If the Committee wishes to address the "inextricably intertwined" doctrine in an amendment to the text of Rule 404(b), it might look something like this:

(b) Crimes, Wrongs, or Other Acts.

(1) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act --- offered as indirect evidence of a matter in dispute --- 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.

A Committee Note might look like this:

The amendment provides that Rule 404(b) does not apply to direct evidence of the matter in dispute. For example, in a prosecution for bank robbery, there is no reason to apply Rule 404(b) to testimony from an eyewitness that he saw the defendant rob the bank. Rule 404(b) has no application because there can be no argument that in presenting that evidence the prosecutor is trying to raise the inference that the defendant has a propensity; rather she is just proving the crime charged. On the other hand, evidence that the defendant threatened an eyewitness a week after the crime is indirect evidence of the bank robbery, and should be evaluated under Rule 404(b). Some courts, in determining the coverage of Rule 404(b), have held that evidence of acts "inextricably intertwined" with the charged act are outside the rule's coverage. But that iteration has led to confusion and conflicting results in the courts. The Committee believes that a "direct/indirect" distinction is easier to apply and will provide the proper scope of coverage for Rule 404(b).

_____

Moving "other":

Another possibility, discussed earlier in the memo, is to return the word "other" to its original placement before "crimes" in the rule. That change would in some way be related to the "inextricably intertwined" doctrine because courts have relied on the original rule's placement of "other" to implement that doctrine. See Kenneth Graham, *Federal Practice and Procedure* § 5239 ("One of the key words in determining the scope of Rule 404(b) is 'other'; only crimes, wrongs or acts 'other' than those at issue under the pleading are made inadmissible under the general rule."). It would not at all solve the problem of the breadth and fuzziness of the inextricably intertwined doctrine, however --- because all that breadth and fuzziness was *created* at a time when "other" was placed before "crimes." And the courts that have cut back on the

doctrine --- discussed earlier in the memo --- have not relied on the text (or the restyling) to do so. They have cut back on the doctrine because it is amorphous and unhelpful. Moreover, courts that do continue to employ the inextricably intertwined doctrine cite and quote the restyled rule without missing a beat. *See, e.g., United States v. Loftis,* 843 F.3d 1173 (9th Cir. 2016) (quoting the restyled Rule 404(b)(1) in full, and then applying the inextricably intertwined doctrine after stating that "Rule 404(b) applies solely to evidence of 'other' acts, not to evidence of the very acts charged as crimes in the indictment"). So putting "other" back in its original place will not solve the problems caused by the "inextricably intertwined" doctrine. That doctrine was a disaster when "other" was in its original place.

Independently of any move to resolve the inextricably intertwined doctrine, however, there is something to be said for returning to "other crimes, wrongs, or acts." For the reasons discussed earlier, the original location of "other" makes more sense and avoids the nonsensical interpretation that Rule 404(b) governs evidence of the charged crime itself. On the other hand, the restyling, while arguably resulting in a weird change of meaning in Rule 404(b), has not actually created any practical problem. I have not found a case in which a court relied on the restyled rule to come to a result on "other" crimes that is different than it would have under the original rule.

If the Committee does wish to change the location of "other" then that change is pretty simple. It looks like this:

> **(b) Crimes, Wrongs, or Other Acts.**
>
> **(1)** ***Prohibited Uses.*** Evidence of ~~a~~ any other 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.

It should be noted that the rule cannot be turned back to the original exactly, because the original version was "evidence of crimes, wrongs, or other acts." But the plural is frowned upon in restyling, and is no longer used throughout the Evidence Rules, so using the plural would raise hackles with the style consultants.

Also, it probably needs to be "any other"; it can't be "another." Because "another" is singular, it could raise the inference that *only one* other crime, wrong or act would be covered by the Rule. That problem was raised in the restyling when Rules 413-415 were proposed to be restyled as "another sexual assault." The Evidence Rules Committee determined that this could be a substantive change --- limiting admissibility to only one sexual assault --- and so it was changed to "any other." That's probably what needs to be done here if the change is to be made. Though the fix is inelegant for sure. One might wonder, "any other than what?" It seems more jarring than just "another."

The real problem in moving "other" though, is the Committee Note. What could be said? Here are two possibilities, only partly in jest:

"Other is being returned to its original placement, because it makes more sense there, even though the restyling change hasn't made a difference in any case." Or

"Other is being returned to its original placement to provide better guidance on which acts are covered by Rule 404(b) and which are not --- even though when it was in its original place the courts responded by establishing a formless and confusing 'inextricably intertwined' doctrine."

In the end, it may be better to leave well enough alone. The Evidence Rules Committee has adhered to a policy that a change to the rules is to be made only when it will solve a practical problem. The problem created by changing the location of "other", if it is one, appears to have no impact on practice.

D. Other suggestions regarding the notice requirement.

1. Disclosure of the "General Nature" of the Evidence.

At the last meeting, a Committee member argued that practice under Rule 404(b) would be improved if the government were required to provide a more detailed description of the other acts that it intended to introduce. The operative language in the Rule is that the government must disclose the "general nature" of the Rule 404(b) evidence. The assertion was that the notice provided was sometimes so general that it provided little if any assistance in knowing about or preparing for the evidence. There is case law that does support the contention that the term "general nature" requires relatively little of the government. *See, e.g., United States v. Watson,* 409 F.3d 458 (D.C.Cir. 2005), where the prosecution gave pretrial notice that it would offer the testimony of a cooperating witness, but did not provide the name of the witness, nor the facts or circumstances of the proposed testimony. The court found that this notice was sufficient because it provided the "general nature" of the testimony. Other examples of vague notice found sufficient under the Rule 404(b) "general nature" language include *United States v. Kern,* 12 F.3d 122, 124 (8th Cir.1993) (holding that the government's statement that it "might use evidence from some local robberies" was sufficient to describe the general nature of the acts under Rule 404(b)); and *United States v. Schoeneman,* 893 F.Supp. 820, 823 (N.D.Ill.1995) (rejecting the defendant's motion that the government provide notice of the dates, times, places and persons involved in the acts it planned to admit under Rule 404(b)).

The argument for more specificity in the notice requirement is straightforward: in order to determine whether the act is admissible for a proper purpose, and that the probative value does not proceed through a propensity inference, it is critical to know just what the act is. There might also be a dispute over whether the defendant even did the act --- again that argument cannot be made effectively if the defendant doesn't know what the act is. Moreover, it is important to get the court attuned to proper purposes and propensity inferences as soon as possible --- and that is difficult to do if the court does not know what the evidence is.

Assuming the Committee wishes to require more specificity in the notice provision, the question is how to accomplish this objective.

One possible solution is simply to delete the "general nature" language --- in which case the notice provision could look like this:

> **(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.

A Committee Note excerpt might look like this:

> The notice provision has been amended to require the government to provide a more detailed description of the evidence that the government intends to offer. The term "general nature" has been read in some courts to allow the government to meet its disclosure obligation without describing the specific act that the evidence would be offered to prove, and without describing the source or form of the evidence. Deleting the term "general nature" means that the government must describe the source of the evidence, the form of the evidence, and the act that the government seeks to prove with the evidence. The notice needs to be sufficiently detailed to allow the defendant (and the court) to determine how the act to be proved is probative for a specific articulated purpose.

Another possibility is to borrow from the amendment to the Rule 807 notice provision that has been unanimously approved by the Committee. That amendment requires the proponent to disclose the "substance" of the evidence. Employing the same language in Rule 404(b) would of course promote uniformity. And the word "substance" arguably provides a bit more guidance than no guidance at all. Though on the other hand it could be argued that "substance of the evidence" could give rise to dispute about how detailed the notice should be, whereas requiring notice of "the evidence" calls for a broader disclosure of all information that would describe the evidence.

If the term "substance" is used, the amendment to the notice provision would look like this:

> **(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~~ substance 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.

The Committee Note excerpt could look like this (borrowing from the Note to the proposed amendment to Rule 807):

> The notice provision has been amended to require the government to provide a more detailed description of the evidence that the government intends to offer. The term "general nature" has been read in some courts to allow the government to meet its disclosure obligation without describing the specific act that the evidence would tend to prove, and without describing the source or form of the evidence. The notice needs to be sufficiently detailed to allow the defendant (and the court) to determine how the act to be proved is probative for a specific articulated purpose. The Rule requires the proponent to disclose the "substance" of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the "substance" of the evidence). Under the amendment the government must describe the source of the evidence, the form of the evidence, and the act that the government seeks to prove with the evidence.

2. Timing Issues.

A number of Committee members at the last meeting indicated an interest in moving up the timing of the notice of intent to use 404(b) evidence. This could be a useful way to get the parties and the court attuned at the outset to whether the asserted purpose for the evidence proceeds through a non-propensity inference.

Currently, Rule 404(b) requires the government to provide "reasonable notice * * * before trial." This essentially means that there is no clear time period within which notice must be provided, and courts have varied on what is "reasonable." *Compare 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), *with United States v. Williams,* 792 F.Supp. 1120 (S.D.

Ind. 1992) (holding that reasonable notice under 404(b) requires notice to be provided 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. White,* 816 F.3d 976, 984 (8th Cir. 2016) (rejecting the argument that notice must be provided two weeks prior to trial, because the standard is one of reasonableness under the circumstances; finding that notice provided one week before trial was reasonable).

Adding a specific time before trial by which notice must be provided would do a better job of accelerating the notice requirement than any "reasonableness" standard can provide. It is true that the virtue of clarity also leads to the possibility of rigidity. Surely there will be situations in which the proponent will not be able to comply with a specific deadline. But that concern is ameliorated by the good cause exception that is currently provided for in Rule 404(b).

The proposal for an amendment to the notice requirement that was made by a Committee member last meeting would require notice to be provided "at least two weeks before trial, unless the court, for good cause, excuses this requirement." Setting the date in terms of weeks would be unusual for the national rules --- which are set in terms of days. See, e.g., Evidence Rules 412 (14 days); Civil Rule 27(a)(2) (21 days); Civil Rule 12 (21 days); Criminal Rule 12.1 (14 days). Thus it would appear preferable, for purposes of uniformity, to set the period as "at least 14 days before trial."

One 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 14-day period falls on a weekend or holiday. The time-counting rules clearly say that you automatically add another day to the period (which, as applied here, means a 15-day notice period if the 14th day is a holiday). But, again, those rules do not apply to the Evidence Rules. But if the period is a multiple of 7, there is not much of a problem, because the time is counted backward from the day of trial, so counting multiples of 7 backward can at least never land on a weekend. While it might end on a holiday, a court in such a rare case could use the time-counting rules as guidance even though they are not binding.

If the time period for notice is to be 14 days before trial, the change could look like this:

> **(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 at least 14 days before trial — or at a later date ~~during trial~~ if the court, for good cause, excuses ~~lack of pretrial notice~~ this requirement.

The Committee Note excerpt for this change could look like this:

> The rule has been amended to add a requirement that notice be provided at least 14 days before trial unless the court for good cause allows notice at a later date. The "reasonableness" standard under the original rule led to differing results, and in some cases courts found it "reasonable" when the notice was provided only a few days before trial. With Rule 404(b) evidence, it is particularly important to have accelerated notice, because it is critical for the parties and the court to discuss and evaluate the purpose for which the evidence is offered at an early point in the proceedings. Early notice allows the court to focus at the outset on whether the evidence is offered for a proper purpose, and on whether the probative value of the evidence for that purpose is dependent on a propensity inference.

E. The Suggestion to Delete the Proper Purposes Language in Rule 404(b)(2)

At the last meeting, a Committee member suggested that Rule 404(b)(2) should be amended to delete the list of proper purposes. One possible rationale for deleting the provision is that it states the obvious. The first sentence of Rule 404(b)(1) states that other acts evidence is not admissible to prove conduct in accordance with character. By inference that means the bar does not apply if the bad act evidence is offered to prove something *other* than conduct in accordance with character. So while the proper purposes provision might be useful to highlight the principle that the Rule 404 bar applies only if the evidence is offered to prove conduct in accordance with character, it is not necessary and arguably has no substantive effect.

Another possible argument for deleting the proper purpose language is that it has been read to mean that Rule 404(b) is one of presumptive admissibility --- which should not be the case and which some courts have found to be an improper expansion of the rule, as discussed above. Deleting the language, with an explanatory Committee Note, might be used to signal that Rule 404(b) is not a rule of inclusion but rather a rule that excludes bad act evidence unless the government can come up with a proper purpose, free of propensity inferences.

With that said, there are strong reasons to be cautious about deleting the proper purposes language. It has been cited and applied in thousands of opinions and so deleting the language could throw decades of precedent into some question. It would be looked at as a major change, when theoretically it is no change at all to the meaning of the Rule. It can be argued that any problem with the rule does not really come from the language, but rather from the knee-jerk application of the rule over time. It could be argued that deleting the language is a necessary wake-up call to courts, to get them to apply the rule with more care. But the change seems so profound that perhaps the other suggested amendments regarding non-propensity inferences would be a better way to provide a wake-up call.

A final concern is that if the proper purposes are deleted, then Rule 404(b)(2) becomes solely a notice provision. That would mean that any substantive change (such as an active contest

requirement or a non-propensity inferences requirement) would be very difficult to place. Perhaps they could be placed in (b)(1). See below.

If the proper purpose language is deleted, the change would look like this:

(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. If offered for another purpose, that purpose must be actively contested by the opponent. And the probative value for the other purpose may not depend on a propensity inference.

(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.

The excerpt in the Committee Note might read as follows:

Rule 404(b)(2) has been amended to delete the list of proper purposes for evidence of other crimes, wrongs, or acts. The list is not necessary because the rule of exclusion by its terms applies only when the evidence is offered to prove conduct in accordance with character. Thus any non-character purpose for which the evidence is relevant --- by a path of inference not dependent on propensity --- suffices to escape the rule's proscription, and moves the analysis to Rule 403. Besides being unnecessary, the list of purposes has been interpreted by many courts, incorrectly, as establishing a "rule of inclusion" under which other act evidence is presumptively admissible. But Rule 404(b) is not a rule of inclusion. It is a rule that excludes evidence when offered to prove conduct in accordance with character.

Of course, other act evidence remains admissible for all the purposes previously listed, so long as the probative value of the evidence for such purpose is not dependent on a propensity inference.

F. The Grand Finale --- Trying to Put the Changes Together

This exercise is intended to provide an overview of what all the changes discussed above might look like if they are implemented together.[10] Of course it is fairly unlikely that the Committee will decide to approve all the changes discussed. But just for discussion's sake, let's see what the whole thing put together might look like.

(b) Other Crimes, Wrongs, or ~~Other~~ Acts.

(1) ***Prohibited Uses.*** Evidence of ~~a~~ any other crime, wrong, or ~~other~~ act --- when offered as indirect evidence of a matter in dispute --- 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~~ Other[11] 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 --- where that purpose has been actively contested by the opponent. But the probative value for the other purpose may not depend on a propensity inference. ~~On request by a defendant in a criminal case, the prosecutor~~

(3) Notice. The proponent must:

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

(B) articulate in the notice the non-propensity purpose for which the proponent intends to offer the evidence;

(C) articulate the chain of reasoning supporting the purpose for offering the evidence; and

(~~B~~ D) do so at least 14 days before trial — or ~~during trial~~ at a later date if the court, for good cause, excuses this requirement ~~lack of pretrial notice~~.

So the changes that are amalgamated here are, going from top to bottom:

- Changing "other" to modify crimes and wrongs.

[10] The exception is the proposal to delete the list of proper purposes in Rule 404(b)(2). That requires relocating the possible additions for active contest and non-propensity inferences from (b)(2) to (b)(1) so it is essentially an alternate structure. That restructuring can be seen on the previous page.

[11] The word "permitted" is not exactly correct because they are only "permitted" if the probative value for the purpose is not substantially outweighed by the prejudicial effect. The text catches that point by stating that the evidence "may be admissible" if offered for another purpose. But "may be admissible" is not the same as "permitted." So if the Rule is going to be amended, there is a good argument that the heading should be changed as indicated. This is another thing that probably should have been caught in the restyling.

● Adding a direct/indirect test to replace the inextricably intertwined doctrine.

● Adding an active contest requirement to the text.

● Including a substantive provision requiring the probative value for the articulated purpose to proceed through a non-propensity inference.

● Applying the notice requirement to civil cases and to criminal defendants. (Note that substantive changes discussed above would of course apply to civil cases and to criminal defendatns).

● Eliminating the request requirement for notice.

● Deleting "general nature" from the notice requirement and replacing it either with nothing or with "substance of".

● Requiring articulation in the notice of the proper purpose and the chain of reasoning supporting the proper purpose.

● Rearranging the notice provision so that the good cause exception applies not only to providing notice about the evidence but also to the articulation requirements.

● Requiring notice to be provided at least 14 days before trial.

Here is a possible Committee Note to cover all these changes:

Rule 404(b) has been amended to improve practice under the Rule, and to provide more assurance that evidence offered to prove conduct in accordance with character will be excluded.

The amendment emphasizes that it is not enough simply to articulate a non-character purpose for evidence of other crimes, wrongs or acts. In order for Rule 404(b) to protect in accordance with its intent, the probative value of the evidence for the proper purpose cannot be dependent on a propensity inference. For example, if evidence of uncharged misconduct is offered to prove intent, it cannot be admitted for that purpose if the inference is, "because the bad act shows he has a propensity to commit a crime like the one charged, it tends to prove he had the intent to commit the charged crime." The proponent must therefore articulate to the court the chain of inferences from the bad act evidence to the purpose for which it is offered, and explain how that chain of inferences does not depend on the actor's propensity.

Even if the proponent articulates a proper purpose for the other act evidence, and the probative value for that purpose proceeds through non-propensity inferences, the

court must still balance the probative value of the evidence against the risk of unfair prejudice. Where the evidence is offered for a proper purpose but the opponent does not actively contest that purpose, its probative value is diminished. For example, assume a defendant in a criminal case is charged with an act of drug distribution, and the government has evidence that the defendant distributed drugs on other occasions. That evidence might be probative of intent. But if the defendant's defense is that he was not in the country on the night of the charged drug deal, intent is not being actively contested; the defendant is arguing that he did not commit the act at all. The probative value of the prior act is accordingly diminished, and its prejudicial effect may well substantially outweigh that diminished probative value.

The amendment provides that Rule 404(b) does not apply to direct evidence of the matter in dispute. For example, in a prosecution for bank robbery, there is no reason to apply Rule 404(b) to testimony from an eyewitness that he saw the defendant rob the bank. Rule 404(b) has no application because there can be no argument that in presenting that evidence the prosecutor is trying to raise the inference that the defendant has a propensity; rather she is just proving the crime charged. On the other hand, evidence that the defendant threatened an eyewitness a week after the crime is indirect evidence of the bank robbery, and should be evaluated under Rule 404(b). Some courts, in determining the coverage of Rule 404(b), have held that evidence of acts "inextricably intertwined" with the charged act are outside the rule's coverage. But that iteration has led to confusion and conflicting results in the courts. The Committee believes that a "direct/indirect" distinction is easier to apply and will provide the proper scope of coverage for Rule 404(b).

The notice requirement of Rule 404(b) has been changed in several respects. The most important change is that the proponent of Rule 404(b) evidence must, as part of the notice, articulate a proper purpose for the evidence and provide a non-propensity chain of inferences that lead to that purpose. These procedural requirements will assist the parties and the court in deciding difficult Rule 404(b) and Rule 403 questions at an early point in the proceedings.

The notice requirement has been extended to civil cases and to the defendant in criminal cases. The importance of articulating proper purposes and non-propensity inferences at the outset of the proceedings is not diminished in civil cases or where the defendant in a criminal case offers "reverse 404(b)" evidence. The Committee recognizes that discovery in a civil case is broad, but the civil discovery rules nowhere require a proponent to provide the explanation for using other act evidence that the notice provision in Rule 404(b) now requires.

The amendment eliminates the requirement that the defendant in a criminal case must make a request before notice is provided. That requirement is not found in any other notice provision in the Federal Rules of Evidence. It has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, the benefit to the government of the requirement is minimal, because many local rules require the government to provide notice of Rule 404(b) material without regard to whether it has

been requested. And in many cases, notice is inevitably provided anyway when the government moves *in limine* for an advance ruling on the admissibility of Rule 404(b) evidence. The request requirement has thus become a technicality that has outlived any usefulness it may once have had.

The notice provision has also been amended to require the government to provide a more detailed description of the evidence that the government intends to offer. The term "general nature" has been read in some courts to allow the government to meet its disclosure obligation without describing the specific act that the evidence would be offered to prove, and without describing the source or form of the evidence. Deleting the term "general nature" means that the government must describe the source of the evidence, the form of the evidence, and the act that the government seeks to prove with the evidence. The notice needs to be sufficiently detailed to allow the defendant (and the court) to determine how the act to be proved is probative for a specific articulated purpose. [The Rule requires the proponent to disclose the "substance" of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the "substance" of the evidence).]

The rule has been amended to add a requirement that notice be provided at least 14 days before trial unless the court for good cause allows notice at a later date. The "reasonableness" standard under the original rule led to differing results, and in some cases courts found it "reasonable" when the notice was provided only a few days before trial. With Rule 404(b) evidence, it is particularly important to have accelerated notice, because it is critical for the parties and the court to discuss and evaluate the purpose for which the evidence is offered at an early point in the proceedings. Early notice allows the court to focus at the outset on whether the evidence is offered for a proper purpose, and on whether the probative value of the evidence for that purpose is dependent on a propensity inference.

As restructured, the good cause exception applies not only to the timing of the notice but also to the obligations to articulate a non-propensity purpose and explain how the evidence leads to that purpose independent of a propensity inference. A good cause exception for the articulation requirements is necessary because in some cases a permissible purpose for the evidence may not become clear until just before, or even during, trial.

Reporter's note: If the amendment does not extend the notice requirement to civil cases, then obviously the draft Committee Note will be changed to a solely-criminal context.

IV. The Proposal to Delete the Requirement that the Defendant Must Ask for Notice

The Committee has already decided unanimously to go forward with an amendment to the notice provision of Rule 404(b). That amendment would delete the requirement that the defendant must ask the government to provide notice. If the Committee decides at this meeting that it does not wish to consider any broader amendment to Rule 404(b), then this minor amendment to the notice provision could be proposed to the Standing Committee with the recommendation that it be issued for public comment. But if the Committee decides to continue consideration of broader amendments to Rule 404(b), then this minor proposal will be held back, because amendments to the same rule should be packaged if possible.

The text of the proposed amendment to delete the request requirement is as follows:

Rule 404. Character Evidence; Crimes or Other Acts

*** * ***

(b) Crimes, Wrongs, or Other Acts.

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

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

(A) provide reasonable notice of the general nature 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.

The Committee Note for the amendment to delete the request requirement is as follows:

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

Reporter's Comment: A requirement that notice be in writing?

Note that Rule 404(b) does not require notice to be in writing. If the notice provision goes forth, it will likely be coupled with a proposal to amend the notice provision of Rule 807. That proposal would require notice to be in writing. So it might be thought that a similar written notice requirement should be added to Rule 404(b). This would be easy to do --- just add the word "written" between "reasonable" and "notice." And the Committee Note on that change could be the same as that provided for in the Rule 807 proposal, which essentially states that written notice prevents any argument about whether notice was provided.

But it should be noted that the Committee has already considered the possibility of adding a written notice requirement to both Rule 807 and 404(b). Here is an excerpt from the Minutes of the Spring, 2016 Committee meeting:

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

Of course the Committee is free to reconsider its prior determination and decide to add a notice requirement to Rule 404(b). Also, some of the iterations of the notice requirement discussed earlier would extend that requirement to parties in civil cases and to the criminal defendant. If those extensions are proposed, then the stated reason for rejecting a written notice requirement would no longer be applicable. As stated above, if the Committee does decide to add a written notice requirement to Rule 404(b) it would be simple to change the text and add to the Committee Note.

TAB 6

FORDHAM

University School of Law

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

Daniel J. Capra
Philip Reed Professor of Law

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

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Fall Conference on Rule 702
Date: April 1, 2017

As discussed at the last Committee meeting, the Advisory Committee on Evidence Rules is preparing a Conference on Rule 702 --- specifically on developments regarding expert testimony that might justify an amendment to Rule 702. The major development to be addressed is the challenges raised in the last few years to forensic expert evidence. In 2009, the National Academy of Sciences issued an important report, concluding that many forensic techniques were not scientific. This report has led to many new challenges to such forensic testimony as ballistics, bite mark identification, and handwriting identification. Then a few months ago the President's Council of Scientific and Technical Advisors (PCAST) issued a detailed report challenging the reliability of various forms of forensic testimony and providing suggestions for how these forensic inquiries can be validated. The Chair of PCAST contacted the Reporter of the Evidence Rules Committee to brainstorm on how the PCAST suggestions might be implemented as "best practices" under Rule 702. The Conference on Rule 702 is the first step in that process.

Besides the new challenges to forensic expert testimony, there are a number of other issues regarding expert testimony that judges and members of the public have asked the Committee to review. Among them are:

- Are courts accurately applying the admissibility factors established in the 2000 amendment to Rule 702 --- specifically that the expert must have a sufficient basis and the methodology must be reliably applied?

- How should a court assess the reliability of non-scientific or "soft science" experts?

- What special problems in evaluating challenges to expert testimony arise in criminal cases?

The Conference will be convened to discuss all of the above issues, though the major focus will be on forensic experts.

The Conference will take place before the Fall Committee meeting on Friday, October 27, 2017 at Boston College Law School. The Conference will begin at 8:30 a.m. and it is anticipated that it will run over into the afternoon.

So far we have commitments from the following people to make presentations at the Conference:

- Judge Alex Kozninski, Ninth Circuit Court of Appeals
- Judge Jed Rakoff, Southern District of New York
- Judge Amy St. Eve, Northern District of Illinois
- Judge Paul Grimm, District of Maryland
- Dr. Eric Lander, Harvard University, Broad Institute, Chair of PCAST
- Professor Charles Fried, Harvard Law School
- Professor Jonathan Koehler, Northwestern University Law School

We invite and seek the Committee's recommendations on other participants who should be invited. We also seek input on other issues and problems regarding Rule 702 that might be the subject of discussion at the Conference.

TAB 7

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FORDHAM

University School of Law

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

Daniel J. Capra
Philip Reed Professor of Law

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

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Research Regarding the Recent Perception (e-Hearsay) Exception
Date: April 1, 2017

The Evidence Rules Committee has decided not to proceed at this point with an amendment that would add a "recent perceptions" exception to Rule 804. The genesis of the proposal was an article by Professor Jeffrey Bellin, in which he argued that such an exception was necessary to allow admission of reliable electronic communications --- particularly texts, tweets and Facebook posts – that would not be admissible under the traditional hearsay exceptions. The Committee was concerned that the exception would be too broad, allowing admission of texts, tweets, and Facebook posts based more on crowd-sourcing than personal knowledge. And it also concluded that there was no indication that any problem existed that needed to be addressed --- no showing that reliable texts and tweets are currently being excluded, or improperly admitted under other exceptions.

The Committee did, however, resolve to monitor developments in the case law on hearsay objections to texts, tweets, and other social media communication. The minutes of the Fall 2014 meeting describe the Committee's determination:

> Ultimately, the Committee decided not to proceed on Professor Bellin's proposal to add a recent perceptions exception to Rule 804. It did not reject a possible reconsideration of a recent perceptions exception, however. The Committee asked the Reporter * * * to monitor federal case law to see how personal electronic communications are being treated in the courts. Are there reliable statements being excluded? Are such statements being admitted but only through misinterpretation of existing exceptions, or overuse of the residual exception?

This memo provides an update on the federal case law involving electronic communications --- especially texts, tweets and Facebook posts --- in cases where a hearsay objection has been made. The goal of the memo is to determine: 1) whether electronic communications that appear to be reliable are being excluded because they don't fit into existing

exceptions; and 2) whether such communications are being admitted as reliable, but only by misapplying existing exceptions (e.g., finding the declarant excited when she was not, overusing the residual exception,[1] etc.).

Before getting to the cases, though, it should be remembered that the FJC report on excited utterances and present sense impressions --- reviewed by the Committee last year --- cites a study indicating that it is easier to lie if the communicants are not face to face:

> Lying appears to be more difficult when conducted in personal settings; for example, the decision to lie has been observed to take twice as much time when testing is conducted person-to-person instead of by computer.

The FJC cites Jeffrey J. Walczyk et al., *Lying Person-to-Person about Life Events: A Cognitive Framework for Lie Detection*, 58 Pers. Psychol. 141, 159–60 (2005) for this proposition. A hearsay exception for recent perceptions, basically geared toward social media communications, would be in tension with these findings. If the findings are correct, there should be *less* time permitted between the event and the electronic communication, not more.

The FJC also makes the point that it is difficult to lie if the statement is being made to a person who can also perceive the event. (That is part of the reliability-grounding for present sense impressions). But the problem with social media communications is that they are often *not* made to one with personal knowledge of the event described. This could be thought to be another reason to be cautious before adopting a hearsay exception for recent perceptions, as applied to electronic communications.

[1] The phrase "overusing the residual exception" is intended to mean use of the residual exception beyond the narrow application that Congress intended. If, however, the Committee decides to expand the coverage of the residual exception --- a topic taken up in another memo of this agenda book --- then it is possible that the exception properly could cover a fair amount of electronic communications that are not admitted under other exceptions. It might be that an expanded residual exception would make it unnecessary to take up the possibility of a recent perceptions exception.

Outline on Recent Cases Involving Admissibility of Electronic Communications Under the Federal Hearsay Rule and Its Exceptions.

I. Electronic Communications Properly Found to be Not Hearsay

Threats: ***United States v. Encarnacion-LaFontaine***, 639 Fed. Appx. 710 (2d Cir. 2016): The defendant, appealing convictions for drug crimes and extortion, argued that threatening Facebook messages should not have been admitted because they were hearsay. The court stated: "His hearsay challenge is easily dismissed because the messages * * * were not admitted for the truth of the matters asserted in them." See Fed.R.Evid. 801(c)(2); see also *United States v. Bellomo*, 176 F.3d 580, 586 (2d Cir.1999) ('Statements offered as evidence of ... threats ... rather than for the truth of the matter asserted therein, are not hearsay.')."

Context: ***United States v. Mathis***, 767 F.3d 1264 (11th Cir. 2014): In a prosecution for enticing minors, the trial court admitted text exchanges between the defendant and a minor, concerning sexual activity. The defendant's side of the text exchange was admitted as statements of a party-opponent; the minor's side of the exchange was admitted as necessary to provide context for the defendant's statements, and the jury was instructed that the minor's statements could not be used for their truth. The court of appeals found no error. ***See also United States v. Reed,*** 2016 U.S. Dist. LEXIS 163275 (E.D. La. Nov. 28, 2016) (finding that a Facebook conversation between the defendant and a reporter was admissible, because the defendant's part of the conversation was not alleged to be hearsay (likely because it would be a clear party-opponent statement), while the reporter's part was admitted to provide the necessary context for the defendant's statements).

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 to show the state of mind of the supervisor in deciding whether to fire the plaintiff. ***See also United States v. Gonzalez***, 560 Fed. Appx. 554 (6th Cir. 2014) (In a prosecution involving fraud and credit card theft, text messages to the defendant were properly admitted as non-hearsay because they provided him information that made him aware of the fraud); ***Hayes v. Sotera Def. Solutions Inc.,*** 2016 U.S. Dist. LEXIS 63559 (E.D. Va. May 12, 2016) (emails containing information on how to reapply for a position in an age

discrimination case were admitted because they were being offered to show the effect on the listener, not the truth of the matter asserted, that these were the actual procedures); ***Borrell v. Bloomsburg Univ.,*** 2016 U.S. Dist. LEXIS 127026 (M.D. Pa. Sept. 19, 2016): In a civil rights action for dismissal from a nursing program, the defendant challenged as hearsay an email from the plaintiff to the defendant, regarding her refusal to take a drug test. The defendant's hearsay objection was overruled because it was admissible to show that the defendant had received the email and not responded to it.

Assertion of rights/verbal act: ***Devona v. Zeitels,*** 2016 U.S. Dist. LEXIS 112267 (D. Mass. Aug. 23, 2016): In a breach of contract through wrongfully dissolved partnership case, the plaintiff offered a November 14, 2011 email sent to the defendant and others to show that the plaintiff had asserted the rights of partnership in winding down. The court found it was not hearsay to the extent it was offered for the limited purpose of showing that the plaintiff asserted partnership rights and objected to closing the partnership.

Effect on the listener: ***Sweeney v. Enfield Bd. of Educ.***, 2016 U.S. Dist. LEXIS 109781 (D. Conn. Aug. 18, 2016): A teacher alleged a violation of substantive and procedural due process after she was suspended without pay for inappropriate remarks to students. The plaintiff objected on hearsay grounds to an email from a student's father to the school administration complaining about an incident. The court found the email admissible; it was not offered for its truth, but for the effect on the listener, as evidence of the administration's basis for discipline. ***See also Holmes v. Branch Banking & Trust Co.***, 2016 U.S. Dist. LEXIS 171088 (D.D.C. Dec. 9, 2016) (emails of customer statements were not offered for the truth of their contents, but to show the defendant's good faith belief in a non-discriminatory reason for termination).

Effect on the listener, and context: ***United States v. Farley***, 2015 WL 6871920 (N. D. Cal. November 9, 2015): In a felon-firearm case, text messages received by the defendant on his cellphone, concerning arrangements to set up gun sales, were found admissible both for effect on the listener and to put the defendant's own statements in context.

Verbal acts: ***Turner v. Am. Building Condo. Corp.***, 2014 U.S. Dist. LEXIS 15804 (S.D. Ohio Feb. 7, 2014): Emails in a contract case were found not hearsay because they were "verbal acts, offered to show what was said when and by whom. The statements themselves are the evidence, not the truthfulness or lack thereof of what the statements purport to express."

Incoming texts requesting drugs are admissible for the fact they were made: ***United States v. Ellis***, 626 Fed. Appx. 148 (6th Cir. 2015): The court found no error in the lower court's ruling that incoming text messages were not hearsay because "they were used to prove that individuals repeatedly contacted Ellis for narcotics purchases, not for their truth. *See, e.g., United States v. Rodriguez–Lopez*, 565 F.3d 312, 315 (6th Cir.2009) ('Even if the statements were assertions, the government offers them, not for their truth, but as evidence of the fact that they

were made. The fact that Rodriguez received ten successive solicitations for heroin is probative circumstantial evidence of his involvement in a conspiracy to distribute heroin.')."

Consumer confusion: ***OraLabs, Inc. v. King Group LLC***, 2015 WL 4538444 (D. Colo. July 28, 2015): In a case under the Lanham Act, consumer tweets indicating confusion about a product were admitted as not hearsay, because the assertions in the tweets were not offered for their truth but rather for the fact that they were untrue. (Other courts admit such statements, electronic or otherwise, under the state of mind exception).

Circumstantial evidence of connection: ***United States v. Edelen***, 561 Fed. Appx. 225 (4th Cir. 2014): Appellants were found guilty of conspiracy to kidnap. They argued it was error to admit a text that was sent to Edelen's phone the day before the attack, by a contact named "Puffy." The text informed Edelen of the victim's location. The court found that the text was properly admitted as not hearsay: it formed a link between Edelen and "Puffy" by the fact that it was made, and it supported the inference that Edelen had access to, and likely received, certain information about the victim prior to the commission of the offense. It was not offered to prove that the victim was actually located at a certain place.

Circumstantial evidence of state of mind: ***United States v. Churn***, 800 F.3d 768 (6th Cir. 2015): In a bank fraud prosecution, the court admitted emails sent to the defendant by a loan officer, in which the officer reported his concerns about the truthfulness of some of the defendant's representations in obtaining bank loans. The emails were not offered for the truth of any fact, but only to show the officer's state of mind and her concern over whether she was receiving inaccurate information. ***See also Hopkins v. Amtrak***, 2016 U.S. Dist. LEXIS 57236 (E.D.N.Y.): When the plaintiff was subject to an electric shock after climbing on top of a train, the court admitted text messages sent to the plaintiff as circumstantial evidence of the state of mind of the sender, that they thought the plaintiff was acting erratically and were concerned. The text messages were not admitted to prove the truth of the matter asserted. ***See also United States v. Shields***, 2016 WL 7435671 (9th Cir. Dec. 21, 2016) (finding that district court had properly admitted, with limiting instructions, an email exhibit offered to show what a co-defendant "knew and understood").

Non-assertive communication: ***United States v. Gill,*** 2016 U.S. App. Lexis 9178 (9th Cir.): On an appeal for conspiracy to distribute methamphetamine, the court admitted several text messages because they were statements of a party opponent or a co-conspirator. The Defendant challenged the admission of the name on the text messages ("Gill Mark") claiming that the name was inadmissible hearsay. The court held that a name is not an assertion, and therefore not hearsay.

II. Hearsay Found Admissible — Correctly — Under Existing Exceptions:

Party-opponent statement: ***United States v. Brinson***, 772 F.3d 1314 (10th Cir. 2014): A text message from the defendant to a prostitute was properly admitted as the defendant's own statement under Rule 801(d)(2)(A). The prosecution showed by a preponderance of the evidence that the text was sent by the defendant: the account was registered to an email address registered to the defendant; the defendant's first name was used in the text; a witness testified that the defendant had identified himself by a nickname that was in the text; and two witnesses testified that the defendant's Facebook name was that nickname. ***See also United States v. Moore***, 611 Fed. Appx. 572 (11th Cir. 2015) (text messages were party-opponent statements); ***Greco v. Velvet Cactus, LLC***, , 2014 U.S. Dist. LEXIS 87778 (E.D. La.) (text messages admitted as party-opponent statements); ***Vaughn v. Target Corp***., 2015 WL 632255 (W.D. Ky.) (In a slip and fall case, an entry on the plaintiff's Facebook page indicating her lack of injury was admitted under Rule 801(d)(2)(A)); ***Hopkins v. Amtrak***, 2016 U.S. Dist. LEXIS 57236 (E.D.N.Y.) (Facebook posts were admissible as statements of party opponent as long as the statements by other individuals were redacted before the Facebook posts were admitted); ***United States v. Browne,*** 834 F.3d 403, 405 (3d Cir. 2016)(holding that the four Facebook chats that involved the defendant, and that were properly authenticated were admissible party-opponent statements); ***United States v. Lewisbey,*** 843 F.3d 653 (7th Cir. 2016) (text messages and social media posts were made by the defendant and so were admissible over a hearsay objection as party-opponent statements).

Texts are party-opponent statements where the government presents evidence that they were more likely than not made by the defendant: ***United States v. Ellis***, 2015 WL 5637551 (6th Cir.): "The government used Ellis's outgoing messages to prove his intent to distribute the marijuana found in his possession. Ellis maintains that the phone's outgoing messages constitute hearsay statements, inadmissible as admissions of a party-opponent * * * because the government failed to show that Ellis is in-fact the declarant. But Ellis cannot point to any clear error in the district court's preliminary finding that it was more likely than not that he made the statements in question. *See* Fed.R.Evid. 104(a). As the court noted, several pieces of evidence supported that finding: the phone was in his possession, contained photographs of Ellis and text messages addressed to "J" and "Javon," and listed his brother and girlfriend as contacts."

Party-opponent statement --- so long as the government can show that the text was from the defendant: ***United States v. Benford***, 2015 WL 631089 (W.D. Okla. Feb. 12, 2015): In a felon-firearm prosecution, the defendant challenged text messages that were setting up a gun transaction. The defendant argued that the texts were hearsay but the court stated that "a statement is not hearsay if it is offered against a party and is the party's own statement." The court further noted that "[t]he government, as proponent of the text messages, must show by a preponderance of the evidence that defendant made the statement. *See United States v. Brinson*, 772 F.3d 1314, 1320 (10th Cir.2014)." Thus, while the standard for authentication is enough for

a reasonable person to find that the text is from the defendant, the test for satisfying the hearsay standard is higher --- Rule 104(a). On the Rule 104(a) question, the court ruled as follows:

> Here, the government contends the text messages were retrieved from the cellphone found on Defendant's person at the time of his arrest. The government intends to offer evidence that the phone was password protected and that Defendant provided his password to police at the time of his arrest. According to the government, police thereafter obtained a search warrant to search the contents of the phone. Although the text messages at issue contain no identifying information, *i.e.*, no names are referenced in the text messages, the government contends other text messages retrieved from the cellphone include monikers that sufficiently identify Defendant. Moreover, Defendant does not offer evidence that the cellphone did not belong to him or that some other person had access to his cellphone. Subject to appropriate identifying information presented by the government to sufficiently demonstrate Defendant authored the text messages, those messages are not inadmissible hearsay.

The court also noted that while the defendant did not challenge the *incoming* texts on hearsay grounds, any such challenge would fail because those statements were admissible for the non-hearsay purpose of providing context for the defendant's own statements. *See United States v. Beckman*, immediately below. **Compare *Linscheid v. Natus Medical Inc.***, 2015 WL 1470122 (N.D. Ga. Mar. 30, 2015) (Linkedin posting to prove what the plaintiff's job was in an FLSA case: the posting was inadmissible because the defendant made no attempt to show that the posting was made by the plaintiff; the standard of proof for establishing that the party-opponent made the statement is a preponderance of the evidence; there is no indication in the facts that the posting would fit a recent perceptions exception).

Chatroom conversation admissible as party-opponent statement and as non-hearsay context: *United States v. Beckman*, 2015 U.S. App. Lexis 12238 (6th Cir. July 13, 2015): In a child pornography case, a chatroom conversation was properly admitted against the defendant:

> Beckman also claims that the chats with unidentified persons constituted inadmissible hearsay. But Beckman concedes he is jimmyab2010; thus his portion of the chats were admissions of a party opponent, not hearsay. The other parties' portions of the chats were properly admitted to provide context to Beckman's own statements. *See United States v. Henderson*, 626 F.3d 326, 336-37 (6th Cir. 2010) (observing that statements Henderson made during recorded telephone conversations were non-hearsay admissions under Fed. R. Evid. 801(d)(2)(A), and the statements made by others were not admitted to show the truth of the matter asserted, but to provide context for Henderson's admissions).

See also United States v. Lemons, 792 F.3d 941 (8th Cir. 2015): In a trial involving social security disability fraud, the trial court admitted the defendant's Facebook posts indicating that she had a very active lifestyle. These posts were party-opponent statements. Some people replied to her posts, and, to the extent that the defendant replied back to those posts, the third party reply posts could have been admitted for the non-hearsay purpose of context: "Some of the Facebook posts at issue here are in the nature of a conversation between Lemons and third parties, and the

district court could reasonably have believed that review of [the complete conversation] would enlighten the jury about the meaning of admissions by Lemons." But the trial court erred because it did not provide a limiting instruction to that effect. The court held that the error did not meet the plain error standard.

Party-opponent and co-conspirator: ***United States v. Olivo***, 2016 U.S. App. LEXIS 20267 (2d Cir. Nov. 10, 2016): In a conspiracy to traffic cocaine and methamphetamine case, the defendant challenged the admission of text messages on cell phones found in his apartment. The court found no error, as the text messages were either party-opponent statements (his own), or co-conspirator statements (responses from others, and there was "ample independent corroborating evidence" that the defendant and the declarants were co-conspirators).

Party-opponent agent's statement: ***United States v. Wilson***, 788 F.3d 1298 (11th Cir. 2015): The defendant was charged with converting to his personal use checks issued as a result of fraudulently filed federal tax returns. He claimed he was a legitimate check casher and didn't know the Treasury checks were obtained by fraud. The defendant's former attorney had engaged in text exchanges with an I.R.S. agent, and the government proffered the attorney's texts at trial. The defendant lodged a hearsay objection but the court admitted the texts. The court of appeals found no error, holding that the text was made by the lawyer acting as the attorney's agent, and concerned a matter within the scope of that agency.

Party-opponent agent's statement: ***United States v. McDonnell***, 2014 WL 6772480, at *1 (E.D. Va.) (admitting an e-mail by the defendant's employee against the defendant pursuant to Rule 801(d)(2)(D) because the email was about a matter within the scope of the declarant's employment). ***See also, Sibley v. Sprint Nextel Corp.,*** 2016 U.S. Dist. LEXIS 164669: (D. Kan. Oct. 15, 2016) (statements in emails were made by Sprint's agent or employee within the scope of that relationship; thus, they were admissible as party-opponent statements); ***Columbia Cas. Co. v. Neighborhood Risk Mgmt. Corp.,*** 2016 U.S. Dist. LEXIS 111553 (S.D.N.Y. Aug. 22, 2016) (finding emails from the defendants' insurance consultant were admissible as party-opponent statements under Rule 801(d)(2)(D)).

Co-conspirator Exemption: ***United States v. Thompson***, 568 Fed. Appx. 812 (8th Cir. 2014): Appellants were found guilty of conspiring to possess and possessing oxycodone with intent to distribute. The government's case against the Thompson twins included text messages between Wadley and the twins discussing a trip from New York to Florida, the specific amount of pills to be purchased from the undercover agent, and elaborate negotiations of the purchase price. One defendant contended that the text messages constituted impermissible hearsay, but the court found them properly admitted as statements between co-conspirators during the course and in furtherance of the conspiracy. ***See also United States v. Moore***, 2015 WL 2263987 (11th Cir. May 15, 2015) (text messages were statements by a coconspirator during the course and in furtherance of a conspiracy); ***United States v. Arnold***, 2015 WL 1347186 (W.D. Okla. Mar. 25, 2015) (same); ***United States v. Norwood***, 2015 WL 2250481 (E.D. Mich. May 13, 2015) (rap videos made by a coconspirator were admissible under the coconspirator exemption; they were

made specifically to threaten witnesses who would testify against conspirators); ***United States v. Wright***, 2016 U.S. Dist. LEXIS 87938 (N.D. Iowa) (holding that text messages regarding agreements to provide drugs were admissible as statements by co-conspirators and other text messages were admitted because they were offered for the effect on the listener or were otherwise not offered for the truth of the matter asserted) ***United States v. Velasquez***, 2016 U.S. App. LEXIS 19966 (9th Cir. Nov. 4, 2016) (text messages between co-conspirators); ***United States v. De La Torre***, 2017 U.S. Dist. LEXIS 943 (D. Neb. Jan. 4, 2017) (finding photographs of text messages admissible as co-conspirator statements in a methamphetamine trafficking case); ***United States v. Trammel***, 2016 U.S. App. LEXIS 21469 (5th Cir. Dec. 1, 2016) (finding text messages sent by co-conspirators in a methamphetamine distribution case to fall within the exception for statements made during and in furtherance of the conspiracy).

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Website for public records: ***United States v. Iverson***, 818 F.3d 1015 (10th Cir. 2016): The government proved that a bank was FDIC insured through testimony of an agent who viewed that fact on the FDIC website. The court found no error because, while the statement on the FDIC website was offered for its truth, the statement was a public report admissible under Rule 803(8). The court noted that government reports "are continually being placed on the internet to allow easy access to the general public. Their electronic format does not, by itself, prevent them from qualifying as public records." As authority the court cited Fed. R.Evid. 101(b)(6), the rule added in the restyling, providing that any reference to a writing includes electronic information. The court also noted that "courts have considered the FDIC website so reliable that they have taken judicial notice of information on it."

Web postings as declarations against interest: ***Linde v. Arab Bank PLC***, 2015 WL 1565479 (E.D.N.Y. Apr. 8, 2015): In a civil case against a bank for providing material support to Hamas, the court found that web postings in which Hamas claimed responsibility for terrorist attacks were properly admitted as declarations against interest. The court stated that accepting such responsibility clearly subjected Hamas to a risk of criminal punishment. The fact that Hamas may also have had a "public relations" motive to claim responsibility did not render the statements inadmissible because there is nothing in Rule 804(b)(3) requiring the declarant to have *solely* a disserving interest. The court also noted that because this was a civil case, the corroborating circumstances requirement of Rule 804(b)(3) was not applicable. (Of course the web postings had to be authenticated, but the court found sufficient authentication given the circumstances of the posting, under Rule 901(b)(4)).

III. Use—or Possible Overuse? --- of the Residual Exception

Facebook Post: ***Ministers and Missionaries Ben. Bd. v. Estate of Flesher***, 2014 WL 1116846 (S.D.N.Y.): In a weird case involving a dispute about an estate, a major fact question was whether Flesher was domiciled in Colorado at the time of his death. The defendant offered a printout of a post from Flesher's Facebook page, in which Flesher stated that he was in Colorado and intended to stay there. The court found these statements admissible under Rule 807, in light

of authentication by a close friend and "corroboration by other documentary evidence." It is difficult to assess whether the court stretched the residual exception and would not have had to do so if a recent perceptions exception had been available. The analysis is terse. But even if the analysis were wrong, a recent perception exception would not have been needed to admit the Facebook post. The assertions in the post, about intent to stay in Colorado, were surely admissible under the state of mind exception and the *Hillmon* doctrine. If the *Hillmon* doctrine allows hearsay to prove an intent to *go* to Colorado, it clearly allows hearsay to prove an intent to *stay* there.

IV. Hearsay That Was Admitted On Improper Grounds, But Proper Grounds for Admissibility Existed

Text Messages Admitted As Business Records Instead of Non-Hearsay: *United States v. Caraballo*, 2016 U.S. App. LEXIS 13857 (2d Cir.): When appealing a murder conviction, the defendant argued that a series of text messages between the victim and her bail bondsmen were inadmissible hearsay. While the Court of Appeals concluded that the text messages were erroneously admitted under the business records exception, the court found no error because the government was not offering the text messages for their truth. Rather, the government was offering the text messages to show that the bail bondsmen was in contact with the victim until she stopped responding.

V. Hearsay Improperly Found Inadmissible

Text Messages that should not have been considered hearsay: *United States v. Rowland*, 826 F.3d 100 (2d Cir. 2016): A former governor was found to have falsified his relationship with two congressional candidates. He challenged a number of rulings, including the decision to exclude emails and text messages that he wanted to introduce involving his discussion with Apple's Chief Operating Officer. The district court concluded that the text messages and emails were hearsay and excluded the evidence. The circuit court found that the emails were not being offered for the truth, but instead to show communications with the Apple COO. However, as the emails were allowed to be used to refresh the witness's recollection and did not appear to have any other impact on the jury, the improper exclusion was considered harmless error.

VI. Hearsay Properly Found Inadmissible --- Would Not Have Been Admissible Under a Recent Perceptions Exception

Email Chain: *Ira Green, Inc. v. Military Sales & Serv. Co.*, 775 F.3d 12 (1st Cir. 2014): the trial court admitted a chain of emails between business people under the business records exception. The court found that this was error because the emails were exchanged in 2012 and described what purportedly occurred in 2011. The court stated that "[t]his lack of contemporaneity puts the exhibit outside the compass of the business records exception." Nor

would that time period be "recent" enough to be within any fair conception of the recent perceptions exception.

Emails not regular enough for admission as business records: ***Queen v. Schultz***, 2016 U.S. App. LEXIS 23479 (D.C. Cir. Dec. 9, 2016): In a breach of contract case, the plaintiff moved for a new trial because of the exclusion of 1,200 emails the plaintiff had sent and received in his role as a business partner. The court found it was not an abuse of discretion because the records lacked the needed indicia of trustworthiness under the business records exception. Petitioner admitted his "focus was to get a television show, not to keep records exactly accurate." There was no showing that the records were made with sufficient contemporaneity to support admission under a recent perceptions exception.

Email on an Employee's Activity: ***United States v. Lloyd***, 807 F.3d 1128 (9th Cir. 2015): Two of five defendants convicted of selling unregistered securities appealed their convictions and sentences. The court agreed with one defendant that the trial judge abused discretion in admitting an e-mail from the office manager where the defendant worked as a telemarketer, to a third party, stating that the defendant had been given five warnings to stop giving potential investors false information. Although the government argued the e-mail was admissible to prove the defendant's state of mind, the court reasoned that it could not prove his state of mind unless the content of the e-mail were used for its truth.

The manager's email was a summary of information occurring over a year after the recounted events. Hopefully it is not the kind of email that would be admitted under a "recent" perceptions exception.

Employee's email inadmissible hearsay when offered by the employer: ***Avaya Inc., RP v. Telecom Labs, Inc.***, 838 F.3d 354, 411 (3d Cir. 2016) ("The only specific example TLI provided of a customer who declined its services because of a FUD letter was substantiated only by an email — inadmissible as hearsay — sent by a TLI employee complaining about the lost contract"; no indication that these email was sent close enough in time to the lost contract to be admissible under a recent perceptions exception).

Webpage was inadmissible hearsay: ***Moss v. Texarkana Ark. Sch. Dist.***, No. 4:14-cv-4157, 2016 U.S. Dist. LEXIS 175714 (W.D. Ark. Dec. 20, 2016): In an employment discrimination action the plaintiff attempted to admit exhibits containing a webpage on the dangers of ingesting soy milk (to show her in-class statements had been accurate and not a sufficient cause for termination). The court found the webpage to be hearsay without exception. Clearly the webpage would not have fit within the recent perceptions exception.

Email from an attorney during a dispute: ***Sansone v. Brennan***, No. 13 C 3415, 2017 U.S. Dist. LEXIS 13666 (N.D. Ill. Feb. 1, 2017): In an action under the Rehabilitation Act (regarding a parking spot for a plaintiff with multiple sclerosis), the plaintiff moved to exclude emails from the defendant's attorney expressing the defendant's "willingness to continue discussing possible parking accommodations" and the hazards of the plaintiff's previous spot. The court found these quintessential hearsay without exception. Even if these statements are sufficiently contemporaneous, admitting them under a recent perceptions exception would be unjustified because they are not describing any event; moreover they are untrustworthy given the fact that they are prepared by a lawyer in anticipation of litigation.

Emails in Business: ***Am. Home Assur. Co. v. Greater Omaha Packing Co.***, 2014 U.S. Dist. LEXIS 51287 (D. Neb.) (emails not admissible as business records because no showing of regularly conducted activity; no indication that these emails could have been considered statements of recent perception). ***See also Roberts Tech. Grp., Inc. v. Curwood, Inc.***, 2016 U.S. Dist. LEXIS 64538 (E.D. Pa.) (holding that the emails did not fall under the business records exception. Additionally because the emails were written after the relevant phone calls, and close to litigation, they did not meet the present sense impression exception and would be unlikely to qualify under a recent perceptions exception); ***Marine Power Holding, L.L.C., v. Malibu Boats, L.L.C.***, 2016 U.S. Dist. LEXIS 98722 (E.D. La.) (holding that the emails were speculation because the authors' lacked personal knowledge of the events and even if the emails were not speculation they were hearsay that did not qualify under the business record exception); ***Applebaum v. Target Corp.***, 2016 U.S. App. LEXIS 14049 (2d Cir.) (holding that emails that were written after the lawsuit commenced did not qualify as business records; given the anticipation of litigation, they should not be admissible under a recent perceptions exception).

VII. Hearsay Found Inadmissible That Might Be Admissible Under a Statement of Recent Perceptions Exception

Defendant's exculpatory text after an alleged sexual attack: ***United States v. Harry***, 816 F.3d 1268 (10th Cir. 2016): The defendant was charged with sexually assaulting a woman at a party hosted by his friend. After the sex act, the defendant had a text conversation with the friend, and in one text he stated that the complainant was "all over me" during the party. The court held that this text message was properly excluded as hearsay. It might have qualified as a statement of recent perception because it was made only an hour or so after the sex act. It can be debated whether it is a good idea to sponsor a hearsay exception that would admit exculpatory statements of defendants accused of sexual assault, an hour or so after the alleged act.

Text indicating a payment arrangement held inadmissible hearsay: ***United States v. Thomas***, 2015 WL 237337 (D. Conn.): The defendant was charged with sex trafficking of a minor and sought to exclude a number of text messages he exchanged with the minor. The court found that many of the texts from the minor were admissible for the non-hearsay purposes of context or effect on the listener; others were admissible as adoptions because the defendant, by

his responses, indicated assent. But one text from the minor, which indicated that the defendant paid for the minor's cross-country trip, was found inadmissible hearsay. The defendant did not send a responsive text to the assertion; while courts have in many cases found that silence can be an adoption, that assumption is less sustainable when it comes to texts, because there is no indication that the party ever read or considered the accusation.

The minor's statement about the defendant paying her ticket would probably be admissible under a recent perceptions exception --- the minor was not going to testify at trial, and the statement was relatively close in time to whatever payment arrangement was made.

Text messages between the defendant and the witness on the day of the crime: *United States v. Rolle*, 2015 WL 7444844 (2d Cir.): The defendant, charged with violating the Hobbs Act, argued that the trial court erred in prohibiting him from cross-examining a prosecution witness with text messages that he had sent to the witness on the day of the crime. The court found no error, as the statements were hearsay --- they could not be admitted in his favor under Rule 801(d)(2)(A) because they were his own statements. The court's analysis is sparse, and there is no description of what the texts actually were. But as they were sent on the day of the crime, they might well have qualified as statements of recent perception. Whether that would have been a good result is another question. The defendant's own exculpatory statements on the day of the crime don't sound very reliable.

Facebook instant messages about a teacher's termination: *Matye v. City of New York*, 2015 WL 1476839 (E.D.N.Y. Mar. 31, 2015): In a case involving an alleged retaliatory termination in violation of the FMLA, the plaintiff sought to admit two instant messages with former students about an event that had occurred in the school. The court held, without analysis, that the messages were inadmissible hearsay. There is not enough in the reported case to determine whether the messages would have been admissible under a recent perceptions exception. For example, there was no discussion of the time lapse between the event and the statement. Moreover, there was no indication that the students would have been unavailable for trial. Nonetheless, it is at least possible that these messages were the kinds of statements that might be covered by a recent perceptions exception.

Facebook messages and tweets relevant to an employment action: *Herster v. Board of Supervisors*, 2015 WL 5443673 (M.D. La.): The defendant, LSU, moved to exclude Facebook comments and tweets that were made in support of the plaintiff in her disputes with LSU. The comments and tweets were hearsay, and LSU argued that they did not fall under the present sense impression exception to hearsay because it was impossible to know whether the comments were made while or immediately after the declarants learned of the events related. The court agreed with LSU and excluded the evidence. It is unclear, but at least possible, that the court would have been more forgiving of the lack of a showing of timing under a recent perceptions exception. But on the other hand, the case presents the classic kind of "crowdsourcing" social media communications that may not be based on personal knowledge.

Facebook Messages About an "Almost Rape": ***United States v. Browne***, 2016 U.S. App. LEXIS 15668 (3d Cir.). The defendant was on trial for child pornography and other sexual offenses. The government sought to introduce several Facebook chats. While four out of the five chats were admissible because they were statements of a party-opponent, a Facebook chat between two of the victims discussing an "almost rape" of one of the victims was held inadmissible hearsay. Because the two individuals who participated in that chat testified at trial, the messages would not have been admissible under a Rule 804 exception because the witnesses were available. However, had the witnesses been unavailable, and the timing of the messages been more explicit than in the current opinion, it is possible they would have been admitted under a recent perceptions exception instead of being deemed inadmissible hearsay.

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FORDHAM

University School of Law

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

Daniel J. Capra
Philip Reed Professor of Law

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

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Federal Case Law Development After *Crawford v. Washington*
Date: April 1, 2017

The Committee has directed the Reporter to keep it apprised of case law developments after *Crawford v. Washington*. This memo is intended to fulfill that function. The memo describes the Supreme Court and federal circuit case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. The outline begins with a short discussion of the Court's two latest cases on confrontation, *Ohio v. Clark* and *Williams v. Illinois*, and then summarizes all the post-*Crawford* cases by subject matter heading.

I. Recent Supreme Court Confrontation Cases

A. Ohio v. Clark

The Court's most recent opinion on the Confrontation Clause and hearsay, *Ohio v. Clark*, 135 S.Ct. 2173 (2015), sheds some more light on how to determine whether hearsay is or is not "testimonial." As shown in the outline below, the Court has found a statement to be testimonial when the "primary motivation" behind the statement is that it be used in a criminal prosecution. *Clark* raised three questions about the application of the primary motivation test:

1. Can a statement be primarily motivated for use in a prosecution when it is not made with the involvement of law enforcement? (Or put the other way, is law enforcement involvement a prerequisite for a finding of testimoniality?).

2. If a person is required to report information to law enforcement, does that requirement

render them law enforcement personnel for the purpose of the primary motivation test?

3. How does the primary motivation test apply to statements made by children, who are too young to know about use of statements for law enforcement purposes?

In *Clark*, teachers at a preschool saw indications that a 3 year-old boy had been abused, and asked the boy about it. The boy implicated the defendant. The boy's statement was admitted at trial under the Ohio version of the residual exception. The boy was not called to testify --- nor could he have been, because under Ohio law, a child of his age is incompetent to testify at trial. The defendant argued that the boy's statement was testimonial, relying in part on the fact that under Ohio law, teachers are required to report evidence of child abuse to law enforcement. The defendant argued that the reporting requirement rendered the teachers agents of law enforcement.

The Supreme Court in C*lark*, in an opinion by Justice Alito for six members of the Court, found that the boy's hearsay statement was not testimonial.[1] It made no categorical rulings as to the issues presented, but did make the following points about the primary motive test of testimoniality:

> 1. Statements of young children are *extremely unlikely* to be testimonial because a young child is not cognizant of the criminal justice system, and so will not be making a statement with the primary motive that it be used in a criminal prosecution.
>
> 2. A statement made without law enforcement involvement is *extremely unlikely* to be found testimonial because if law enforcement is not involved, there is probably some other motive for making the statement other than use in a criminal prosecution. Moreover, the formality of a statement is a critical component in determining primary motive, and if the statement is not made with law enforcement involved, it is much less likely to be formal in nature.
>
> 3. The fact that the teachers were subject to a reporting requirement was essentially irrelevant, because the teachers would have sought information from the child whether or not there was a reporting requirement --- their primary motivation was to protect the child, and the reporting requirement did nothing to change that motivation. (So there may be room left for a finding of testimoniality if the government sets up mandatory reporting in a situation in which the individual would not otherwise think of, or be interested in, obtaining information).

[1]All nine Justices found that the boy's statement was not testimonial. Justices Scalia and Ginsburg concurred in the judgment, but challenged some of the language in the majority opinion on the ground that it appeared to be backsliding from the *Crawford* decision. Justice Thomas concurred in the judgment, finding that the statement was not testimonial because it lacked the solemnity required to meet his definition of testimoniality.

B. Williams v. Illinois

In *Williams v. Illinois*, 132 S.Ct. 2221 (2012), the Court brought substantial uncertainty to how courts are supposed to regulate hearsay offered against an accused under the Confrontation Clause. The case involved an expert who used testimonial hearsay as part of the basis for her opinion. The expert relied in part on a Cellmark DNA report to conclude that the DNA found at the crime scene belonged to Williams. The splintered opinions in *Williams* create confusion not only for how and whether experts may use testimonial hearsay, but more broadly about how some of the hearsay exceptions square with the Confrontation Clause bar on testimonial hearsay.

The question in *Williams* was whether an expert's testimony violates the Confrontation Clause when the expert relies on hearsay. A plurality of four Justices, in an opinion written by Justice Alito, found no confrontation violation for two independent reasons:

> 1) First, the hearsay (the report of a DNA analyst) was never admitted for its truth, but was only used as a basis of the expert's own conclusion that Williams's DNA was found at the crime scene. Justice Alito emphasized that the expert witness conducted her own analysis of the data and did not simply parrot the conclusions of the out-of-court analyst.
>
> 2) Second, the DNA test that was conducted was not testimonial in any event, because at the time it was conducted the suspect was at large, and so the DNA was not prepared with the intent that it be used against a *targeted individual.*

Justice Kagan, in a dissenting opinion for four Justices, rejected both of the grounds on which Justice Alito relied to affirm Williams's conviction. She stated that it was a "subterfuge" to say that it was only the expert's opinion (and not the underlying report) that was admitted against Williams. She reasoned that where the expert relies on a report, the expert's opinion is useful only if the report itself is true. Therefore, according to Justice Kagan, the argument that the Cellmark report was not admitted for its truth rests on an artificial distinction that cannot satisfy the right to confrontation. As to Justice Alito's "targeting the individual" test of testimoniality, Justice Kagan declared that it was not supported by the Court's prior cases defining testimoniality in terms of primary motive. Her test of "primary motive" is whether the statement was prepared primarily for the purpose of *any* criminal prosecution, which the Cellmark report clearly was.[2]

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[2] Justice Breyer wrote a concurring opinion. He argued that rejecting the premise that an expert can rely on testimonial hearsay --- as permitted by Fed.R.Evid. 703 --- would end up requiring the government to call every person who had anything to do with a forensic test. That was a result he found untenable. He also set forth several possible approaches to permitting/limiting experts' reliance on lab reports, some of which he found "more compatible with *Crawford* than others" and some of which "seem more easily considered by a rules committee" than the Court.

Justice Thomas was the tiebreaker. He essentially agreed completely with Justice Kagan's critique of Justice Alito's two grounds for affirming the conviction. But Justice Thomas concurred in the judgment nonetheless, because he had his own reason for affirming the conviction. In his view, the use of the Cellmark report for its truth did not offend the Confrontation Clause because that report was not sufficiently "formalized." He tried to explain that the Cellmark report

> lacks the solemnity of an affidavit of deposition, for it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained. . . . And, although the report was introduced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation.

Fallout from Williams:

It must be noted that *eight* members of the Court rejected Justice Thomas's view that testimoniality is defined by whether a statement is sufficiently formal as to constitute an affidavit or certification. Yet if a court is counting Justices, it appears that it might be necessary for the government to comply with the rather amorphous standards for "informality" established by Justice Thomas. Thus, if the government offers hearsay that would be testimonial under the Kagan view of "primary motive" but not under the Alito view, then the government may have to satisfy the Thomas requirement that the hearsay is not tantamount to a formal affidavit. Similarly, if the government proffers an expert who relies on testimonial hearsay, but the declarant does not testify, then it can be argued that the government must establish that the hearsay is not tantamount to a formal affidavit --- because five members of the Court rejected the argument that the Confrontation Clause is satisfied so long as the testimonial hearsay is used only as the basis of the expert's opinion.

There is a strong argument, though, that counting Justices after *Williams* is a fool's errand for now --- because of the death of Justice Scalia and the uncertainty over his replacement. What can at least be said is that Justice Alito's opinion becomes more viable on both points --- use of experts and a requirement of targeting for testimoniality --- at least for now, because if *Williams* were retried today Justice Alito's opinion would not be rejected by a majority of the Court.

The problem of course with consideration of these alternatives by a rules committee is that if the Confrontation Clause bars these approaches, the rules committee is just wasting its time. And given the uncertainty of *Williams*, it is fair to state that none of the approaches listed by Justice Breyer are clearly constitutional.

It should be noted that much of the post-*Crawford* landscape is unaltered by *Williams*. For example, take a case in which a victim has just been shot. He makes a statement to a neighbor "I've just been shot by Bill. Call an ambulance." Surely that statement --- admissible against the accused as an excited utterance --- satisfies the Confrontation Clause on the same grounds after *Williams* as it did before. Such a statement is not testimonial because even under the Kagan view, it was not made with the primary motive that it would be used in a criminal prosecution. And *a fortiori* it satisfies the less restrictive Alito view. Thus Justice Thomas's "formality" test is not controlling, but even if it were, such a statement is not tantamount to an affidavit and so Justice Thomas would find no constitutional problem with its admission. See *Michigan v. Bryant*, 562 U.S. 344 (2011) (Thomas, J., concurring) (excited utterance of shooting victim "bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.").

Similarly, there is extensive case law both before and after *Williams* allowing admission of testimonial statements on the ground that they are not offered for their truth. For example, if a statement is legitimately offered to show the background of a police investigation, or offered to show that the statement is in fact false, then it is not hearsay and it also does not violate the right to confrontation. This is because if the statement is not offered for its truth, there is no reason to cross-examine the declarant, and cross-examination is the procedure right that the Confrontation Clause guarantees. As will be discussed further below, while both Justice Thomas and Justice Kagan in *Williams* reject the not-for-truth analysis in the context of expert reliance on hearsay, they both distinguish that use from admitting a statement for a *legitimate* not-for-truth purpose. Moreover, both approve of the language in *Crawford* that the Confrontation Clause "does not bar the use of testimonial statements offered for purposes other than establishing the truth of the matter asserted." And they both approve of the result in *Tennessee v. Street*, 471 U.S. 409 (1985), in which the Court held that the Confrontation Clause was not violated when an accomplice confession was admitted only to show that it was different from the defendant's own confession. For the Kagan-Thomas camp, the question will be whether the testimonial statement is offered for a purpose as to which its probative value is not dependent on the statement being true --- and that is the test that is essentially applied by the lower courts in determining whether statements ostensibly offered for a not-for-truth purpose are consistent with the Confrontation Clause.

II. Post-*Crawford* Cases Discussing the Relationship Between the Confrontation Clause and the Hearsay Rule and its Exceptions, Arranged By Subject Matter

"Admissions" --- Hearsay Statements by the Defendant

Defendant's own hearsay statement was not testimonial: *United States v. Lopez,* 380 F.3d 538 (1st Cir. 2004): The defendant blurted out an incriminating statement to police officers after they found drugs in his residence. The court held that this statement was not testimonial under *Crawford.* The court declared that "for reasons similar to our conclusion that appellant's statements were not the product of custodial interrogation, the statements were also not testimonial." That is, the statement was spontaneous and not in response to police interrogation.

> **Note: The *Lopez* court had an easier way to dispose of the case. Both before and after *Crawford,* an accused has no right to confront *himself*. If the solution to confrontation is cross-examination, as the Court in *Crawford* states, then it is silly to argue that a defendant has the right to have his own statements excluded because he had no opportunity to cross-examine himself. *See United States v. Hansen,* 434 F.3d 92 (1st Cir. 2006) (admission of defendant's own statements does not violate *Crawford*); *United States v. Orm Hieng,* 679 F.3d 1131 (9th Cir. 2012): "The Sixth Amendment simply has no application [to the defendant's own hearsay statements] because a defendant cannot complain that he was denied the opportunity to confront himself."**

Defendant's own statements, reporting statements of another defendant, are not testimonial under the circumstances: *United States v. Gibson,* 409 F.3d 325 (6th Cir. 2005): In a case involving fraud and false statements arising from a mining operation, the trial court admitted testimony from a witness that Gibson told him that another defendant was planning on doing something that would violate regulations applicable to mining. The court recognized that the testimony encompassed double hearsay, but held that each level of hearsay was admissible as a statement by a party-opponent. Gibson also argued that the testimony violated *Crawford.* But the court held that Gibson's statement and the underlying statement of the other defendant were both casual remarks made to an acquaintance, and therefore were not testimonial.

Text messages were properly admitted as coming from the defendant: *United States v. Brinson,* 772 F.3d 1314 (10th Cir. 2014). In a prosecution for sex trafficking, text messages sent to a prostitute were admitted against the defendant. The defendant argued that admitting the texts violated his right to confrontation, but the court disagreed. The court stated that the texts were properly admitted as statements of a party-opponent, because the government had established by a

preponderance of the evidence that the texts were sent by the defendant. They were therefore "not hearsay" under Rule 801(d)(2)(A), and "[b]ecause the messages did not constitute hearsay their introduction did not violate the Confrontation Clause."

Note: The court in *Brinson* was right but for the wrong reasons. It is true that if a statement is "not hearsay" its admission does not violate the Confrontation Clause. (See the many cases collected under the "not hearsay" headnote, infra). But party-opponent statements are only technically "not hearsay." They are in fact hearsay because they are offered for their truth --- they are hearsay subject to an exemption. The Evidence Rules' technical categorization in Rule 801(d)(2) cannot determine the scope of the Confrontation Clause. If that were so, then coconspirator statements would automatically satisfy the Confrontation Clause because they, too, are classified as "not hearsay" under the Federal Rules. That would have made the Supreme Court's decision in *Bourjaily v. United States* unnecessary; and the Court in *Crawford* would not have had to discuss the fact that coconspirator statements are ordinarily not testimonial. The real reason that party-opponent statements are not hearsay is that when the defendant makes a hearsay statement, he has no right to confront himself.

Bruton --- Testimonial Statements of Co-Defendants

Bruton* line of cases not applicable unless accomplice's hearsay statement is testimonial:** ***United States v. Figueroa-Cartagena, 612 F.3d 69 (1st Cir. 2010): The defendant's codefendant had made hearsay statements in a private conversation that was taped by the government. The statements directly implicated both the codefendant and the defendant. At trial the codefendant's statements were admitted against him, and the defendant argued that the *Bruton* line of cases required severance. But the court found no *Bruton* error, because the hearsay statements were not testimonial in the first place. The statements were from a private conversation so the speaker was not primarily motivated to have the statements used in a criminal prosecution. The court stated that the "*Bruton/Richardson* framework presupposes that the aggrieved co-defendant has a Sixth Amendment right to confront the declarant in the first place."

Bruton* does not apply unless the testimonial hearsay directly implicates the nonconfessing codefendant:** ***United States v. Lung Fong Chen, 393 F.3d 139, 150 (2d Cir. 2004)**:** The court held that a confession of a co-defendant, when offered only against the co-defendant, is regulated by *Bruton*, not *Crawford*: so that the question of a Confrontation violation is dependent on whether the confession is powerfully incriminating against the non-confessing defendant. If the confession does not directly implicate the defendant, then there will be no violation if the judge gives an effective limiting instruction to the jury. *Crawford* does not apply because if the instruction is effective, the co-defendant is not a witness "against" the defendant within the meaning of the Confrontation Clause. ***See also Chrysler v. Guiney,*** 806 F.3d 104 (2nd Cir. 2015) (noting that if an accomplice confession is properly redacted to satisfy *Bruton,* then *Crawford* is not violated because the accomplice is not a witness "against" the defendant within the meaning of the Confrontation Clause).

Bruton* protection limited to testimonial statements:** ***United States v. Berrios, 676 F.3d 118 (3rd Cir. 2012): "[B]ecause *Bruton* is no more than a byproduct of the Confrontation Clause, the Court's holdings in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements. Any protection provided by *Bruton* is therefore only afforded to the same extent as the Confrontation Clause, which requires that the challenged statement qualify as testimonial. To the extent we have held otherwise, we no longer follow those holdings." ***See also United States v. Shavers,*** 693 F.3d 363 (3rd Cir. 2012) (admission of non-testifying co-defendant's inculpatory statement did not violate *Bruton* because it was made casually to an acquaintance and so was non-testimonial; the statement bore "no resemblance to the abusive governmental investigation tactics that the Sixth Amendment seeks to prevent").

Bruton* protection does not apply unless the codefendant's statements are testimonial:** ***United States v. Dargan, 738 F.3d 643 (4th Cir. 2013): The court held that a statement made to a cellmate in an informal setting was not testimonial --- therefore admitting the

statement against the nonconfessing codefendant did not violate *Bruton*, because the premise of *Bruton* is that the nonconfessing defendant's confrontation rights are violated when the confessing defendant's statement is admitted at trial. But after *Crawford* there can be no confrontation violation unless the hearsay statement is testimonial.

Bruton* remains in place to protect against admission of testimonial hearsay against a non-confessing co-defendant: *United States v. Ramos-Cardenas, 524 F.3d 600 (5th Cir. 2008): In a multiple-defendant case, the trial court admitted a post-arrest statement by one of the defendants, which indirectly implicated the others. The court found that the confession could not be admitted against the other defendants, because the confession was testimonial under *Crawford.* But the court found that *Crawford* did not change the analysis with respect to the admissibility of a confession against the confessing defendant (because he has no right to confront himself); nor did it displace the case law under *Bruton* allowing limiting instructions to protect the non-confessing defendants under certain circumstances. The court found that the reference to the other defendants in the confession was vague, and therefore a limiting instruction was sufficient to assure that the confession would not be used against them. Thus, the *Bruton* problem was resolved by a limiting instruction.

Codefendant's testimonial statements were not admitted "against" the defendant in light of limiting instruction: *United States v. Harper,* 527 F.3d 396 (5th Cir. 2008): Harper's co-defendant made a confession, but it did not directly implicate Harper. At trial the confession was admitted against the co-defendant and the jury was instructed not to use it against Harper. The court recognized that the confession was testimonial, but held that it did not violate Harper's right to confrontation because the co-defendant was not a witness "against" him. The court relied on the post-*Bruton* case of *Richardson v. Marsh,* and held that the limiting instruction was sufficient to protect Harper's right to confrontation because the co-defendant's confession did not directly implicate Harper and so was not as "powerfully incriminating" as the confession in *Bruton.* The court concluded that because "the Supreme Court has so far taken a pragmatic approach to resolving whether jury instructions preclude a Sixth Amendment violation in various categories of cases, and because *Richardson* has not been expressly overruled, we will apply *Richardson* and its pragmatic approach, as well as the teachings in *Bruton.*"

Bruton* inapplicable to statement made by co-defendant to another prisoner, because that statement was not testimonial: *United States v.Vasquez, 766 F.3d 373 (5th Cir. 2014): The defendant's co-defendant made a statement to a jailhouse snitch that implicated the defendant in the crime. The defendant argued that admitting the codefendant's statement at his trial violated *Bruton*, but the court disagreed. It stated that *Bruton* "is no longer applicable to a non-testimonial prison yard conversation because *Bruton* is no more than a by-product of the Confrontation Clause." The court further stated that "statements from one prisoner to another are clearly non-testimonial."

Bruton* protection does not apply unless codefendant's statements are testimonial: *United States v. Johnson, 581 F.3d 320 (6th Cir. 2009): The court held that after *Crawford, Bruton* is applicable only when the codefendant's statement is testimonial.

Bruton* protection does not apply unless codefendant's statements are testimonial: *United States v. Dale, 614 F.3d 942 (8th Cir. 2010): The court held that after *Crawford, Bruton* is applicable only when the codefendant's statement is testimonial.

Statement admitted against co-defendant only does not implicate *Crawford: Mason v. Yarborough,* 447 F.3d 693 (9th Cir. 2006): A non-testifying codefendant confessed during police interrogation. At the trial of both defendants, the government introduced only the fact that the codefendant confessed, not the content of the statement. The court first found that there was no *Bruton* violation, because the defendant's name was never mentioned --- *Bruton* does not prohibit the admission of hearsay statements of a non-testifying codefendant if the statements implicate the defendant only by inference and the jury is instructed that the evidence is not admissible against the defendant. For similar reasons, the court found no *Crawford* violation, because the codefendant was not a "witness against" the defendant. "Because Fenton's words were never admitted into evidence, he could not 'bear testimony' against Mason."

Statement that is non-testimonial cannot raise a *Bruton* problem: *United States v. Patterson,* 713 F.3d 1237 (10th Cir. 2013): The defendant challenged a statement by a non-testifying codefendant on *Bruton* grounds. The court found no error, because the statement was made in furtherance of the conspiracy. Accordingly, it was non-testimonial. That meant there was no *Bruton* problem because *Bruton* does not apply to non-testimonial hearsay. *Bruton* is a confrontation case and the Supreme Court has held that the Confrontation Clause extends only to testimonial hearsay. ***See also United States v. Clark,*** 717 F.3d 790 (10th Cir. 2013) (No *Bruton* violation because the codefendant hearsay was a coconspirator statement made in furtherance of the conspiracy and so was not testimonial); ***United States v. Morgan***, 748 F.3d 1024 (10th Cir. 2014) (statement admissible as a coconspirator statement cannot violate *Bruton* because "*Bruton* applies only to testimonial statements" and the statements were made between coconspirators dividing up the proceeds of the crime and so "were not made to be used for investigation or prosecution of crime.").

Child-Declarants

Statements of young children are extremely unlikely to be testimonial: *Ohio v. Clark,* 135 S.Ct. 2173 (2015): This case is fully discussed in Part I. The case involved a statement from a three-year-old boy to his teachers. It accused the defendant of injuring him. The Court held that a statement from a young child is extremely unlikely to be testimonial because the child is not aware of the possibility of use of statements in criminal prosecutions, and so cannot be speaking with the primary motive that the statement will be so used. The Court refused to adopt a bright-line rule, but it is hard to think of a case in which the statement of a young child will be found testimonial under the primary motivation test.

Following *Clark,* the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker,* 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark.* The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Co-Conspirator Statements

Co-conspirator statement not testimonial: ***United States v. Felton,*** 417 F.3d 97 (1st Cir. 2005): The court held that a statement by the defendant's coconspirator, made during the course and in furtherance of the conspiracy, was not testimonial under *Crawford.* **Accord** ***United States v. Sanchez-Berrios,*** 424 F.3d 65 (1st Cir. 2005) (noting that *Crawford* "explicitly recognized that statements made in furtherance of a conspiracy by their nature are not testimonial."). ***See also United States v. Turner,*** 501 F.3d 59 (1st Cir. 2007) (conspirator's statement made during a private conversation were not testimonial); ***United States v. Ciresi,*** 697 F.3d 19 (1st Cir. 2012) (statements admissible as coconspirator hearsay under Rule 801(d)(2)(E) are "by their nature" not testimonial because they are "made for a purpose other than use in a prosecution.").

Surreptitiously recorded statements of coconspirators are not testimonial: ***United States v. Hendricks,*** 395 F.3d 173 (3rd Cir. 2005): The court found that surreptitiously recorded statements of an ongoing criminal conspiracy were not testimonial within the meaning of *Crawford* because they were informal statements among coconspirators. **Accord** ***United States v. Bobb,*** 471 F.3d 491 (3rd Cir. 2006) (noting that the holding in *Hendricks* was not limited to cases in which the declarant was a confidential informant).

Statement admissible as coconspirator hearsay is not testimonial: ***United States v. Robinson***, 367 F.3d 278 (5th Cir. 2004): The court affirmed a drug trafficker's murder convictions and death sentence. It held that coconspirator statements are not testimonial under *Crawford* as they are made under informal circumstances and not for the purpose of creating evidence. ***Accord United States v. Delgado,*** 401 F.3d 290 (5th Cir. 2005); ***United States v. Olguin,*** 643 F.3d 384 (5th Cir. 2011); ***United States v. Alaniz,*** 726 F.3d 586 (5th Cir. 2013). ***See also United States v. King,*** 541 F.3d 1143 (5th Cir. 2008) ("Because the statements at issue here were made by co-conspirators in the furtherance of a conspiracy, they do not fall within the ambit of *Crawford's* protection"). Note that the court in *King* rejected the defendant's argument that the co-conspirator statements were testimonial because they were "presented by the government for their testimonial value." Accepting that definition would mean that all hearsay is testimonial simply by being offered at trial. The court observed that *"Crawford's* emphasis clearly is on whether the statement was testimonial at the time it was made."

Statement by an anonymous coconspirator is not testimonial: ***United States v. Martinez,*** 430 F.3d 317 (6th Cir. 2005). The court held that a letter written by an anonymous coconspirator during the course and in furtherance of a conspiracy was not testimonial under *Crawford* because it was not written with the intent that it would be used in a criminal investigation or prosecution. ***See also United States v. Mooneyham,*** 473 F.3d 280 (6th Cir. 2007) (statements made by coconspirator in furtherance of the conspiracy are not testimonial because the

one making them "has no awareness or expectation that his or her statements may later be used at a trial"; the fact that the statements were made to a law enforcement officer was irrelevant because the officer was undercover and the declarant did not know he was speaking to a police officer); ***United States v. Stover,*** 474 F.3d 904 (6th Cir. 2007) (holding that under *Crawford* and *Davis*, "co-conspirators' statements made in pendency and furtherance of a conspiracy are not testimonial" and therefore that the defendant's right to confrontation was not violated when a statement was properly admitted under Rule 801(d)(2)(E)); ***United States v. Damra,*** 621 F.3d 474 (6th Cir. 2010) (statements made by a coconspirator "by their nature are not testimonial") ***United States v. Tragas,*** 727 F.3d 610 (6th Cir. 2013) ("As coconspirator statements were made in furtherance of the conspiracy, they were categorically non-testimonial.").

Coconspirator statements made to an undercover informant are not testimonial: ***United States v. Hargrove,*** 508 F.3d 445 (7th Cir. 2007): The defendant, a police officer, was charged with taking part in a conspiracy to rob drug dealers. One of his coconspirators had a discussion with a potential member of the conspiracy (in fact an undercover informant) about future robberies. The defendant argued that the coconspirator's statements were testimonial, but the court disagreed. It held that *"Crawford* did not affect the admissibility of coconspirator statements." The court specifically rejected the defendant's argument that *Crawford* somehow undermined *Bourjaily*, noting that in both *Crawford* and *Davis*, "the Supreme Court specifically cited *Bourjaily* --- which as here involved a coconspirator's statement made to a government informant --- to illustrate a category of nontestimonial statements that falls outside the requirements of the Confrontation Clause."

Statements by a coconspirator during the course and in furtherance of the conspiracy are not testimonial: ***United States v. Lee,*** 374 F.3d 637 (8th Cir. 2004): The court held that statements admissible under the coconspirator exemption from the hearsay rule are by definition not testimonial. As those statements to be admissible must be made during the course and in furtherance of the conspiracy, they cannot be the kind of formalized, litigation-oriented statements that the Court found testimonial in *Crawford.* The court reached the same result on co-conspirator hearsay in ***United States v. Reyes,*** 362 F.3d 536 (8th Cir. 2004); ***United States v. Singh,*** 494 F.3d 653 (8th Cir. 2007); and ***United States v. Hyles,*** 521 F.3d 946 (8th Cir. 2008) (noting that the statements were not elicited in response to a government investigation and were casual remarks to co-conspirators)**.**

Statements in furtherance of a conspiracy are not testimonial: ***United States v. Allen,*** 425 F.3d 1231 (9th Cir. 2005): The court held that "co-conspirator statements are not testimonial and therefore beyond the compass of *Crawford's* holding." ***See also United States v. Larson,*** 460 F.3d 1200 (9th Cir. 2006) (statement from one conspirator to another identifying the defendants as the source of some drugs was made in furtherance of the conspiracy; conspiratorial statements were not testimonial as there was no expectation that the statements would later be used at trial); ***United States v. Grasso,*** 724 F.3d 1077 (9th Cir. 2013) ("co-conspirator statements in furtherance of a conspiracy are not testimonial"); ***United States v. Cazares,*** 788 F.3d 956 (9th Cir.

2015) ("a conversation between two gang members about the journey of their burned gun is not testimonial").

Statements admissible under the co-conspirator exemption are not testimonial: ***United States v. Townley,*** 472 F.3d 1267 (10th Cir. 2007): The court rejected the defendant's argument that hearsay is testimonial under *Crawford* whenever "confrontation would have been required at common law as it existed in 1791." It specifically noted that *Crawford* did not alter the rule from *Bourjaily* that a hearsay statement admitted under Federal Rule 801(d)(2)(E) does not violate the Confrontation Clause. ***Accord United States v. Ramirez,*** 479 F.3d 1229 (10th Cir. 2007) (statements admissible under Rule 801(d)(2)(E) are not testimonial under *Crawford*); ***United States v. Patterson,*** 713 F.3d 1237 (10th Cir. 2013) (same); ***United States v. Morgan***, 748 F.3d 1024 (10th Cir. 2014) (statements made between coconspirators dividing up the proceeds of the crime were not testimonial because they "were not made to be used for investigation or prosecution of crime.").

Statements made during the course and in furtherance of the conspiracy are not testimonial: ***United States v. Underwood,*** 446 F.3d 1340 (11th Cir. 2006): In a narcotics prosecution, the defendant argued that the admission of an intercepted conversation between his brother Darryl and an undercover informant violated *Crawford*. But the court found no error and affirmed. The court noted that the statements "clearly were not made under circumstances which would have led [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 constitutionally ineffective at that trial (by failing to investigate a self-defense theory and failing to call two witnesses). The court, however, found the cross-examination to be adequate. The court noted that the state court had found the cross-examination to be adequate --- that court found "baseless" the defendant's argument that counsel had failed to explore the witness's immunity agreement. Because the witness had made statements before that agreement was entered into that were consistent with his in-court testimony, counsel could reasonably conclude that exploring the immunity agreement would do more harm than good. The court of appeals concluded that "[t]here is no Supreme Court precedent to suggest that Goldstein's cross-examination was inadequate, and the record does not support such a conclusion. Consequently, the Superior Court's finding was not contrary to, or an unreasonable application of, *Crawford.*"

Attorney's cross-examination at a prior trial was adequate and therefore admitting the testimony at a later trial did not violate the right to confrontation: *United States v. Richardson,* 781 F. 3d 287 (5th Cir. 2015): The defendant was convicted on drug and gun charges, but the conviction was reversed on appeal. By the time of retrial on mostly the same charges, a prosecution witness had become unavailable, and the trial court admitted the transcript of the witness's testimony from the prior trial. The court found no violation of the right to confrontation. The court found that *Crawford* did not change the long-standing rule as to the opportunity that must be afforded for cross-examination to satisfy the Confrontation Clause. What is required is an "adequate opportunity to cross-examine" the witness: enough to provide the jury with "sufficient information to appraise the bias and the motives of the witness." The court noted that while the lawyer's cross-examination of the witness at the first trial could have been better, it was adequate, as the lawyer explored the witness's motive to cooperate, his arrests and convictions, his relationship with the defendant, and "the contours of his trial testimony."

State court was not unreasonable in finding that cross-examination by defense counsel at the preliminary hearing was sufficient to satisfy the defendant's right to confrontation: *Williams v. Bauman,* 759 F.3d 630 (9th Cir. 2014): The defendant argued that his right to confrontation was violated when the transcript of the preliminary hearing testimony of an eyewitness was admitted against him at his state trial. The witness was unavailable for trial and the defense counsel cross-examined him at the preliminary hearing. The court found that the state court was not unreasonable in concluding that the cross-examination was adequate, thus satisfying the right to confrontation. The court noted that "there is some question whether a preliminary hearing necessarily offers an adequate opportunity to cross-examine for Confrontation Clause

purposes" but concluded that there was "reasonable room for debate" on the question, and therefore the state court's decision to align itself on one side of the argument was beyond the federal court's power to remedy on habeas review.

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

Accomplice's jailhouse statement was admissible as a declaration against interest and accordingly was not testimonial: *United States v. Pelletier,* 666 F.3d 1 (1st Cir. 2011): The defendant's accomplice made hearsay statements to a jailhouse buddy, indicating among other things that he had smuggled marijuana for the defendant. The court found that the statements were properly admitted as declarations against interest. The court noted specifically that the fact that the accomplice made the statements "to fellow inmate Hafford, rather than in an attempt to curry favor with police, cuts in favor of admissibility." For similar reasons, the hearsay was not testimonial under *Crawford.* The court stated that the statements were made "not under formal circumstances, but rather to a fellow inmate with a shared history, under circumstances that did not portend their use at trial against Pelletier."

Statement admissible as a declaration against penal interest, after *Williamson,* is not testimonial: *United States v. Saget,* 377 F.3d 223 (2nd Cir. 2004) (Sotomayor, J.): The defendant's accomplice spoke to an undercover officer, trying to enlist him in the defendant's criminal scheme. The accomplice's statements were admitted at trial as declarations against penal interest under Rule 804(b)(3), as they tended to implicate the accomplice in a conspiracy. After *Williamson v. United States,* hearsay statements made by an accomplice to a law enforcement officer while in custody are not admissible under Rule 804(b)(3) when they implicate the defendant, because the accomplice may be currying favor with law enforcement. But in the instant case, the accomplice's statement was not barred by *Williamson,* because it was made to an undercover officer---the accomplice didn't know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant. For similar reasons, the statement was not testimonial under *Crawford* --- it was not the kind of formalized statement to law enforcement, prepared for trial, such as a "witness" would provide. ***See also United States v. Williams***, 506 F.3d 151 (2d Cir. 2007): Statement of accomplice implicating himself and defendant in a murder was admissible under Rule 804(b)(3) where it was made to a friend in informal circumstances; for the same reason the statement was not testimonial. The defendant's argument about insufficient indicia of reliability was misplaced because the Confrontation Clause no longer imposes a reliability requirement. ***Accord United States v. Wexler,*** 522 F.3d 194 (2nd Cir. 2008) (inculpatory statement made to friends found admissible under Rule 804(b)(3) and not testimonial).

Intercepted conversations were admissible as declarations against penal interest and were not testimonial: *United States v. Berrios,* 676 F.3d 118 (3rd Cir. 2012): Authorities intercepted a conversation between two criminal associates in a prison yard. The court held that the statements were non-testimonial, because neither of the declarants "held the objective of incriminating any of the defendants at trial when their prison yard conversation was recorded; there is no indication that they were aware of being overheard; and there is no indication that their

conversation consisted of anything but casual remarks to an acquaintance." A defendant also lodged a hearsay objection, but the court found that the statements were admissible as declarations against interest. The declarants unequivocally incriminated themselves in acts of carjacking and murder, as well as shooting a security guard, and they mentioned the defendant "only to complain that he crashed the getaway car."

Accomplice statement made to a friend, admitting complicity in a crime, was admissible as a declaration against interest and was not testimonial: *United States v. Jordan,* 509 F.3d 191 (4th Cir. 2007): The defendant was convicted of murder while engaged in a drug-trafficking offense. He contended that the admission of a statement of an accomplice was error under the Confrontation Clause and the hearsay rule. The accomplice confessed her part in the crime in a statement to her roommate. The court found no error in the admission of the accomplice's statement. It was not testimonial because it was made to a friend, not to law enforcement. The court stated: "To our knowledge, no court has extended *Crawford* to statements made by a declarant to friends or associates." The court also found the accomplice's statement properly admitted as a declaration against interest. The court elaborated as follows:

> Here, although Brown's statements to Adams inculpated Jordan, they also subject *her* to criminal liability for a drug conspiracy and, by extension, for Tabon's murder. Brown made the statements to a friend in an effort to relieve herself of guilt, not to law enforcement in an effort to minimize culpability or criminal exposure.

Accomplice's statements to the victim, in conversations taped by the victim, were not testimonial: *United States v. Udeozor,* 515 F.3d 260 (4th Cir.2008): The defendant was convicted for conspiracy to hold another in involuntary servitude. The evidence showed that the defendant and her husband brought a teenager from Nigeria into the United States and forced her to work without compensation. The victim also testified at trial that the defendant's husband raped her on a number of occasions. On appeal the defendant argued that the trial court erroneously admitted two taped conversations between the victim and the defendant. The victim taped the conversations surreptitiously in order to refer them to law enforcement. The court found no error in admitting the tapes. The conversations were hearsay, but the husband's statements were admissible as declarations against penal interest, as they admitted wrongdoing and showed an attempt to evade prosecution. The defendant argued that even if admissible under Rule 804(b)(3), the conversations were testimonial under *Crawford*. He argued that a statement is testimonial if the *government's* primary motivation is to prepare the statement for use in a criminal prosecution --- and that in this case, the victim was essentially acting as a government agent in obtaining statements to be used for trial. But the court found that the conversation was not testimonial because the husband did not know he was talking to anyone affiliated with law enforcement, and the *husband's* primary motivation was not to prepare a statement for any criminal trial. The court observed that the "intent of the police officers or investigators is relevant to the determination of whether a statement is testimonial only if it is first the case that a person in the position of the declarant reasonably would have expected that his statements would be used prosecutorially."

Note: This case was decided before *Michigan v. Bryant, infra,* but it consistent with the holding in *Bryant* that the primary motive test considers the motivation of all the parties to a communication --- and that all of them must be primarily motivated to have the statement used in a criminal prosecution for the statement to be testimonial.

Accomplice's confessions to law enforcement agents were testimonial: *United States v. Harper,* 514 F.3d 456 (5th Cir. 2008): The court held that confessions made by the codefendant to law enforcement were testimonial, even though the codefendant did not mention the defendant as being involved in the crime. The statements were introduced to show that the codefendant owned some of the firearms and narcotics at issue in the case, and these facts implicated the defendant as well. The court did not consider whether the confessions were admissible under a hearsay exception --- but they would not have been admissible as a declaration against interest, because *Williamson* bars confessions of cohorts made to law enforcement.

Accomplice's statements to a friend, implicating both the accomplice and the defendant in the crime, were not testimonial: *Ramirez v. Dretke,* 398 F.3d 691 (5th Cir. 2005): The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The accomplice made statements both before and after the murder that directly implicated both himself and the defendant. These statements were made to the accomplice's roommate. The court found that these statements were not testimonial under *Crawford*: "There is nothing in *Crawford* to suggest that testimonial evidence includes spontaneous out-of-court statements made outside any arguably judicial or investigatorial context."

Declaration against penal interest, made to a friend, is not testimonial: *United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005): The defendant was charged with bank robbery. One of the defendant's accomplices (Clarke), was speaking to a friend (Wright) sometime after the robbery. Wright told Clarke that he looked "stressed out." Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The court found no error in admitting Clarke's hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark's interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the court found that Clarke's statement was not testimonial under *Crawford:*

> Clarke made the statements to his friend by happenstance; Wright was not a police officer or a government informant seeking to elicit statements to further a prosecution against Clarke or Franklin. To the contrary, Wright was privy to Clarke's statements only as his friend and confidant.

The court distinguished other cases in which an informant's statement to police officers was found testimonial, on the ground that those other cases involved accomplice statements knowingly made to police officers, so that "the informant's statements were akin to statements elicited during police

interrogation, i.e., the informant could reasonably anticipate that the statements would be used to prosecute the defendant."

See also United States v. Gibson, 409 F.3d 325 (6th Cir. 2005) (describing statements as nontestimonial where "the statements were not made to the police or in the course of an official investigation, nor in an attempt to curry favor or shift the blame"); ***United States v. Johnson,*** 440 F.3d 832 (6th Cir. 2006) (statements by accomplice to an undercover informant he thought to be a cohort were properly admitted against the defendant; the statements were not testimonial because the declarant didn't know he was speaking to law enforcement, and so a person in his position "would not have anticipated that his statements would be used in a criminal investigation or prosecution of Johnson.").

Statement admissible as a declaration against penal interest is not testimonial: *United States v. Johnson,* 581 F.3d 320 (6th Cir. 2009): The court held that the tape-recorded confession of a coconspirator describing the details of an armed robbery, including his and the defendant's roles, was properly admitted as a declaration against penal interest. The court found that the statements tended to disserve the declarant's interest because "they admitted his participation in an unsolved murder and bank robbery." And the statements were trustworthy because they were made to a person the declarant thought to be his friend, at a time when the declarant did not know he was being recorded "and therefore could not have made his statement in order to obtain a benefit from law enforcement." Moreover, the hearsay was not testimonial, because the declarant did not know he was being recorded or that the statement would be used in a criminal proceeding against the defendant.

Accomplice confession to law enforcement is testimonial, even if redacted: *United States v. Jones,* 371 F.3d 363 (7th Cir. 2004): An accomplice's statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, could be admissible as a declaration against interest (a question it did not decide), its admission would violate the Confrontation Clause after *Crawford*. The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And because the defendant never had a chance to cross-examine the accomplice, "under *Crawford*, no part of Rock's confession should have been allowed into evidence."

Declaration against interest made to an accomplice who was secretly recording the conversation for law enforcement was not testimonial: *United States v. Watson,* 525 F.3d 583 (7th Cir. 2008): After a bank robbery, one of the perpetrators was arrested and agreed to cooperate with the FBI. She surreptitiously recorded a conversation with Anthony, in which Anthony implicated himself and Watson in the robbery. The court found that Anthony's statement was against his own interest, and rejected Watson's contention that it was testimonial. The court noted that Anthony could not have anticipated that the statement would be used at a trial, because he did not know that the FBI was secretly recording the conversation. It concluded: "A statement unwittingly made to a confidential informant and recorded by the government is not testimonial for Confrontation Clause purposes." ***Accord United States v. Volpendesto*** , 746 F.3d 273 (7th Cir. 2014): Statements of an accomplice made to a confidential informant were properly admitted as declarations against interest and for the same reasons were not testimonial. The defendant argued that the court should reconsider its ruling in *Watson* because the Supreme Court, in *Michigan v. Bryant,* had in the interim stated that in determining primary motive, the court must look at the motivation of both the declarant and the other party to the conversation, and in this case as in *Watson* the other party was a confidential informant trying to obtain statements to use in a criminal prosecution. But the court noted that in *Bryant* the Court stated that the relevant inquiry "is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had." Applying this objective approach, the court concluded that the conversation "looks like a casual, confidential discussion between co-conspirators."

Statement admissible as a declaration against penal interest, after *Williamson,* is not testimonial: *United States v. Manfre,* 368 F.3d 832 (8th Cir. 2004): An accomplice made a statement to his 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 were not testimonial: *United States v. Johnson,* 495 F.3d 951 (8th Cir. 2007): The defendant's accomplice made statements to a cellmate, implicating himself and the defendant in a number of murders. The court found that these hearsay statements were not testimonial, as they were made under informal circumstances and there was no involvement with law enforcement.

Accomplice's confession to law enforcement was testimonial, even if redacted: *United States v. Shaw,* 758 F.3d 1187 (10th Cir. 2014): At the defendant's trial, the court permitted a police officer to testify about a confession made by the defendant's alleged accomplice. The accomplice was not a co-defendant, but the court, relying on the *Bruton* line of cases, ruled that the confession could be admitted so long as all references to the defendant were replaced with a

neutral pronoun. The court of appeals found that this was error, because the confession to law enforcement was, under *Crawford*, clearly testimonial. It stated that "[r]edaction does not override the Confrontation Clause. It is just a tool to remove, in appropriate cases, the prejudice to the defendant from allowing the jury to hear evidence admissible against the codefendant but not admissible against the defendant." The trial court's reliance on the *Bruton* cases was flawed because in those cases the accomplice is joined as a codefendant and the confession is admissible against the accomplice. In this case, where the defendant was tried alone and the confession was offered against him only, it was inadmissible for any purpose, whether or not redacted.

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

Declaration against interest is not testimonial: *United States v. U.S. Infrastructure, Inc.,* 576 F.3d 1195 (11th Cir. 2009): The declarant, McNair, made a hearsay statement that he was accepting bribes from one of the defendants. The statement was made in private to a friend. The court found that the statement was properly admitted as a declaration against McNair's penal interest, as it showed that he accepted bribes from an identified person. The court also held that the hearsay was not testimonial, because it was "part of a private conversation" and no law enforcement personnel were involved.

Excited Utterances, 911 Calls, Etc.

911 calls and statements to responding officers may be testimonial, but only if the primary purpose is to establish or prove past events in a criminal prosecution: *Davis v. Washington* and *Hammon v. Indiana,* 547 U.S. 813 (2006): In companion cases, the Court decided whether reports of crime by victims of domestic abuse were testimonial under *Crawford*. In *Davis,* the victim's statements were made to a 911 operator while and shortly after the victim was being assaulted by the defendant. In *Hammon,* the statements were made to police, who were conducting an interview of the victim after being called to the scene. The Court held that the statements in *Davis* were not testimonial, but came to the opposite result with respect to one of the statements in *Hammon*. The Court set the dividing line for such statements as follows:

> Without attempting to produce an exhaustive classification of all conceivable statements --- or even all conceivable statements in response to police interrogation --- as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Court defined testimoniality by whether the *primary motivation* in making the statements was for use in a criminal prosecution.

Pragmatic application of the emergency and primary purpose standards: *Michigan v. Bryant,* 562 U.S. 344 (2011): The Court held that the statement of a shooting victim to police, identifying the defendant as the shooter --- and admitted as an excited utterance under a state rule of evidence --- was not testimonial under *Davis* and *Crawford.* The Court applied the test for testimoniality established by *Davis* --- whether the primary motive for making the statement was to have it used in a criminal prosecution --- and found that in this case such primary motive did not exist. The Court noted that *Davis* focused on whether statements were made to respond to an emergency, as distinct from an investigation into past events. But it stated that the lower court had construed that distinction too narrowly to bar, as testimonial, essentially all statements of past events. The Court made the following observations about how to determine testimoniality when statements are made to responding police officers:

> 1. The primary purpose inquiry is objective. The relevant inquiry into the parties' statements and actions is not the subjective or actual purpose of the particular parties, but the purpose that reasonable participants would have had, as ascertained from the parties' statements and actions and the circumstances in which the encounter occurred.

2. As *Davis* notes, the existence of an "ongoing emergency" at the time of the encounter is among the most important circumstances informing the interrogation's primary purpose. An emergency focuses the participants not on proving past events potentially relevant to later criminal prosecution, but on ending a threatening situation. But there is no categorical distinction between present and past fact. Rather, the question of whether an emergency exists and is ongoing is a highly context-dependent inquiry. An assessment of whether an emergency threatening the police and public is ongoing cannot narrowly focus on whether the threat to the first victim has been neutralized, because the threat to the first responders and public may continue.

3. An emergency's duration and scope may depend in part on the type of weapon involved; in *Davis* and *Hammon* the assailants used their fists, which limited the scope of the emergency --- unlike in this case where the perpetrator used a gun, and so questioning could permissibly be broader.

4. A victim's medical condition is important to the primary purpose inquiry to the extent that it sheds light on the victim's ability to have any purpose at all in responding to police questions and on the likelihood that any such purpose would be a testimonial one. It also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.

5. Whether an ongoing emergency exists is simply one factor informing the ultimate inquiry regarding an interrogation's "primary purpose." Another is the encounter's informality. Formality suggests the absence of an emergency, but informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.

6. The statements and actions of *both* the declarant and interrogators provide objective evidence of the interrogation's primary purpose. Looking to the contents of both the questions and the answers ameliorates problems that could arise from looking solely to one participant, because both interrogators and declarants may have mixed motives.

Applying all these considerations to the facts, the Court found that the circumstances of the encounter as well as the statements and actions of the shooting victim and the police objectively indicated that the interrogation's "primary purpose" was "to enable police assistance to meet an ongoing emergency." The circumstances of the interrogation involved an armed shooter, whose motive for and location after the shooting were unknown and who had mortally wounded the victim within a few blocks and a few minutes of the location where the police found him. Unlike the emergencies in *Davis* and *Hammon*, the circumstances presented in *Bryant* indicated a potential threat to the police and the *public*, even if not the victim. And because this case involved a gun, the physical separation that was sufficient to end the emergency in *Hammon* was not necessarily sufficient to end the threat.

The Court concluded that the statements and actions of the police and victim objectively indicated that the primary purpose of their discussion was not to generate statements for trial. When the victim responded to police questions about the crime, he was lying in a gas station

parking lot bleeding from a mortal gunshot wound, and his answers were punctuated with questions about when emergency medical services would arrive. Thus, the Court could not say that a person in his situation would have had a primary purpose "to establish or prove past events potentially relevant to later criminal prosecution." For their part, the police responded to a call that a man had been shot. They did not know why, where, or when the shooting had occurred; the shooter's location; or anything else about the crime. They asked exactly the type of questions necessary to enable them "to meet an ongoing emergency" --- essentially, who shot the victim and where did the act occur. Nothing in the victim's responses indicated to the police that there was no emergency or that the emergency had ended. The informality suggested that their primary purpose was to address what they considered to be an ongoing emergency --- apprehending a suspect with a gun --- and the circumstances lacked the formality that would have alerted the victim to or focused him on the possible future prosecutorial use of his statements.

Justice Sotomayor wrote the majority opinion for five Justices. Justice Thomas concurred in the judgment, adhering to his longstanding view that testimoniality is determined by whether the statement is the kind of formalized accusation that was objectionable under common law --- he found no such formalization in this case. Justices Scalia and Ginsburg wrote dissenting opinions. Justice Kagan did not participate.

911 call reporting drunk person with an unloaded gun was not testimonial: *United States v. Cadieux,* 500 F.3d 37 (1st Cir. 2007): In a felon-firearm prosecution, the trial court admitted a tape of a 911 call, made by the daughter of the defendant's girlfriend, reporting that the defendant was drunk and walking around with an unloaded shotgun. The court held that the 911 call was not testimonial. It relied on the following factors: 1) the daughter spoke about events "in real time, as she witnessed them transpire"; 2) she specifically requested police assistance; 3) the dispatcher's questions were tailored to identify "the location of the emergency, its nature, and the perpetrator"; and 4) the daughter was "hysterical as she speaks to the dispatcher, in an environment that is neither tranquil nor, as far as the dispatcher could reasonably tell, safe." The defendant argued that the call was testimonial because the daughter was aware that her statements to the police could be used in a prosecution. But the court found that after *Davis*, awareness of possible use in a prosecution is not enough for a statement to be testimonial. A statement is testimonial only if the "primary motivation" for making it is for use in a criminal prosecution.

911 call was not testimonial under the circumstances: *United States v. Brito,* 427 F.3d 53 (1st Cir. 2005): The court affirmed a conviction of firearm possession by an illegal alien. It held that statements made in a 911 call, indicating that the defendant was carrying and had fired a gun, were properly admitted as excited utterances, and that the admission of the 911 statements did not violate the defendant's right to confrontation. The court declared that the relevant question is whether the statement was made with an eye toward "legal ramifications." The court noted that under this test, statements to police made while the declarant or others are still in personal danger are ordinarily not testimonial, because the declarant in these circumstances "usually speaks out of

urgency and a desire to obtain a prompt response." In this case the 911 call was properly admitted because the caller stated that she had "just" heard gunshots and seen a man with a gun, that the man had pointed the gun at her, and that the man was still in her line of sight. Thus the declarant was in "imminent personal peril" when the call was made and therefore her report was not testimonial. The court also found that the 911 operator's questioning of the caller did not make the answers testimonial, because "it would blink reality to place under the rubric of interrogation the single off-handed question asked by the dispatcher --- a question that only momentarily interrupted an otherwise continuous stream of consciousness."

911 call --- including statements about the defendant's felony status --- was not testimonial: ***United States v. Proctor,*** 505 F.3d 366 (5th Cir. 2007): In a firearms prosecution, the court admitted a 911 call from the defendant's brother (Yogi), in which the brother stated that the defendant had stolen a gun and shot it into the ground twice. Included in the call were statements about the defendant's felony status and that he was probably on cocaine. The court held that the entire call was nontestimonial. It applied the "primary purpose" test and evaluated the call in the following passage:

> Yogi's call to 911 was made immediately after Proctor grabbed the gun and fired it twice. During the course of the call, he recounts what just happened, gives a description of his brother, indicates his brother's previous criminal history, and the fact that his brother may be under the influence of drugs. All of these statements enabled the police to deal appropriately with the situation that was unfolding. The statements about Proctor's possession of a gun indicated Yogi's understanding that Proctor was armed and possibly dangerous. The information about Proctor's criminal history and possible drug use necessary for the police to respond appropriately to the emergency, as it allowed the police to determine whether they would be encountering a violent felon. Proctor argues that the emergency had already passed, because he had run away with the weapon at the time of the 911 call and, therefore, the 911 conversation was testimonial. It is hard to reconcile this argument with the facts. During the 911 call, Yogi reported that he witnessed his brother, a felon possibly high on cocaine, run off with a loaded weapon into a nightclub. This was an ongoing emergency --- not one that had passed. Proctor's retreat into the nightclub provided no assurances that he would not momentarily return to confront Yogi * * *. Further, Yogi could have reasonably feared that the people inside the nightclub were in danger. Overall, a reasonable viewing of the 911 call is that Yogi and the 911 operator were dealing with an ongoing emergency involving a dangerous felon, and that the 911 operator's questions were related to the resolution of that emergency.

See also United States v. Mouzone, 687 F.3d 207 (5th Cir. 2012) (911 calls found non-testimonial as "each caller simply reported his observation of events as they unfolded"; the 911 operators were not attempting to "establish or prove past events"; and "the transcripts simply reflect an effort to meet the needs of the ongoing emergency").

911 call, and statements made by the victim after police arrived, are excited utterances and not testimonial: ***United States v. Arnold,*** 486 F.3d 177 (6th Cir. 2007) (en banc): In a felon-firearm prosecution, the court admitted three sets of hearsay statements made by the daughter of the defendant's girlfriend, after an argument between the daughter (Tamica) and the defendant. The first set were statements made in a 911 call, in which Tamica stated that Arnold pulled a pistol on her and is "fixing to shoot me." The call was made after Tamica got in her car and went around the corner from her house. The second set of statements occurred when the police arrived within minutes; Tamica was hysterical, and without prompting said that Arnold had pulled a gun and was trying to kill her. The police asked what the gun looked like and she said "a black handgun." At the time of this second set of statements, Arnold had left the scene. The third set of statements was made when Arnold returned to the scene in a car a few minutes later. Tamica identified Arnold by name and stated "that's the guy that pulled the gun on me." A search of the vehicle turned up a black handgun underneath Arnold's seat.

The court first found that all three sets of statements were properly admitted as excited utterances. For each set of statements, Tamica was clearly upset, she was concerned about her safety, and the statements were made shortly after or right at the time of the two startling events (the gun threat for the first two sets of statements and Arnold's return for the third set of statements).

The court then concluded that none of Tamica's statements fell within the definition of "testimonial" as developed by the Court in *Davis*. Essentially the court found that the statements were not testimonial for the very reason that they were excited utterances --- Tamica was upset, she was responding to an emergency and concerned about her safety, and her statements were largely spontaneous and not the product of an extensive interrogation.

911 call is not testimonial*:* ***United States v. Thomas,*** 453 F.3d 838 (7th Cir. 2006): The court held that statements made in a 911 call were non-testimonial under the analysis provided by the Supreme Court in *Davis/Hammon*. The anonymous caller reported a shooting, and the perpetrator was still at large. The court analyzed the statements as follows:

> [T]he caller here described an emergency as it happened. First, she directed the operator's attention to Brown's condition, stating "[t]here's a dude that just got shot . . .", and ". . . the guy who shot him is still out there." Later in the call, she reiterated her concern that ". . . [t]here is somebody shot outside, somebody needs to be sent over here, and there's somebody runnin' around with a gun, somewhere." Any reasonable listener would know from this exchange that the operator and caller were dealing with an ongoing emergency, the resolution of which was paramount in the operator's interrogation. This fact is evidenced by the operator's repeatedly questioning the caller to determine who had the gun and where Brown lay injured. Further, the caller ended the conversation immediately upon the arrival of the police, indicating a level of interrogation that was significantly less formal than the testimonial statement in *Crawford*. Because the tape-recording of the call is nontestimonial, it does not implicate Thomas's right to confrontation.

See also United States v. Dodds, 569 F.3d 336 (7th Cir. 2009) (unidentified person's identification of a person with a gun was not testimonial: "In this case, the police were responding to a 911 call reporting shots fired and had an urgent need to identify the person with the gun and to stop the shooting. The witness's description of the man with a gun was given in that context, and we believe it falls within the scope of *Davis*.").

Statement made by a child immediately after an assault on his mother was admissible as excited utterance and was not testimonial: *United States v. Clifford,* 791 F.3d 884 (8th Cir. 2015): In an assault trial, the court admitted a hearsay statement from the victim's three-year-old son, made to a trusted adult, that the defendant "hurt mama." The statement was made immediately after the event and the child was shaking and crying; the statement was in response to the adult asking "what happened?" The court of appeals held that the statement was admissible as an excited utterance and was not testimonial. There was no law enforcement involvement and the court noted that the defendant "identifies no case in which questions from a private individual acting without any direction from state officials were determined to be equivalent to police interrogation." The court also noted that the interchange between the child and the adult was informal, and was in response to an emergency. Finally, the court relied on the Supreme Court's most recent decision in *Ohio v. Clark:*

> As in *Clark,* the record here shows an informal, spontaneous conversation between a very young child and a private individual to determine how the victim had just been injured. [The child's] age is significant since "statements by very young children will rarely, if ever, implicate the Confrontation Clause."

911 calls and statements made to officers responding to the calls were not testimonial: *United States v. Brun,* 416 F.3d 703 (8th Cir. 2005): The defendant was charged with assault with a deadly weapon. The police received two 911 calls from the defendant's home. One was from the defendant's 12-year-old nephew, indicating that the defendant and his girlfriend were arguing, and requesting assistance. The other call came 20 minutes later, from the defendant's girlfriend, indicating that the defendant was drunk and had a rifle, which he had fired in the house and then left. When officers responded to the calls, they found the girlfriend in the kitchen crying; she told the responding officers that the defendant had been drunk, and shot his rifle in the bathroom while she was in it. The court had little problem in finding that all three statements were properly admitted as excited utterances, and addressed whether the admission of the statements violated the defendant's right to confrontation after *Crawford.* The court first found that the nephew's 911 call was not testimonial because it was not the kind of statement that was equivalent to courtroom testimony. The court had "no doubt that the statements of an adolescent boy who has called 911 while witnessing an argument between his aunt and her partner escalate to an assault would be emotional and spontaneous rather than deliberate and calculated." The court used similar reasoning to find that the girlfriend's 911 call was not testimonial. The court also found that the girlfriend's statement to the police was not testimonial. It reasoned that the girlfriend's conversation with the officers "was unstructured, and not the product of police interrogation."

Note: The court's decision in *Brun* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon* and then *Bryant,* but the analysis appears consistent with that of the Supreme Court. It is true that in *Hammon* the Court found statements by the victim to responding police officers to be testimonial, but that was largely because the police officers engaged in a structured interview about past criminal activity; in *Brun* the victim spoke spontaneously in response to an emergency. And the Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they were directed more toward dealing with an emergency than toward investigating or prosecuting a crime. The *Brun* decision is especially consistent with the pragmatic approach to finding an emergency (and to the observation that emergency is only one factor in the primary motive test) that the Court found in *Michigan v. Bryant.*

Statements made by mother to police, after her son was taken hostage, were not testimonial: *United States v. Lira-Morales,* 759 F.3d 1105 (9th Cir. 2014): The defendant was charged with hostage-taking and related crimes. At trial, the court admitted statements from the hostage's mother, describing a telephone call with her son's captors. The call was arranged as part of a sting operation to rescue the son. The court found that the mother's statements to the officers about what the captors had said were not testimonial, because the primary motive for making the call --- and thus the report about it to the police officers --- was to rescue the son. The court noted that throughout the event the mother was "very nervous, shaking, and crying in response to continuous ransom demands and threats to her son's life." Thus the agents faced an "emergency situation" and "the primary purpose of the telephone call was to respond to these threats and to ensure [the son's] safety." The defendant argued that the statements were testimonial because an agent attempted, unsuccessfully, to record the call that they had set up. But the court rejected this argument, noting that the agent "primarily sought to record the call to obtain information about Aguilar's location and to facilitate the plan to rescue Aguilar. Far from an attempt to build a case for prosecution, Agent Goyco's actions were good police work directed at resolving a life-threatening hostage situation. * * * That Agent Goyco may have also recorded the call in part to build a criminal case does not alter our conclusion that the *primary* purpose of the call was to diffuse the emergency hostage situation."

Excited utterance not testimonial under the circumstances, even though made to law enforcement: *Leavitt v. Arave,* 371 F.3d 663 (9th Cir. 2004): In a murder case, the government introduced the fact that the victim had called the police the night before her murder and stated that she had seen a prowler who she thought was the defendant. The court found that the victim's statement was admissible as an excited utterance, as the victim was clearly upset and made the statement just after an attempted break-in. The court held that the statement was not testimonial under *Crawford*. The court explained as follows:

Although the question is close, we do not believe that Elg's statements are of the kind with which *Crawford* was concerned, namely, testimonial statements. * * * Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which the Confrontation Clause was directed: the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.

Note: The court's decision in *Leavitt* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. The Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they are directed toward dealing with an emergency rather than prosecuting a crime. It is especially consistent with the pragmatic approach to applying the primary motive test established in *Michigan v. Bryant.*

911 call that a man had put a gun to another person's head was not testimonial: *United States v. Hughes*, 840 F.3d 1368 (11th Cir. 2016). In a felon-firearm prosecution, the trial court admitted a 911 call in which a bystander reported that the defendant had cocked a gun and put it to the head of a couple of people. The defendant argued that the 911 call was testimonial, but the court of appeals found no error. It concluded that "Hughes fails to distinguish the 911 caller's statements from those in *Davis* in any way whatsoever."

Expert Witnesses

Confusion over expert witnesses testifying on the basis of testimonial hearsay: *Williams v. Illinois,* 132 S.Ct. 2221 (2012): This case is fully set forth in Part One. To summarize, the confusion is over whether an expert can, consistently with the Confrontation Clause, rely on testimonial hearsay so long as the hearsay is not explicitly introduced for its truth and the expert makes an independent judgment, i.e., is not just a conduit for the hearsay. That practice is permitted by Rule 703. Five members of the Court rejected the use of testimonial hearsay in this way, on the ground that it was based on an artificial distinction. But the plurality decision by Justice Alito embraces this Rule 703 analysis. At this stage, the answer appears to be that an expert can rely on testimonial hearsay so long as it is not in the form of an affidavit or certificate --- that proviso would then get Justice Thomas's approval. As seen elsewhere in this outline, some courts have found *Williams* to have no precedential effect other than over cases that present the same facts as *Williams.* And many courts have held that the use of testimonial hearsay by an expert is permitted without regard to its formality, so long as the expert makes an independent conclusion and the hearsay itself is not admitted into evidence.

Expert's reliance on testimonial hearsay does not violate the Confrontation Clause: *United States v. Law,* 528 F.3d 888 (D.C. Cir. 2008)**:** The court found that an expert's testimony about the typical practices of narcotics dealers did not violate *Crawford*. While the testimony was based on interviews with informants, "Thomas testified based on his experience as a narcotics investigator; he did not relate statements by out-of-court declarants to the jury."

> **Note: This opinion precedes *Williams* and is questionable if you count the votes in *Williams.* But the case is quite consistent with the Alito opinion in *Williams* and many --- allowing the expert to use testimonial hearsay as long as the hearsay is not introduced at trial and the expert is not simply parroting the hearsay. And lower courts are treating the Alito opinion as controlling on an expert's reliance on testimonial hearsay.**

Confrontation Clause violated where expert does no more 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 *Ramos-Gonzalez* surely remains valid. Five members of the *Williams* Court rejected the proposition that an expert can rely *at all* on testimonial hearsay even if the expert testifies to his own opinion. And even Justice Alito cautions that an expert may not testify if he does nothing more than parrot the testimonial hearsay.

Confrontation Clause not violated where testifying expert conducts his own testing that confirms the results of a testimonial report: *United States v. Soto*, 720 F.3d 51 (1st Cir. 2013): In a prosecution for identity theft and related offenses, a technician did a review of the defendant's laptop and came to conclusions that inculpated the defendant. At trial, a different expert testified that he did the same test and it came out exactly the same as the test done by the absent technician. The defendant argued that this was surrogate testimony that violated *Bullcoming v. New Mexico*, in which the Court held that production of a surrogate who simply reported testimonial hearsay did not satisfy the Confrontation Clause. But the court disagreed:

Agent Pickett did not testify as a surrogate witness for Agent Murphy. * * * Unlike in *Bullcoming*, Agent Murphy's forensic report was not introduced into evidence through Agent Pickett. Agent Pickett testified about a conclusion he drew from his own independent examination of the hard drive. The government did not need to get Agent

> Murphy's report into evidence through Agent Pickett. We do not interpret *Bullcoming* to mean that the agent who testifies against the defendant cannot know about another agent's prior examination or that agent's results when he conducts his examination. The government may ask an agent to replicate a forensic examination if the agent who did the initial examination is unable to testify at trial, so long as the agent who testifies conducts an independent examination and testifies to his own results.

The court reviewed the votes in *Bullcoming* and found that "it appears that six justices would find no Sixth Amendment violation when a second analyst retests evidence and testifies at trial about her conclusions about her independent examination." This count resulted from the fact that Justice Ginsburg, joined by Justice Scalia, stated that the Confrontation problem in *Bullcoming* could have been avoided if the testifying expert had simply retested the substance and testified on the basis of the retest.

The *Soto* court did express concern, however, that the testifying expert did more than simply replicate the results of the prior test: he also testified that the tests came to identical results:

> Soto's argument that Agent Murphy's report bolstered Agent Pickett's testimony hits closer to the mark. At trial, Agent Pickett testified that the incriminating documents in Exhibit 20 were found on a laptop that was seized from Soto's car. Although Agent Pickett had independent knowledge of that fact, he testified that "everything that was in John Murphy's report was exactly the way he said it was," and that Exhibit 20 "was contained in the same folder that John Murphy had said that he had found it in." * * * These two out-of-court statements attributed to Agent Murphy were arguably testimonial and offered for their truth. Agent Pickett testified about the substance of Agent Murphy's report which Agent Murphy prepared for use in Soto's trial. * * * Agent Pickett's testimony about Agent Murphy's prior examination of the hard drive bolstered Agent Pickett's independent conclusion that the Exhibit 20 documents were found on Soto's hard drive.

But the court found no plain error, in large part because the bolstering was cumulative.

See also Barbosa v. Mitchell, 812 F.3d 62 (1st Cir. 2016): On habeas review, the court found it not clearly established that expert reliance on a testimonial lab report violates the Confrontation Clause. The defendant was convicted in the time between *Melendez-Diaz* and *Williams.* The Court held that, "[t]o the contrary, four Justices [in *Williams*] later read *Melendez-Diaz* as not establishing at all, much less beyond doubt" the principle that such testimony violates the Confrontation Clause.

Expert reliance on a manufacturing label to conclude on point of origin did not violate the Confrontation Clause, because the label was not testimonial: *United States v. Torres-Colon,* 790 F.3d 26 (1st Cir. 2015): In a trial on a charge of unlawful possession of a firearm, the government's expert testified that the firearm was made in Austria. He relied on a manufacturing inscription on the firearm that stated "made in Austria." The court found no

violation of confrontation in the expert's testimony. The statement on the firearm was clearly not made by the manufacturer with the primary purpose of use in a criminal prosecution.

Expert's reliance on out-of-court accusations does not violate *Crawford*, unless the accusations are directly presented to the jury*: United States v. Lombardozzi*, 491 F.3d 61 (2nd Cir. 2007): The court stated that *Crawford* is inapplicable if testimonial statements are not used for their truth, and that "it is permissible for an expert witness to form an opinion by applying her expertise because, in that limited instance, the evidence is not being presented for the truth of the matter asserted." The court concluded that the expert's testimony would violate the Confrontation Clause "only if he communicated out-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion." ***See also United States v. Mejia,*** 545 F.3d 179 (2nd Cir. 2008) (violation of Confrontation Clause where expert directly relates statements made by drug dealers during an interrogation).

Expert reliance on printout from machine does not violate *Crawford*: *United States v. Summers,* 666 F.3d 192 (4th Cir. 2011): The defendant objected to the admission of DNA testing performed on a jacket that linked him to drug trafficking. The court first considered whether the Confrontation Clause was violated by the government's failure to call the FBI lab employees who signed the internal log documenting custody of the jacket. The court found no error in admitting the log, because chain-of-custody evidence had been introduced by the defense and therefore the defendant had opened the door to rebuttal. The court next considered whether the Confrontation Clause was violated by testimony of an expert who relied on DNA testing results by lab analysts who were not produced at trial. The court again found no error. It emphasized that the expert did his own testing, and his reliance on the report was limited to a "pure instrument read-out." The court stated that "[t]he numerical identifiers of the DNA allele here, insofar as they are nothing more than raw data produced by a machine" should be treated the same as gas chromatograph data, which the courts have held to be non-testimonial. ***See also United States v. Shanton,*** 2013 WL 781939 (4th Cir.) (Unpublished) (finding that the result concerning the admissibility of the expert testimony in *Summers* was unaffected by *Williams*: "[W]e believe five justices would affirm: Justice Thomas on the ground that the statements at issue were not testimonial and Justice Alito, along with the three justices who joined his plurality opinion, on the ground that the statements were not admitted for the truth of the matter asserted.").

Expert reliance on confidential informants in interpreting coded conversation does not violate *Crawford: United States v. Johnson*, 587 F.3d 625 (4th Cir. 2009): The court found no error in admitting expert testimony that decoded terms used by the defendants and coconspirators during recorded telephone conversations. The defendant argued that the experts relied on hearsay statements by cooperators to help them reach a conclusion about the meaning of particular

conversations. The defendant asserted that the experts were therefore relying on testimonial hearsay. The court recognized that it is "appropriate to recognize the risk that a particular expert might become nothing more than a transmitter of testimonial hearsay." But in this case, the experts never made reference to their interviews, and the jury heard no testimonial hearsay. "Instead, each expert presented his independent judgment and specialized understanding to the jury." Because the experts "did not become mere conduits" for the testimonial hearsay, their consideration of that hearsay "poses no *Crawford* problem." ***Accord United States v. Ayala,*** 601 F.3d 256 (4th Cir. 2010) (no violation of the Confrontation Clause where the experts "did not act as mere transmitters and in fact did not repeat statements of particular declarants to the jury."). ***Accord United States v Palacios,*** 677 F.3d 234 (4th Cir. 2012): Expert testimony on operation of a criminal enterprise, based in part on interviews with members, did not violate the Confrontation Clause because the expert "did not specifically reference" any of the testimonial interviews during his testimony, and simply relied on them as well as other information to give his own opinion.

> **Note: These cases are in doubt if you count the votes in *Williams,* but most courts have come to the same result after *Williams:* Finding no confrontation problem where an expert relies on testimonial hearsay, so long as the hearsay is not admitted into evidence and the expert draws his own conclusion from the data (rather than just parroting it).**

Expert testimony translating coded conversations violated the right to confrontation where the government failed to make a sufficient showing that the expert was relying on her own evaluations rather than those of informants: *United States v. Garcia,* 752 F.3d 382 (4th Cir. 2014): The court reversed drug convictions in part because the law enforcement expert who translated purportedly coded conversations had relied, in coming to her conclusion, on input from coconspirators whom she had debriefed. The court distinguished *Johnson, supra,* on the ground that in this case the government had not done enough to show that the expert had conducted her own independent analysis in reaching her conclusions as to the meaning of certain conversations. The court noted that "the question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay." In this case, "we cannot say that Agent Dayton was giving such independent judgments. While it is true she never made direct reference to the content of her interviews, this could just 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 opinion based in part on information learned during custodial interrogation did not violate *Crawford* where expert was more than a conduit: *United States v. Lockhart,* 844 F.3d 501 (5th Cir. 2016): In a sex trafficking prosecution, an officer testified as an expert that the defendants were gang members. The defendant argued that the testimony violated his right to confrontation because the officer, in reaching his conclusion, relied on statements made during custodial interrogations, as well as statements of other officers describing their experiences during interrogations. But the court found no error. The court explained that *Crawford* "in no way

prevents expert witnesses from offering their independent judgments merely because those judgments were in some part informed by their exposure to otherwise inadmissible evidence." It further stated that "when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise." The court concluded that in this case the expert "did not serve as a conduit for inadmissible testimonial hearsay."

Police officer's reliance on statements from people he had arrested for drug crimes did not violate *Crawford: United States v. Collins,* 799 F.3d 554 (6th Cir. 2015): In a trial involving manufacture of methamphetamine, a law enforcement officer testified as an expert on the conversion ratio between pseudoephedrine and methamphetamine. He relied in part on statements from people he had interviewed after he had arrested them for manufacturing methamphetamine. The court found no plain error because there was "no evidence that the suspected methamphetamine manufacturers Agent O'Neil questioned throughout his career 'intended to bear testimony' against Collins or his co-defendants." Thus the expert was not relying on testimonial hearsay.

> **Note: The court appears to be applying --- maybe without realizing it --- Justice Alito's definition of testimoniality in *Williams.* The court is saying that the arrestees did not *target* their testimony toward the defendant. But under the view of five Justices in *Williams,* the statements of the arrestees would probably be testimonial, as they were under arrest --- just like Mrs. Crawford --- and the statements could be thought to be motivated toward *some* criminal proscecution.**

Expert reliance on printout from machine and another expert's lab notes does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone." Moreover, the expert's reliance on another expert's lab notes did not violate *Crawford* because the court concluded that an expert is permitted to rely on hearsay (including testimonial hearsay) in reaching his conclusion. The court noted that the defendant could "insist that the data underlying an expert's testimony be admitted, see Fed.R.Evid. 705, but by offering the evidence themselves defendants would waive any objection under the Confrontation Clause." The court observed that the notes of the chemist, evaluating the data from the machine, were testimonial and should not have been independently admitted, but it found no plain error in the admission of these notes.

> **Note: The court makes two holdings in *Moon.* The first is that expert reliance on a machine output does not violate *Crawford* because the machine is not a witness. That holding appears unaffected by *Williams* --- at least it can be said that *Williams* says nothing about whether machine output is testimony. The second**

holding, that an expert's reliance on lab notes he did not prepare, is at the heart of *Williams.* It would appear that such a practice would be permissible even after *Williams* because 1) *post-Williams* courts have found that an expert may rely on testimonial hearsay so long as the expert does his own analysis and the hearsay is not introduced at trial ; and 2) in any case, lab "notes" are not certificates or affidavits so they do not appear to be the kind of formalized statement that Justice Thomas finds to be testimonial.

Expert reliance on drug test conducted by another does not violate the Confrontation Clause --- though on remand from *Williams* the court states that part of the expert's testimony might have violated the Confrontation Clause, but finds harmless error*: United States v. Turner,* 591 F.3d 928 (7th Cir. 2010), on remand from Supreme Court, 709 F.3d 1187 (7th Cir. 2013) : At the defendant's drug trial, the government called a chemist to testify about the tests conducted on the substance seized from the defendant --- the tests indicating that it was cocaine. The defendant objected that the witness did not conduct the tests and was relying on testimonial statements from other chemists, in violation of *Crawford.* The court found no error, emphasizing that no statements of the official who actually tested the substance were admitted at trial, and that the witness unequivocally established that his opinions about the test reports were his own.

Note: The Supreme Court vacated the decision in *Turner* and remanded for reconsideration in light of *Williams.* On remand, the court declared that while a rule from *Williams* was difficult to divine, it at a minimum "casts doubt on using expert testimony in place of testimony from an analyst who actually examined and tested evidence bearing on a defendant's guilt, insofar as the expert is asked about matters which lie solely within the testing analyst's knowledge." But the court noted that even after *Williams,* much of what the expert testified to was permissible because it was based on personal knowledge:

> We note that the bulk of Block's testimony was permissible. Block testified as both a fact and an expert witness. In his capacity as a supervisor at the state crime laboratory, he described the procedures and safeguards that employees of the laboratory observe in handling substances submitted for analysis. He also noted that he reviewed Hanson's work in this case pursuant to the laboratory's standard peer review procedure. As an expert forensic chemist, he went on to explain for the jury how suspect substances are tested using gas chromatography, mass spectrometry, and infrared spectroscopy to yield data from which the nature of the substance may be determined. He then opined, based on his experience and expertise, that the data Hanson had produced in testing the substances that Turner distributed to the undercover officer-introduced at trial as Government Exhibits 1, 2, and 3-indicated that the substances contained cocaine base. * * *
>
> As we explained in our prior decision, an expert who gives testimony about the nature of a suspected controlled substance may rely on information gathered and produced by an analyst who does not himself testify. Pursuant to Federal Rule

of Evidence 703, the information on which the expert bases his opinion need not itself be admissible into evidence in order for the expert to testify. Thus, the government could establish through Block's expert testimony what the data produced by Hanson's testing revealed concerning the nature of the substances that Turner distributed, without having to introduce either Hanson's documentation of her analysis or testimony from Hanson herself. And because the government did not introduce Hanson's report, notes, or test results into evidence, Turner was not deprived of his rights under the Sixth Amendment's Confrontation Clause simply because Block relied on the data contained in those documents in forming his opinion.

> Nothing in the Supreme Court's *Williams* decision undermines this aspect of our decision. On the contrary, Justice Alito's plurality opinion in *Williams* expressly endorses the notion that an appropriately credentialed individual may give expert testimony as to the significance of data produced by another analyst. Nothing in either Justice Thomas's concurrence or in Justice Kagan's dissent takes issue with this aspect of the plurality's reasoning. Moreover, as we have indicated, Block in part testified in his capacity as Hanson's supervisor, describing both the procedures and safeguards that employees of the state laboratory are expected to follow and the steps that he took to peer review Hanson's work in this case. Block's testimony on these points, which were within his personal knowledge, posed no Confrontation Clause problem.

The *Turner* court on remand saw two Confrontation problems in the expert's testimony: 1) his statement that Hanson followed standard procedures in testing the substances that Turner distributed to the undercover officer, and 2) his testimony that he reached the same conclusion about the nature of the substances that the analyst did. The court held that on those two points, "Block necessarily was relying on out-of-court statements contained in Hanson's notes and report. These portions of Block's testimony strengthened the government's case; and, conversely, their exclusion would have diminished the quantity and quality of evidence showing that the substances Turner distributed comprised cocaine base in the form of crack cocaine." And while the case was much like *Williams,* the court found two distinguishing factors: 1) it was tried to a jury, thus raising a question of whether Justice Alito's not-for-truth analysis was fully applicable; and 2) the test was conducted with a suspect in mind, as Turner had been arrested with the substances to be tested in his possession. The defendant also argued that the report was "certified" and so was formal under the Thomas view. But the court noted that the analysts did not formally certify the results --- the certification was made by the Attorney General to the effect that the report was a correct copy of the *report.* But the court implied that it was sufficiently formal in any case, because it was "both official and signed, it constituted a formal record of the result of the laboratory tests that Hanson had performed, and it was clearly designed to memorialize that result for purposes of the pending legal proceeding against Turner, who was named in the report."

Ultimately the court found it unnecessary to decide whether the defendant's Confrontation rights were violated because the error, if any, in the use of the analyst's report was harmless.

No confrontation violation where expert did not testify that he relied on a testimonial report: *United States v. Maxwell,* 724 F.3d 724 (7th Cir. 2013): In a narcotics prosecution, the analyst from the Wisconsin State Crime Laboratory who originally tested the substance seized from Maxwell retired before trial, so the government offered the testimony of his co-worker instead. The coworker did not personally analyze the substance herself, but concluded that it contained crack cocaine after reviewing the data generated by the original analyst. The court found no plain error in permitting this testimony, explaining that there could be no Confrontation

problem, even after *Bullcoming* and *Williams*, where there is no testimony that the expert relied on the report:

> What makes this case different (and relatively more straightforward) from those we have dealt with in the past is that Gee did not read from Nied's report while testifying * * * , she did not vouch for whether Nied followed standard testing procedures or state that she reached the same conclusion as Nied about the nature of the substance (as in *Turner*), and the government did not introduce Nied's report itself or any readings taken from the instruments he used (as in *Moon*). Maxwell argues that Nied's forensic analysis is testimonial, but Gee never said she relied on Nied's report or his interpretation of the data in reaching her own conclusion. Instead, Gee simply testified (1) about how evidence in the crime lab is typically tested when determining whether it contains a controlled substance, (2) that she had reviewed the data generated for the material in this case, and (3) that she reached an independent conclusion that the substance contained cocaine base after reviewing that data.

The court concluded that concluded that "Maxwell was not deprived of his Sixth Amendment right simply by virtue of the fact that Gee relied on Nied's data in reaching her own conclusions, especially since she never mentioned what conclusions Nied reached about the substance."

Expert's reliance on report of another law enforcement agency did not violate the right to confrontation: *United States v. Huether,* 673 F.3d 789 (8th Cir. 2012): In a trial on charges of sexual exploitation of minors, an expert testified in part on the basis of a report by the National Center for Missing and Exploited Children. The court found no confrontation violation because the NCMEC report was not introduced into evidence and the expert drew his own conclusion and was not a conduit for the hearsay.

No confrontation violation where expert who testified did so on the basis of his own retesting: *United States v. Ortega,* 750 F.3d 1020 (8th Cir. 2014): In a drug conspiracy prosecution, the defendant argued that his right to confrontation was violated because the expert who testified at trial that the substances seized from a coconspirator's car were narcotics had tested composite samples that another chemist had produced from the substances found in the car. But the court found no error, because the testifying expert had personally conducted his own test of the composite substances, and the original report of the other chemist who prepared the composite (and who concluded the substances were narcotics) was not offered by the government; nor was the testifying expert asked about the original test. The court noted that any objection about the composite really went to the chain of custody --- whether the composite tested by the expert witness was in fact derived from what was found in the car --- and the court observed that "it is up to the prosecution to decide what steps are so crucial as to require evidence." The defendant made no showing of bad faith or evidence tampering, and so any question about the chain of custody was one of weight and not admissibility. Moreover, the government's introduction of the original chemist's statement about creating the composite sample did not violate the Confrontation Clause

because "chain of custody alone does not 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 on the testimonial hearsay: *United States v. Vera,* 770 F.3d 1232 (9th Cir. 2014): Appealing from convictions for drug offenses, the defendants argued that the testimony of a prosecution expert on gangs violated the Confrontation Clause because it was nothing but a conduit for testimonial hearsay from former gang members. The court agreed with the premise that expert testimony violates the Confrontation Clause when the expert "is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation." But the court disagreed that the expert operated as a conduit in this case. The court found that the witness relied on his extensive experience with gangs and that his opinion "was not merely repackaged testimonial hearsay but was an original product that could have been tested through cross-examination."

Expert's reliance on notes prepared by lab technicians did not violate the Confrontation Clause: *United States v. Pablo,* 625 F.3d 1285 (10th Cir. 2010), ***on remand for reconsideration under Williams,* 696 F.3d 1280 (10th Cir. 2012)**: The defendant was tried for rape and other charges. Two lab analysts conducted tests on the rape kit and concluded that the DNA found at the scene matched the defendant. The defendant complained that the lab results were introduced through the testimony of a forensic expert and the lab analysts were not produced for cross-examination. In the original appeal the court found no plain error, reasoning that the notes of the lab analysts were not admitted into evidence and were never offered for their truth. To the extent they were discussed before the jury, it was only to describe the basis of the expert's opinion --- which the court found to be permissible under Rule 703. The court observed that "[t]he extent to which an expert witness may disclose to a jury otherwise inadmissible testimonial hearsay without implicating a defendant's confrontation rights * * * is a matter of degree." According to the court, if an expert "simply parrots another individual's testimonial hearsay, rather than conveying her own independent judgment that only incidentally discloses testimonial hearsay to assist the jury in evaluating her opinion, then the expert is, in effect, disclosing the testimonial hearsay for its substantive truth and she becomes little more than a backdoor conduit for otherwise inadmissible testimonial hearsay." In this case the court, applying the plain error standard, found insufficient indication that the expert had operated solely as a conduit for testimonial hearsay.

***Pablo* was vacated for reconsideration in light of *Williams*. On remand, the court once again affirmed the conviction.** The court stated that "we need not decide the precise mandates and limits of *Williams*, to the extent they exist." The court noted that five members of the *Williams* Court "might find" that the expert's reliance on the lab test in this case was for its truth. But "we cannot say the district court plainly erred in admitting Ms. Snider's testimony, as it is not plain that a majority of the Supreme Court would have found reversible error with the challenged admission." The court explained as follows in a parsing of *Williams:*

> On the contrary, it appears that five Justices would affirm the district court in this case, albeit with different Justices relying on different rationales as they did in Williams. The four-Justice plurality in *Williams* likely would determine that Ms. Snider's testimony was not offered for the truth of the matter asserted in Ms. Dick's report, but rather was offered for the separate purpose of evaluating Ms. Snider's credibility as an expert witness per Fed.R.Evid. 703; and therefore that the admission of her testimony did not offend the Confrontation Clause. Meanwhile, although Justice Thomas likely would conclude that the testimony was being offered for the truth of the matter asserted, he likely would further determine that the testimony was nevertheless constitutionally admissible because the appellate record does not show that the report was certified, sworn to, or otherwise imbued with the requisite "solemnity" required for the statements therein to be considered testimonial for purposes of the Confrontation Clause. Since Ms. Dick's report is not a part of the appellate record, we naturally cannot say that it plainly would meet Justice Thomas's solemnity test. In sum, it is not clear or obvious under current law that the district court erred in admitting Ms. Snider's testimony, so reversal is unwarranted on this basis.

The *Pablo* court on remand concluded that "the manner in which, and degree to which, an expert may merely rely upon, and reference during her in-court expert testimony, the out-of-court testimonial conclusions in a lab report made by another person not called as a witness is a nuanced legal issue without clearly established bright line parameters, particularly in light of the discordant 4-1-4 divide of opinions in *Williams*."

Expert's testimony on gang structure and practice did not violate the Confrontation Clause even though it was based in part on testimonial hearsay, where expert applied his own expertise. *United States v. 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. ***Compare United States v. Garcia,*** 793 F.3d 1194 (10th Cir. 2015) (gang-expert's testimony violated the Confrontation Clause, where he parroted statements from former gang members that were testimonial hearsay: "The government cannot plausibly argue that Webb applied his expertise to this statement. It involves no interpretation of gang culture or iconography, no calibrated judgment based on years of experience and the synthesis of multiple sources of information. He simply relayed what DV gang members told him. Admission of the testimony violated the Confrontation Clause.").

Forfeiture

Constitutional standard for forfeiture --- like Rule 804(b)(6) --- requires a showing that the defendant acted wrongfully with the intent to keep the witness from testifying: *Giles v. California,* 554 U.S. 353 (2008): The Court held that a defendant does not forfeit his constitutional right to confront testimonial hearsay unless the government shows that the defendant engaged in wrongdoing *designed to keep the witness from testifying at trial.* Giles was charged with the murder of his former girlfriend. A short time before the murder, Giles had assaulted the victim, and she made statements to the police implicating Giles in that assault. The victim's hearsay statements were admitted against the defendant on the ground that he had forfeited his right to invoke the Confrontation Clause, because he murdered the victim. The government made no showing that Giles murdered the victim with the intent to keep her from testifying. The Court found an intent-to-procure requirement in the common law, and therefore, under the historical analysis mandated by *Crawford*, there is necessarily an intent-to-procure requirement for forfeiture of confrontation rights. Also, at one point in the opinion, the Court in dictum stated that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial --- presumably because the primary motivation for making such statements is for something other than use at trial.

Murder of witness by co-conspirators as a sanction to protect the conspiracy against testimony constitutes forfeiture of both hearsay and Confrontation Clause objections: *United States v. Martinez,* 476 F.3d 961 (D.C. Cir. 2007): Affirming drug and conspiracy convictions, the court found no error in the admission of hearsay statements made to the DEA by an informant involved with the defendant's drug conspiracy. The trial court found by a preponderance of the evidence that the informant was murdered by members of the defendant's conspiracy, in part to procure his unavailability as a witness. The court of appeals affirmed this finding --- rejecting the defendant's argument that forfeiture could not be found because his co-conspirators would have murdered the informant anyway, due to his role in the loss of a drug shipment. The court stated that it is "surely reasonable to conclude that anyone who murders an informant does so intending *both* to exact revenge *and* to prevent the informant from disclosing further information and testifying." It concluded that the defendant's argument would have the "perverse consequence" of allowing criminals to avoid forfeiture if they could articulate more than one bad motivation for disposing of a witness. Finally, the court held that forfeiture under Rule 804(b)(6) by definition constituted forfeiture of the Confrontation Clause objection. It stated that *Crawford* and *Davis* "foreclose" the possibility that the admission of evidence under Rule 804(b)(6) could nonetheless violate the Confrontation Clause.

Fact that defendant had multiple reasons for killing a witness does not preclude a finding of forfeiture: *United States v. Jackson,* 706 F.3d 262 (4th Cir. 2013): The defendant argued that the constitutional right to confrontation can be forfeited only when a defendant was

motivated *exclusively* by a desire to silence a witness. (In this case the defendant argued that while he murdered a witness to silence him, he had additional reasons, including preventing the witness from harming the defendant's drug operation and as retaliation for robbing one of the defendant's friends.) The court rejected the argument, finding nothing in *Giles* to support it. To the contrary, the Court in *Giles* reasoned that the common law forfeiture rule was designed to prevent the defendant from profiting from his own wrong. Moreover, under a multiple-motive exception to forfeiture, defendants might be tempted to murder witnesses and then cook up another motive for the murder after the fact.

Forfeiture can be found on the basis of *Pinkerton* liability: *United States v. Dinkins,* 691 F.3d 358 (4th Cir. 2012): The court found that the defendant had forfeited his right of confrontation when a witness was killed by a coconspirator as an act to further the conspiracy by silencing the witness. The court concluded that in light of *Pinkerton* liability, "the Constitution does not guarantee an accused person against the legitimate consequence of his own wrongful acts."

Retaliatory murder of witnesses who testified against the accused in a prior case is not a forfeiture in the trial for murdering the witnesses: *United States v. Henderson,* 626 F.3d 626 (6th Cir. 2010): The defendant was convicted of bank robbery after two people (including his accomplice) testified against him. Shortly after the defendant was released from prison, the two witnesses were found murdered. At the trial for killing the two witnesses, the government offered statements made by the victims to police officers during the investigation of the bank robbery. These statements concerned their cooperation and threats made by the defendant. The trial judge admitted the statements after finding by a preponderance of the evidence that the defendant killed the witnesses. That decision, grounded in forfeiture, was made before *Giles* was decided. On appeal, the court found error under *Giles* because "Bass and Washington could not have been killed, in 1996 and 1998, respectively, to prevent them from testifying against [the defendant] in the bank robbery prosecution in 1981." Thus there was no showing of intent to keep the witnesses from testifying, as *Giles* requires for a finding of forfeiture. The court found the errors to be harmless.

Forfeiture of confrontation rights, like forfeiture under Federal Rule 804(b)(6), is found upon a showing by a preponderance of the evidence: *United States v. Johnson,* 767 F.3d 815 (9th Cir. 2014): The court affirmed convictions for murder and armed robbery. At trial hearsay testimony of an unavailable witness was admitted against the defendant, after the government made a showing that the defendant had threatened the witness; the trial court found that the defendant had forfeited his right under both the hearsay rule and the Confrontation Clause to object to the hearsay. The court found no error. It held that a forfeiture of the right to object under the hearsay rule and under the Confrontation Clause is governed by the same standard: the government must establish by a preponderance of the evidence that the defendant acted wrongfully to cause the unavailability of a government witness, with the intent that the witness would not testify at trial. The defendant argued that the Constitution requires a showing of clear and

convincing evidence before forfeiture of a right to confrontation can be found. But the court disagreed. It noted that a clear and convincing evidence standard had been applied by some lower courts when the Confrontation Clause regulated the admission of unreliable hearsay. But now, after *Crawford v. Washington*, the Confrontation Clause does not bar unreliable hearsay from being admitted; rather it regulates testimonial hearsay. The court stated that after *Crawford*, "the forfeiture exception is consistent with the Confrontation Clause, not because it is a means for determining whether hearsay is reliable, but because it is an equitable doctrine designed to prevent defendants from profiting from their own wrongdoing." The court also noted that the Supreme Court's post-*Crawford* decisions of Davis v. Washington and Giles v. California "strongly suggest, if not squarely hold, that the preponderance standard applies." On the facts, the court concluded that "the evidence tended to show that Johnson alone had the means, motive, and opportunity to threaten [the witness], and did not show anyone else did. This was sufficient to satisfy the preponderance standard."

Evaluating the kind of action the defendant must take to justify a finding of forfeiture: *Carlson v. Attorney General of California,* 791 F.3d 1003 (9th Cir. 2015): Reviewing the denial of a habeas petition, the court found that statements of victims to police were testimonial, but that the state trial court was not unreasonable in finding that the petitioner had forfeited his right to confront the declarants. In a careful analysis of Supreme Court cases, the court provided "a standard for the kind of action a defendant must take" to be found to have forfeited the right to confrontation. The court concluded that

> [T]he forfeiture-by-wrongdoing doctrine applies where there has been affirmative action on the part of the defendant that produces the desired result, non-appearance by a prospective witness against him in a criminal case. Simple tolerance of, or failure to foil, a third party's previously unexpressed decision either to skip town himself rather than testifying or to prevent another witness from appearing [is] not a sufficient reason to foreclose a defendant's Sixth Amendment confrontation rights at trial.

On the merits --- and applying the standard of deference required by AEDPA, the court concluded that the trial court could reasonably have found, on the basis of circumstantial evidence, that the petitioner more likely than not was actively involved in procuring unavailability, with the intent to keep the witness from testifying.

> **Note: The court says that a defendant's mere "acquiescence" is not enough to justify forfeiture. That language might raise a doubt as to whether a forfeiture may be found by the defendant's mere membership in a conspiracy; many courts have found such membership to be sufficient where disposing of a witness is within the course and furtherance of the underlying conspiracy. See, e.g., *United States v. Dinkins,* 691 F.3d 358 (4th Cir. 2012). The *Carlson* court, however, cited the conspiracy cases favorably, and noted that in such cases, the defendant *has* acted affirmatively and committed wrongdoing by joining a conspiracy in which a foreseeable result is killing witnesses.**

A different panel of the Ninth Circuit, in a case decided around the same time as *Carlson*, upheld a finding of forfeiture based on conspiratorial liability. *See United States Cazares,* 788 F.3d 956 (9th Cir. 2015).

The *Carlson* court noted that the restyled Rule 804(b)(6) provides that mere passive agreement with the wrongful act of another is not enough to find forfeiture, but that that forfeiture can be found if a defendant "acquiesced in wrongfully causing" the absence of the witness --- and that would include joining a conspiracy where one of the foreseeable consequences is to kill witnesses. The court found the restyling to be a helpful clarification of what the original rule meant by "acquiescence."

Grand Jury, Plea Allocutions, Etc.

Grand jury testimony and plea allocution statement are both testimonial: *United States v. Bruno,* 383 F.3d 65 (2nd Cir. 2004): The court held that a plea allocution statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant. It noted that the Court in *Crawford* had taken exception to previous cases decided by the Circuit that had admitted such statements as sufficiently reliable under *Roberts*. Those prior cases have been overruled by *Crawford.* The court also noted that the admission of grand jury testimony was error as it was clearly testimonial after *Crawford*. **See *also United States v. Becker,*** 502 F.3d 122 (2nd Cir. 2007) (plea allocution is testimonial even though redacted to take out direct reference to the defendant: "any argument regarding the purposes for which the jury might or might not have actually considered the allocutions necessarily goes to whether such error was harmless, not whether it existed at all"); ***United States v. Snype,*** 441 F.3d 119 (2nd Cir. 2006) (plea allocution of the defendant's accomplice was testimonial even though all direct references to the defendant were redacted); ***United States v. Gotti,*** 459 F.3d 296 (2nd Cir. 2006) (redacted guilty pleas of accomplices, offered to show that a bookmaking business employed five or more people, were testimonial under *Crawford*); ***United States v. Al-Sadawi,*** 432 F.3d 419 (2nd Cir. 2005) (*Crawford* violation where the trial court admitted portions of a cohort's plea allocution against the defendant, even though the statement was redacted to take out any direct reference to the defendant).

Defendant charged with aiding and abetting has confrontation rights violated by admission of primary wrongdoer's guilty plea: *United States v. Head,* 707 F.3d 1026 (8th Cir. 2013): The defendant was charged with aiding and abetting a murder committed by her boyfriend in Indian country. The trial court admitted the boyfriend's guilty plea to prove the predicate offense. The court found that the guilty plea was testimonial and reversed the aiding and abetting conviction. The court relied on *Crawford's* statement that "prior testimony that the defendant was unable to cross-examine" is one of the "core class of 'testimonial' statements."

Grand jury testimony is testimonial: *United States v. Wilmore,* 381 F.3d 868 (9th Cir. 2004): The court held, unsurprisingly, that grand jury testimony is testimonial under *Crawford*. It could hardly have held otherwise, because even under the narrowest definition of "testimonial" (i.e., the specific types of hearsay mentioned by the *Crawford* Court) grand jury testimony is covered within the definition.

Implied Testimonial Statements

Testimony that a police officer's focus changed after hearing an out-of-court statement impliedly included accusatorial statements from an accomplice and so violated the defendant's right to confrontation: ***United States v. Meises,*** 645 F.3d 5 (1st Cir. 2011): At trial an officer testified that his focus was placed on the defendant after an interview with a cooperating witness. The government did not explicitly introduce the statement of the cooperating witness. On appeal, the defendant argued that the jury could surmise that the officer's focus changed because of an out-of-court accusation of a declarant who was not produced at trial. The government argued that there was no confrontation violation because the testimony was all about the actions of the officer and no hearsay statement was admitted at trial. But the court agreed with the defendant and reversed the conviction. The court noted that it was irrelevant that the government did not introduce the actual statements, because such statements were effectively before the jury in the context of the trial. The court stated that "any other conclusion would permit the government to evade the limitations of the Sixth Amendment and the Rules of Evidence by weaving an unavailable declarant's statements into another witness's testimony by implication. The government cannot be permitted to circumvent the Confrontation Clause by introducing the same substantive testimony in a different form." ***Compare United States v. Occhiuto,*** 784 F.3d 862 (1st Cir. 2015)**:** In a narcotics prosecution, an officer testified that he arranged for a cooperating informant to buy drugs from the defendant; that he monitored the transactions; and that the drugs that were in evidence were the same ones that the defendant had sold to the informant. The defendant argued that the officer's conclusion about the drugs must have rested on assertions from the informant, and therefore his right to confrontation was violated. The defendant relied upon *Meises,* but the court distinguished that case, because here the officer's testimony was based on his own personal observations and did not necessarily rely on anything said by the informant. The fact that the officer's surveillance was not airtight did not raise a confrontation issue, rather it raised a question of weight as to the officer's conclusion.

Statements to law enforcement were testimonial, and right to confrontation was violated even though the statements were not stated in detail at trial: ***Ocampo v. Vail,*** 649 F.3d 1098 (9th Cir. 2011): In a murder case, an officer testified that on the basis of an interview with Vazquez, the police were able to rule out suspects other than the defendant. Vazquez was not produced for trial. The state court found no confrontation violation on the ground that the officer did not testify to the substance of anything Vazquez said. But the court found that the state court unreasonably applied *Crawford* and reversed the district court's denial of a grant of habeas corpus. The statements from Vazquez were obviously testimonial because they were made during an investigation of a murder. And the court held that the Confrontation Clause bars not only quotations from a declarant, but also any testimony at trial that conveys the substance of a declarant's testimonial hearsay statement. It reasoned as follows:

> Where the government officers have not only "produced" the evidence, but then condensed it into a conclusory affirmation for purposes of presentation to the jury, the difficulties of testing the veracity of the source of the evidence are not lessened but exacerbated. With the language actually used by the out-of-court witness obscured, any clues to its truthfulness provided by that language --- contradictions, hesitations, and other clues often used to test credibility --- are lost, and instead a veneer of objectivity conveyed.
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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.

Statement of young child to his teacher is not sufficiently formal to be testimonial: *Ohio v. Clark,* 135 S.Ct. 2173 (2015): This case is fully discussed in Part I. The case involved a statement from a three-year-old boy to his teachers. It accused the defendant of injuring him. The Court held that a statement is extremely unlikely to be found testimonial in the absence of some participation by or with law enforcement. The presence of law enforcement is what signifies that a statement is made formally with the motivation that it will be used in a criminal prosecution. The Court did not establish a bright-line rule, however, leaving at least the remote possibility that an accusation might be testimonial even if law enforcement had no role in the making of the statement.

Private conversations and casual remarks are not testimonial: *United States v. Malpica-Garcia,* 489 F.3d 393 (1st Cir. 2007): In a drug prosecution, the defendant argued that testimony of his former co-conspirators violated *Crawford* because some of their assertions were not based on personal knowledge but rather were implicitly derived from conversations with other people (e.g., that the defendant ran a protection racket). The court found that if the witnesses were in fact relying on accounts from others, those accounts were not testimonial. The court noted that the information was obtained from people "in the course of private conversations or in casual remarks that no one expected would be preserved or later used at trial." There was no indication that the statements were made "to police, in an investigative context, or in a courtroom setting."

Informal letter found reliable under the residual exception is not testimonial: *United States v. Morgan,* 385 F.3d 196 (2nd Cir. 2004): In a drug trial, a letter written by the co-defendant was admitted against the defendant. The letter was written to a boyfriend and implicated both the defendant and the co-defendant in a conspiracy to smuggle drugs. The court found that the letter was properly admitted under Rule 807, and that it was not testimonial under *Crawford.* The court noted the following circumstances indicating that the letter was not testimonial: 1) it was not written in a coercive atmosphere; 2) it was not addressed to law enforcement authorities; 3) it was written to an intimate acquaintance; 4) it was written in the privacy of the co-defendant's hotel room; 5) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 6) it was not written to curry favor with the authorities or with anyone else. These were the same factors that rendered the hearsay statement sufficiently reliable to qualify under Rule 807.

Informal conversation between defendant and undercover informant was not testimonial under *Davis: United States v. Burden,* 600 F.3d 204 (2nd Cir. 2010): Appealing RICO and drug convictions, the defendant argued that the trial court erred in admitting a recording of a drug transaction between the defendant and a cooperating witness. The defendant argued that the statements on the recording were testimonial, but the court disagreed and affirmed. The

defendant's part of the conversation was not testimonial because he was not aware at the time that the statement was being recorded or would be potentially used at his trial. As to the informant, "anything he said was meant not as an accusation in its own right but as bait."

> **Note: Other courts, as seen in the "Not Hearsay" section below, have come to the same result as the Second Circuit in *Burden,* but using a different analysis: 1) admitting the defendant's statement does not violate the Confrontation Clause because it is his own statement and he doesn't have a right to confront himself; 2) the informant's statement, while testimonial, is not offered for its truth but only to put the defendant's statements in context --- therefore it does not violate the right to confrontation because it is not offered as an accusation.**

Prison telephone calls between defendant and his associates were not testimonial: *United States v. Jones,* 716 F.3d 851 (4th Cir. 2013): Appealing from convictions for marriage fraud, the defendant argued that the trial court erred in admitting telephone conversations between the defendant and his associates, who were incarcerated at the time. The calls were recorded by the prison. The court found no error in admitting the conversations because they were not testimonial. The calls involved discussions to cover up and lie about the crime, and they were casual, informal statements among criminal associates, so it was clear that they were not primarily motivated to be used in a criminal prosecution. The defendant argued that the conversations were testimonial because the parties knew they were being recorded. But the court noted that "a declarant's understanding that a statement could potentially serve as criminal evidence does not necessarily denote testimonial intent" and that "just because recorded statements are used at trial does not mean they were created for trial." The court also noted that a prison "has significant institutional reasons for recording phone calls outside or procuring forensic evidence --- i.e., policing its own facility by monitoring prisoners' contact with individuals outside the prison."

Following *Clark,* the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker,* 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark.* The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Statements made to an undercover informant setting up a drug transaction are not testimonial: *Brown v. Epps,* 686 F.3d 281 (5th Cir. 2012)**:** The court found no error in the state

court's admission of an intercepted conversation between the defendant, an accomplice, and an undercover informant. The conversation was to set up a drug deal. The court held that statements "unknowingly made to an undercover officer, confidential informant, or cooperating witness are not testimonial in nature because the statements are not made under circumstances which would lead an objective witness to reasonably believe that the statements would be available for later use at trial." The court elaborated further:

> The conversations did not consist of solemn declarations made for the purpose of establishing some fact. Rather, the exchange was casual, often profane, and served the purpose of selling cocaine. Nor were the unidentified individuals' statements made under circumstances that would lead an objective witness reasonably to believe that they would be available for use at a later trial. To the contrary, the statements were furthering a criminal enterprise; a future trial was the last thing the declarants were anticipating. Moreover, they were unaware that their conversations were being preserved, so they could not have predicted that their statements might subsequently become available at trial. * * * No witness goes into court to proclaim that he will sell you crack cocaine in a Wal-Mart parking lot. An objective analysis would conclude that the primary purpose of the unidentified individuals' statements was to arrange the drug deal. Their purpose was not to create a record for trial and thus is not within the scope of the Confrontation Clause.

Statements made by a victim to her friends and family are not testimonial: *Doan v. Carter,* 548 F.3d 449 (6th Cir. 2008): The defendant challenged a conviction for murder of his girlfriend. The trial court admitted a number of statements from the victim concerning physical abuse that the defendant had perpetrated on her. The defendant argued that these statements were testimonial but the court disagreed. The defendant contended that under *Davis* a statement is nontestimonial only if it is in response to an emergency, but the court rejected the defendant's "narrow characterization of nontestimonial statements." The court relied on the statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation * * * would be excluded, if at all, only by hearsay rules." ***See also United States v. Boyd,*** 640 F.3d 657 (6th Cir. 2011) (statements were non-testimonial because the declarant made them to a companion; stating broadly that "statements made to friends and acquaintances are non-testimonial").

Suicide note implicating the declarant and defendant in a crime was testimonial under the circumstances: *Miller v. Stovall,* 608 F.3d 913 (6th Cir. 2010): A former police officer involved in a murder wrote a suicide note to his parents, indicating he was going to kill himself so as not go to jail for the crime that he and the defendant committed. The note was admitted against the defendant. The court found that the note was testimonial and its admission against the defendant violated his right to confrontation, because the declarant could "reasonably anticipate" that the note would be passed on to law enforcement --- especially because the declarant was a former police officer.

Note: The court's "reasonable anticipation" test appears to be a broader definition of testimoniality than that applied by the Supreme Court in *Davis* and especially *Bryant*. The Court in *Davis* looked to the "primary motivation" of the speaker. In this case, the "primary motivation" of the declarant was probably to explain to his parents why he was going to kill himself, rather than to prepare a case against the defendant. So the case appears wrongly decided.

Statements made by an accomplice to a jailhouse informant are not testimonial: *United States v. Honken,* 541 F.3d 1146 (8th Cir. 2008): When the defendant's murder prosecution was pending, the defendant's accomplice (Johnson) was persuaded by a fellow inmate (McNeese) that Johnson could escape responsibility for the crime by getting another inmate to falsely confess to the crime --- but that in order to make the false confession believable, Johnson would have to disclose where the bodies were buried. Johnson prepared maps and notes describing where the bodies were buried, and gave it to McNeese with the intent that it be delivered to the other inmate who would falsely confess. In fact this was all a ruse concocted by McNeese and the authorities to get Johnson to confess, in which event McNeese would get a benefit from the government. The notes and maps were admitted at the defendant's trial, over the defendant's objection that they were testimonial. The defendant argued that Johnson had been subjected to the equivalent of a police interrogation. But the court held that the evidence was not testimonial, because Johnson didn't know that he was speaking to a government agent. It explained as follows:

> Johnson did not draw the maps with the expectation that they would be used against Honken at trial * * * . Further, the maps were not a "solemn declaration" or a "formal statement." Rather, Johnson was more likely making a casual remark to an acquaintance. We simply cannot conclude Johnson made a "testimonial" statement against Honken without the faintest notion that she was doing so.

See also United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008) (private conversation between inmates about a future course of action is not testimonial).

Statement from one friend to another in private circumstances is not testimonial: *United States v. Wright,* 536 F.3d 819 (8th Cir. 2008): The defendant was charged with shooting two people in the course of a drug deal. One victim died and one survived. The survivor testified at trial to a private conversation he had with the other victim, before the shootings occurred. The court held that the statements of the victim who died were not testimonial. The statements were made under informal circumstances to a friend. The court relied on the Supreme Court's statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial.

Accusatory statements in a victim's diary are not testimonial: *Parle v. Runnels*, 387 F.3d 1030 (9th Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The court held that the victim's diary was not testimonial, as it was a private diary of daily events. There was no indication that it was prepared for use at a trial.

Private conversation between mother and son is not testimonial: *United States v. Brown,* 441 F.3d 1330 (11th Cir. 2006): In a murder prosecution, the court admitted testimony that the defendant's mother received a phone call, apparently from the defendant; the mother asked the caller whether he had killed the victim, and then the mother started crying. The mother's reaction was admitted at trial as an excited utterance. The court found no violation of *Crawford.* The court reasoned as follows:

> We need not divine any additional definition of "testimonial" evidence to conclude that the private conversation between mother and son, which occurred while Sadie Brown was sitting at her dining room table with only her family members present, was not testimonial. The phone conversation Davis overheard obviously was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial. Thus, it is not testimonial and its admission is not barred by *Crawford*. (Citations omitted).

Defendant's lawyer's informal texts with I.R.S. agent found not testimonial: *United States v. Wilson,* 788 F.3d 1298 (11th Cir. 2015): The defendant was charged with converting checks that he knew to be issued as a result of fraudulently filed income tax returns. He claimed that he was a legitimate cashier and did not know that the checks were obtained by fraud. The trial court admitted texts sent by the defendant's lawyer to the I.R.S. The texts involved the return of certain records that the I.R.S. agent had allowed the defendant to take to copy; the texts contradicted the defendant's account at trial that he didn't know he had to return the boxes (in essence a showing of consciousness of guilt). The defendant argued that the lawyer's texts to the I.R.S. agent were testimonial, but the court disagreed: "Here, the attorney communicated through informal text messages to coordinate the delivery of the boxes. The cooperative and informal nature of those text messages was such that an objective witness would not reasonably expect the texts to be used prosecutorially." ***See also United States v. Mathis,*** 767 F.3d 1264 (11th Cir. 2014) (text messages between defendant and a minor concerning sex were informal, haphazard communications and therefore not made with the primary motive to be used in a criminal prosecution).

Interpreters

Interpreter is not a witness but merely a language conduit and so testimony recounting the interpreter's translation does not violate *Crawford*: *United States v. Orm Hieng,* 679 F.3d 1131 (9th Cir. 2012): At the defendant's drug trial, an agent testified to inculpatory statements the defendant made through an interpreter. The interpreter was not called to testify, and the defendant argued that admitting the interpreter's statements about what the defendant said violated his right to confrontation. The court found that the interpreter had acted as a "mere language conduit" and so he was not a witness against the defendant within the meaning of the Confrontation Clause. The court noted that in determining whether an interpreter acts as a language conduit, a court must undertake a case-by-case approach, considering factors such as "which party supplied the interpreter, whether the interpreter had any motive to lead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated." The court found that these factors cut in favor of the lower court's finding that the interpreter in this case had acted as a language conduit. Because the interpreter was only a conduit, the witness against the defendant was not the interpreter, but rather himself. The court concluded that when it is the defendant whose statements are translated, "the Sixth Amendment simply has no application because a defendant cannot complain that he was denied the opportunity to confront himself." ***See also United States v. Romo-Chavez,*** 681 F.3d 955 (9th Cir. 2012)(where an interpreter served only as a language conduit, the defendant's own statements were properly admitted under Rule 801(d)(2)(A), and the Confrontation Clause was not violated because the defendant was his own accuser and he had no right to cross-examine himself); ***United States v. Aifang Ye,*** 808 F.3d 395 (9th Cir. 2015) (adhering to pre-*Crawford* case law that a translator acting as a language conduit does not implicate the Confrontation Clause, because that case law "is not clearly irreconcilable with *Crawford*"; finding on the facts that the translator was a language conduit, by applying the four-factor test from *Orm Hieng*). .

Interpreter's statements were testimonial: *United States v. Charles,* 722 F.3d 1319 (11th Cir. 2013): The defendant was convicted of knowingly using a fraudulently authored travel document. When the defendant was detained at the airport, he spoke to the Customs Officer through an interpreter. At trial, the defendant's statements were reported by the officer. The interpreter was not called. The court held that the defendant had the right to confront the interpreter. It stated that the interpreter's translations were testimonial because they were rendered in the course of an interrogation and for these purposes the interpreter was the relevant declarant. But the court found that the error was not plain and affirmed the conviction. The court did not address the conflicting authority in the Ninth Circuit, supra. ***See also United States v. Curbelo,*** 726 F.3d 1260 (11th Cir. 2013) (transcripts of a wiretapped conversation that were translated constituted the translator's implicit out-of-court representation that the translation was correct, and the translator's implicit assertions were testimonial; but there was no violation of the Confrontation Clause because a party to the conversation testified to what was said based on his

independent review of the recordings and the transcript, and the transcript itself was never admitted at trial).

Interrogations, Tips to Law Enforcement, Etc.

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

Accomplice's statements during police interrogation are testimonial: ***United States v. Alvarado-Valdez,*** 521 F.3d 337 (5th Cir. 2008): The trial court admitted the statements of the defendant's accomplice that were made during a police interrogation. The statements were offered for their truth --- to prove that the accomplice and the defendant conspired with others to transport cocaine. Because the accomplice had absconded and could not be produced for trial, admission of his testimonial statements violated the defendant's right to confrontation.

Identification of a defendant, made to police by an incarcerated person, is testimonial: ***United States v. Pugh,*** 405 F.3d 390 (6th Cir. 2005): In a bank robbery prosecution, the court found a *Crawford* violation when the trial court admitted testimony from a police officer that he had brought a surveillance photo down to a person who was incarcerated, and that person identified the defendant as the man in the surveillance photo. This statement was testimonial under *Crawford* because "the term 'testimonial' at a minimum applies to police interrogations." The court also noted that the statement was sworn and that a person who "makes a formal statement to government officers bears testimony." ***See also United States v. McGee****,* 529 F.3d 691 (6th Cir. 2008) (confidential informant's statement identifying the defendant as the source of drugs was testimonial).

Circuit Court's opinion that an anonymous tip to law enforcement is testimonial was reversed by the Supreme Court on AEPDA grounds: ***Etherton v. Rivard,*** 800 F.3d 737 (6th Cir. 2015), ***rev'd sub nom., Woods v. Etherton,*** 136 S.Ct. 1149 (2016): On habeas review, the court held that an anonymous tip to law enforcement, accusing the defendant of criminal misconduct, was testimonial. It further held that the defendant's right to confrontation was violated at his trial where the tip was admitted into evidence for its truth. It noted that "[t]he prosecutor's repeated references both to the existence and the details of the tip went far beyond what was necessary for background --- thereby indicating the content of the tip was admitted for its truth." **But the Supreme Court, in a per curiam opinion, reversed the Sixth Circuit,** holding that it gave insufficient deference to the state court's determination that the anonymous tips were properly admitted for the non-hearsay purpose of explaining the context of the police investigation. The Court stated that a "fairminded jurist" could conclude "that repetition of the tip did not establish that the uncontested facts it conveyed were submitted for their truth. Such a jurist might reach that

conclusion by placing weight on the fact that the truth of the facts was not disputed. No precedent of this Court clearly forecloses that view."

Accomplice statement to law enforcement is testimonial: *United States v. Nielsen,* 371 F.3d 574 (9th Cir. 2004): Nielsen resided in a house with Volz. Police officers searched the house for drugs. Drugs were found in a floor safe. An officer asked Volz who had access to the floor safe. Volz said that she did not but that Nielsen did. This hearsay statement was admitted against Nielsen at trial. The court found this to be error, as the statement was testimonial under *Crawford*, because it was made to police officers during an interrogation. The court noted that even the first part of Volz's statement --- that she did not have access to the floor safe --- violated *Crawford* because it provided circumstantial evidence that Nielsen did have access.

Statement made by an accomplice after arrest, but before formal interrogation, is testimonial: *United States v. Summers,* 414 F.3d 1287 (10th Cir. 2005): The defendant's accomplice in a bank robbery was arrested by police officers. As he was walked over to the patrol car, he said to the officer, "How did you guys find us?" The court found that the admission of this statement against the defendant violated his right to confrontation under *Crawford.* The court explained as follows:

> Although Mohammed had not been read his *Miranda* rights and was not subject to formal interrogation, he had nevertheless been taken into physical custody by police officers. His question was directed at a law enforcement official. Moreover, Mohammed's statement * * * implicated himself and thus was loosely akin to a confession.

Statements made by accomplice to police officers during a search are testimonial: *United States v. Arbolaez,* 450 F.3d 1283 (11th Cir. 2006): In a marijuana prosecution, the court found error in the admission of statements made by one of the defendant's accomplices to law enforcement officers during a search. The government argued that the statements were offered not for truth but to explain the officers' reactions to the statements. But the court found that "testimony as to the details of statements received by a government agent . . . even when purportedly admitted not for the truthfulness of what the informant said but to show why the agent did what he did after he received that information constituted inadmissible hearsay." The court also found that the accomplice's statements were testimonial under *Crawford*, because they were made in response to questions from police officers.

Investigative Reports

Reports by a law enforcement officer on prior statements made by a cooperating witness were testimonial: ***United States v. Moreno,*** 809 F.3d 766 (3rd Cir. 2016): After a cooperating witness testified on direct, defense counsel attacked his credibility on the ground that he had made a deal. On redirect, the trial court allowed the witness to read into evidence the reports of a law enforcement officer who had interviewed the witness. The reports indicated that the witness had made statements consistent with his in-court testimony. The court of appeals found a violation of the Confrontation Clause, because the officer's hearsay statements (about what the witness had told him) were testimonial and the officer was not produced for cross-examination. The court found that the reports were "investigative reports prepared by a government agent in actual anticipation of trial."

Joined Defendants

Testimonial hearsay offered by another defendant violates *Crawford* where the statement can be used against the defendant: *United States v. Nguyen,* 565 F.3d 668 (9th Cir. 2009): In a trial of multiple defendants in a fraud conspiracy, one of the defendants offered statements he made to a police investigator. These statements implicated the defendant. The court found that the admission of the codefendant's statements violated the defendant's right to confrontation. The statements were clearly testimonial because they were made to a police officer during an interrogation. The court noted that the confrontation analysis "does not change because a co-defendant, as opposed to the prosecutor, elicited the hearsay statement. The Confrontation Clause gives the accused the right to be confronted with the witnesses against him. The fact that Nguyen's co-counsel elicited the hearsay has no bearing on her right to confront her accusers."

Judicial Findings and Judgments

Judicial findings and an order of judicial contempt are not testimonial: *United States v. Sine,* 493 F.3d 1021 (9th Cir. 2007): The court held that the admission of a judge's findings and order of criminal contempt, offered to prove the defendant's lack of good faith in a tangentially related fraud case, did not violate the defendant's right to confrontation. The court found "no reason to believe that Judge Carr wrote the order in anticipation of Sine's prosecution for fraud, so his order was not testimonial."

See also United States v. Ballesteros-Selinger, 454 F.3d 973 (9th Cir. 2006) (holding that an immigration judge's deportation order was nontestimonial because it "was not made in anticipation of future litigation").

Law Enforcement Involvement

Following *Clark,* the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker,* 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark.* The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Accusations made to child psychologist appointed by law enforcement were testimonial: *McCarley v. Kelly,* 759 F.3d 535 (6th Cir. 2014): A three year old boy witnessed a murder but would not talk to the police about it. The police sought out a child psychologist, who interviewed the boy with the understanding that she would try to "extract information" from him about the crime and refer that information to the police. Helping the child was, at best, a secondary motive. Under these circumstances, the court found that the child's statements to the psychologist were testimonial and erroneously admitted in the defendant's state trial. The court noted that the sessions "were more akin to police interrogations than private counseling sessions."

> **Note: *McCarley* was decided before *Ohio v. Clark,* where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. *McCarley* differs in one respect from *Clark*, though. In *McCarley,* the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark,* where the child was being interviewed by his teachers. Still, the result in *McCarley* is questionable after *Clark* --- and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer.**

Police officer's count of marijuana plants found in a search is testimonial: *United States v. Taylor,* 471 F.3d 832 (7th Cir. 2006): The court found plain error in the admission of testimony by a police officer about the number of marijuana plants found in the search of the defendant's premises. The officer did not himself count all of the plants; part of his total count was based on a hearsay statement of another officer who assisted in the count. The court held that the officer's hearsay statement about the amount of plants counted was clearly testimonial as it was an evaluation prepared for purposes of criminal prosecution.

Social worker's interview of child-victim, with police officers present, was the functional equivalent of interrogation and therefore testimonial: *Bobadilla v. Carlson,* 575 F.3d 785 (8th Cir. 2009): The court affirmed the grant of a writ of habeas after a finding that the defendant's state conviction for child sexual abuse was tainted by the admission of a testimonial statement by the child-victim. A police officer arranged to have the victim interviewed at the police station five days after the alleged abuse. The officer sought the assistance of a social worker, who conducted the interview using a forensic interrogation technique designed to detect sexual abuse. The court found that "this interview was no different than any other police interrogation: it was initiated by a police officer a significant time after the incident occurred for the purpose of gathering evidence during a criminal investigation." The court found it important that the interview took place at the police station, it was recorded for use at trial, and the social worker utilized a structured, forensic method of interrogation at the behest of the police. Under the circumstances, the social worker "was simply acting as a surrogate interviewer for the police."

> **Note: *Bobadilla* was decided before *Ohio v. Clark,* where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. *Bobadilla* differs in one respect from *Clark,* though. In *Bobadilla,* the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark,* where the child was being interviewed by his teachers. Still, the result in *Bobadilla* is questionable after *Clark* --- and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer.**

Statements made by a child-victim to a forensic investigator are testimonial: *United States v. Bordeaux,* 400 F.3d 548 (8th Cir. 2005): In a child sex abuse prosecution, the trial court admitted hearsay statements made by the victim to a forensic investigator. The court reversed the conviction, finding among other things that the hearsay statements were testimonial under *Crawford.* The court likened the exchange between the victim and the investigator to a police interrogation. It elaborated as follows:

> The formality of the questioning and the government involvement are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a "forensic" interview . . . That [the victim's] statements may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.

Note: This case was decided before *Ohio v. Clark,* where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. This case differs in one respect from *Clark,* though --- the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark,* where the child was being interviewed by his teachers. Still, the result here is questionable after *Clark* --- and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer.

Moreover, the court concedes that there may have been a dual motive here --- treatment being the other motive. At a minimum, a court would have to make the finding that the prosecutorial motive was primary, and the court did not do this.

See also United States v. Eagle, 515 F.3d 794 (8th Cir. 2008) (statements from a child concerning sex abuse, made to a forensic investigator, are testimonial). ***Compare United States v. Peneaux,*** 432 F.3d 882 (8th Cir. 2005) (distinguishing *Bordeaux* where the child's statement was made to a treating physician rather than a forensic investigator, and there was no evidence that the interview resulted in any referral to law enforcement: "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial."); ***United States v. DeLeon,*** 678 F.3d 317 (4th Cir. 2012) (discussed below under "medical statements" and distinguishing *Bordeaux* and *Bobodilla* as cases where statements were essentially made to law enforcement officers and not for treatment purposes).

Machine-Generated Information

Printout from machine is not hearsay and therefore its admission does not violate *Crawford*: *United States v. Washington,* 498 F.3d 225 (4th Cir. 2007): The defendant was convicted of operating a motor vehicle under the influence of drugs and alcohol. At trial, an expert testified on the basis of a printout from a gas chromatograph machine. The machine issued the printout after testing the defendant's blood sample. The expert testified to his interpretation of the data issued by the machine --- that the defendant's blood sample contained PCP and alcohol. The defendant argued that *Crawford* was violated because the expert had no personal knowledge of whether the defendant's blood contained PCP or alcohol. He read *Crawford* to require the production of the lab personnel who conducted the test. But the court rejected this argument, finding that the machine printout was not hearsay, and therefore its use at trial by the expert could not violate *Crawford* even though it was prepared for use at trial. The court reasoned as follows:

> The technicians could neither have affirmed or denied independently that the blood contained PCP and alcohol, because all the technicians could do was to refer to the raw data printed out by the machine. Thus, the statements to which Dr. Levine testified in court . . . did not come from the out-of-court technicians [but rather from the machine] and so there was no violation of the Confrontation Clause. . . . The raw data generated by the diagnostic machines are the "statements" of the machines themselves, not their operators. But "statements" made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause.

The court noted that the technicians might have needed to be produced to provide a chain of custody, but observed that the defendant made no objection to the authenticity of the machine's report.

> **Note: The result in *Washington* appears unaffected by *Williams,* as the Court in *Williams* had no occasion to consider whether a machine output can be testimonial hearsay.**

See also United States v. Summers, 666 F.3d 192 (4th Cir. 2011): (expert's reliance on a "pure instrument read-out" did not violate the Confrontation Clause because such a read-out is not "testimony").

Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone."

Google satellite images, and machine-generated location markers, are not hearsay and therefore, even if prepared for trial, their admission does not violate the Confrontation Clause: *United States v. Lizarraga-Tirado,* 789 F.3d 1107 (4th Cir. 2015): The defendant was convicted of illegal entry as a previously removed alien. The defendant contended that when he was arrested, he was still on the Mexican side of the border. At trial the arresting officer testified that she contemporaneously recorded the coordinates of the defendant's arrest using a handheld GPS device. To illustrate the location of these coordinates, the government introduced a Google Earth satellite image. The image contained a "tack" showing the location of the coordinates to be on the United States side of the border. There was no testimony on whether the tack was automatically generated or manually placed and labeled. The defendant argued that both the satellite image and the tack were inadmissible hearsay and that their admission violated his right to confrontation. As to the satellite image itself, the court found that "[b]ecause a satellite image, like a photograph, makes no assertion, it isn't hearsay." The court found the tack to be a more difficult question. It noted that "[u]nlike a satellite image itself, labeled markers added to a satellite image do make clear assertions. Indeed, that is what makes them useful." The court concluded that if a tack is placed manually and then labeled, "it's classic hearsay" --- for example, a dot manually labeled with the name of a town "asserts that there's a town where you see the dot." On the other hand, "[a] tack placed by the Google Earth program and automatically labeled with GPS coordinates isn't hearsay" because it is completely machine-generated and so no assertion is being made.

In this case, the court took judicial notice that the tack was automatically generated because the court itself accessed Google Earth and typed in the same coordinates to which the arresting officer testified --- which resulted in a tack identical to the one shown on the satellite image admitted at trial. Thus the program "analyze[d] the GPS coordinates and, without any human intervention, place[d] a labeled tack on the satellite image." The court concluded that "[b]ecause the program makes the relevant assertion --- that the tack is accurately placed at the labeled GPS coordinates --- there's no statement as defined by the hearsay rule." The court noted that any issues of malfunction or tampering present questions of authenticity, not hearsay, and the defendant made no authenticity objection. Finally, "[b]ecause the satellite images and tack-coordinates pair weren't hearsay, their admission also didn't violate the Confrontation Clause."

Electronic tabulation of phone calls is not a statement and therefore cannot be testimonial hearsay: *United States v. Lamons,* 532 F.3d 1251 (11th Cir. 2008): Bomb threats were called into an airline, resulting in the disruption of a flight. The defendant was a flight attendant accused of sending the threats. The trial court admitted a CD of data collected from telephone calls made to the airline; the data indicated that calls came from the defendant's cell phone at the time the threats were made. The defendant argued that the information on the CD was testimonial hearsay, but the court disagreed, because the information was entirely machine-generated. The court stated that "the witnesses with whom the Confrontation Clause is concerned are *human* witnesses" and that the purposes of the Confrontation Clause "are ill-served through confrontation of the machine's human operator. To say that a wholly machine-generated

statement is unreliable is to speak of mechanical error, not mendacity. The best way to advance the truth-seeking process * * * is through the process of authentication as provided in Federal Rule of Evidence 901(b)(9)." The court concluded that there was no hearsay statement at issue, and therefore the Confrontation Clause was inapplicable.

Medical/Therapeutic Statements

Statements by victim of abuse to treatment manager of Air Force medical program were admissible under Rule 803(4) and non-testimonial: *United States v. DeLeon,* 678 F.3d 317 (4th Cir. 2012): The defendant was convicted of murdering his eight-year-old son. Months before his death, the victim had made statements about incidents in which he had been physically abused by the defendant as part of parental discipline. The statements were made to the treatment manager of an Air Force medical program that focused on issues of family health. The court found that the statements were properly admitted under Rule 803(4) and (essentially for that reason) were non-testimonial because their primary purpose was not for use in a criminal prosecution of the defendant. The court noted that the statements were not made in response to an emergency, but that emergency was only one factor under *Bryant.* The court also recognized that the Air Force program "incorporates reporting requirements and a security component" but stated that these factors were not sufficient to render statements to the treatment manager testimonial. The court explained why the "primary motive" test was not met in the following passage:

> We note first that Thomas [the treatment manager] did not have, nor did she tell Jordan [the child] she had, a prosecutorial purpose during their initial meeting. Thomas was not employed as a forensic investigator but instead worked * * * as a treatment manager. And there is no evidence that she recorded the interview or otherwise sought to memorialize Jordan's answers as evidence for use during a criminal prosecution. * * * Rather, Thomas used the information she gathered from Jordan and his family to develop a written treatment plan and continued to provide counseling and advice on parenting techniques in subsequent meetings with family members. * * * Thomas also did not meet with Jordan in an interrogation room or at a police station but instead spoke with him in her office in a building that housed * * * mental health service providers.
>
> Importantly, ours is also not a case in which the social worker operated as an agent of law enforcement. * * * Here, Thomas did not act at the behest of law enforcement, as there was no active criminal investigation when she and Jordan spoke. * * * An objective review of the parties' actions and the circumstances of the meeting confirms that the primary purpose was to develop a treatment plan --- not to establish facts for a future criminal prosecution. Accordingly, we hold that the contested statements were nontestimonial and that their admission did not violate DeLeon's Sixth Amendment rights.

Note: The court's analysis is strongly supported by the subsequent Supreme Court decision in *Ohio v. Clark.* The *Clark* Court held that: 1) Statements by children are extremely unlikely to be primarily motivated for use in a criminal prosecution; and 2) public officials do not become an agent of law enforcement by asking about suspected child abuse.

Following *Clark,* the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker*, 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark.* The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Statements admitted under Rule 803(4) are presumptively non-testimonial: *United States v. Peneaux,* 432 F.3d 882 (8th Cir. 2005): "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial."

Miscellaneous

Labels on electronic devices, indicating that they were made in Taiwan, are not testimonial: *United States v. Napier*, 787 F.3d 333 (6th Cir. 2015): In a child pornography prosecution, the government proved the interstate commerce element by offering two cellphones used to commit the crimes. The cellphones were each labeled "Made in Taiwan." The defendant argued that the statements on the labels were hearsay and testimonial. But the court found that the labels clearly were not made with the primary motive of use in a criminal prosecution.

> **Note: The court in *Napier* reviewed the confrontation argument for plain error, because the defendant objected at trial only on hearsay grounds; a hearsay objection does not preserve a claim of error on confrontation grounds.**

Statement of an accomplice made to his attorney is not testimonial: *Jensen v. 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* is not retroactive (the holding in *Bochting*) is that it is not essential to the accuracy of a verdict. And one of the reasons *Crawford* is not essential to accuracy is that, with respect to non-testimonial statements, *Crawford* conflicts with accurate factfinding because it lifts all constitutional reliability requirements imposed by *Roberts.* Thus, if hearsay is non-testimonial, there is no constitutional limit on its admission.

Non-Verbal Information

Videotape of drug transaction was not hearsay and so its introduction did not violate the right to confrontation: ***United States v. Wallace,*** 753 F.3d 671 (7th Cir. 2014): In a drug prosecution, the government introduced a videotape, without sound, which appeared to show the defendant selling drugs to an undercover informant. The defendant argued that the tape was inadmissible hearsay and violated his right to confrontation, because the undercover informant was never called to testify. But the court disagreed and affirmed his conviction. The court reasoned that the video was

> a picture; it was not a witness who could be cross-examined. The agent narrated the video at trial, and his narration was a series of statements, so he was subject to being cross-examined and was, and thus was "confronted." [The informant] could have testified to what he saw, but what could he have said about the recording device except that the agents had strapped it on him and sent him into the house, whether the device recorded whatever happened to be in front of it? Rule 801(a) of the Federal Rules of Evidence does define "statement" to include "nonverbal conduct," but only if the person whose conduct it was "intended it as an assertion." We can't fit the videotape in this definition.

Photographs of seized evidence was not testimony so its admission did not violate the Confrontation Clause: ***United States v. Brooks,*** 772 F.3d 1161 (9th Cir. 2014): In a narcotics trial, the defendant objected to the admission of photographs of a seized package on the ground it would violate his right to confrontation. But the court disagreed. It noted that the *Crawford* Court defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." The photographs did not meet that definition because they "were not 'witnesses' against Brooks. They did not 'bear testimony' by declaring or affirming anything with a 'purpose.'"

See also the cases under the heading "Machine-Generated Evidence" supra.

Not Offered for Truth

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's own statements: *United States v. Bostick,* 791 F.3d 127 (D.C.Cir. 2015): In a surreptitiously taped conversation, the defendant made incriminating statements to a confidential informant in the course of a drug transaction. The defendant argued that admitting the informant's part of the conversation violated his right to confrontation because the informant was motivated to develop the conversation for purposes of prosecution. But the court found that the Confrontation Clause was inapplicable because the informant's statements were not offered for their truth, but rather to provide "context" for the defendant's own statements regarding the drug transaction. (And the defendant had no right to confront his own statements). Statements that are not hearsay cannot violate the Confrontation Clause even if they fit the definition of testimoniality.

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's own statements: *United States v. Hansen*, 434 F.3d 92 (1st Cir. 2006): After a crime and as part of cooperation with the authorities, the father of an accomplice surreptitiously recorded his conversation with the defendant, in which the defendant admitted criminal activity. The court found that the father's statements during the conversation were testimonial under *Crawford* --- as they were made specifically for use in a criminal prosecution. But their admission did not violate the defendant's right to confrontation. The defendant's own side of the conversation was admissible as a statement of a party-opponent, and the father's side of the conversation was admitted not for its truth but to provide context for the defendant's statements. *Crawford* does not bar the admission of statements not offered for their truth. ***Accord United States v. Walter,*** 434 F.3d 30 (1st Cir. 2006) (*Crawford* "does not call into question this court's precedents holding that statements introduced solely to place a defendant's admissions into context are not hearsay and, as such, do not run afoul of the Confrontation Clause."); ***United States v. Santiago,*** 566 F.3d 65 (1st Cir. 2009) (statements were not offered for their truth "but as exchanges with Santiago essential to understand the context of Santiago's own recorded statements arranging to 'cook' and supply the crack"); ***United States v. Liriano,*** 761 F.3d 131 (1st Cir. 2014) (even though statements were testimonial, admission did not violation the Confrontation Clause where they were properly offered to place the defendant's responses in context). ***See also Furr v. Brady,*** 440 F.3d 34 (1st Cir. 2006) (the defendant was charged with firearms offenses and intimidation of a government witness; an accomplice's confession to law enforcement did not implicate *Crawford* because it was not admitted for its truth; rather, it was admitted to show that the defendant knew about the confession and, in contacting the accomplice thereafter, intended to intimidate him).

Note: Five members of the Court in *Williams* disagreed with Justice Alito's analysis that the Confrontation Clause was not violated because the testimonial lab report was not admitted for its truth. The question from *Williams* is whether those five Justices (now four, actually) are opposed to *any* use of the not-for-truth analysis in answering Confrontation Clause challenges. The answer is apparently that their objection to the not-for truth analysis in *Williams* does not extend to situations in which (in their personal view) the statement has a *legitimate* not-for-truth purpose. Thus, Justice Thomas distinguishes the expert's use of the lab report from the prosecution's admission of an accomplice's confession in *Tennessee v. Street,* where the confession "was not introduced for its truth, but only to impeach the defendant's version of events." In *Street* the defendant challenged his confession on the ground that he had been coerced to copy Peele's confession. Peele's confession was introduced not for its truth but only to show that it differed from Street's. For that purpose, it didn't matter whether it was true. Justice Thomas stated that "[u]nlike the confession in *Street,* statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose" because "to use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true." Justice Kagan in her opinion essentially repeats Justice Thomas's analysis and agrees with his distinction between legitimate and illegitimate use of the "not-for-truth" argument. Both Justices Kagan and Thomas agree with the Court's statement in *Crawford* that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Both would simply add the proviso that the not-for-truth use must be *legitimate* or *plausible.*

It follows that the cases under this "not-for-truth" headnote are probably unaffected by *Williams,* as they largely permit admission of testimonial statements as offered "not-for-truth" only when that purpose is legitimate, i.e., *only when the statement is offered for a purpose as to which it is relevant regardless of whether it is true or not.*

Also it should be noted that one of the "five members" of the Court that rejected Justice Alito's broader "not-for-truth" reasoning is no longer on the Court.

Statements by informant to police officers, offered implausibly to prove the "background" of the police investigation, probably violate *Crawford,* but admission is not

plain error: *United States v. Maher,* 454 F.3d 13 (1st Cir. 2006): At the defendant's drug trial, several accusatory statements from an informant (Johnson) were admitted ostensibly to explain why the police focused on the defendant as a possible drug dealer. The court found that these statements were testimonial under *Crawford*, because "the statements were made while the police were interrogating Johnson after Johnson's arrest for drugs; Johnson agreed to cooperate and he then identified Maher as the source of drugs. . . . In this context, it is clear that an objectively reasonable person in Johnson's shoes would understand that the statement would be used in prosecuting Maher at trial." The court then addressed the government's argument that the informant's statements were not admitted for their truth, but to explain the background of the police investigation:

> The government's articulated justification --- that any statement by an informant to police which sets context for the police investigation is not offered for the truth of the statements and thus not within *Crawford* --- is impossibly overbroad [and] may be used not just to get around hearsay law, but to circumvent *Crawford's* constitutional rule. . . . Here, Officer MacVane testified that the confidential informant had said Maher was a drug dealer, even though the prosecution easily could have structured its narrative to avoid such testimony. The . . . officer, for example, could merely say that he had acted upon "information received," or words to that effect. It appears the testimony was primarily given exactly for the truth of the assertion that Maher was a drug dealer and should not have been admitted given the adequate alternative approach.

The court noted, however, that the defendant had not objected to the admission of the informant's statements. It found no plain error, noting among other things, the strength of the evidence and the fact that the testimony "was followed immediately by a sua sponte instruction to the effect that any statements of the confidential informant should not be taken as standing for the truth of the matter asserted, i.e., that Maher was a drug dealer who supplied Johnson with drugs."

Accomplice statements purportedly offered for "background" were actually admitted for their truth, resulting in a Confrontation Clause violation: *United States v. Cabrera-Rivera,* 583 F.3d 26 (1st Cir. 2009): In a robbery prosecution, the government offered hearsay statements that accomplices made to police officers. The government argued that the statements were not offered for their truth, but rather to explain how the government was able to find other evidence in the case. But the court found that the accusations were not properly admitted for the purpose of explaining the police investigation. The government at trial emphasized the details of the accusations that had nothing to do with leading the government to other evidence; and the government did not contend that one of the accomplice's confessions led to any other

evidence. Because the statements were testimonial, and because they were in fact offered for their truth, admission of the statements violated *Crawford.*

> **Note: The result in *Cabrera-Rivera* is certainly unchanged by *Williams.* The prosecution's was not offering the accusations for any *legitimate* not-for-truth purpose.**

Statements offered to provide context for the defendant's part of a conversation were not hearsay and therefore could not violate the Confrontation Clause: *United States v. Hicks,* 575 F.3d 130 (1st Cir. 2009): The court found no error in admitting a telephone call that the defendant placed from jail in which he instructed his girlfriend how to package and sell cocaine. The defendant argued that admission of the girlfriend's statements in the telephone call violated *Crawford.* But the court found that the girlfriend's part of the conversation was not hearsay and therefore did not violate the defendant's right to confrontation. The court reasoned that the girlfriend's statements were admissible not for their truth but to provide the context for understanding the defendant's incriminating statements. The court noted that the girlfriend's statements were "little more than brief responses to Hicks's much more detailed statements." ***See also United States v. Occhiuto,*** 784 F.3d 862 (1st Cir. 2015) (statements by undercover informant made to defendant during a drug deal were properly admitted; they were offered not for their truth but to provide context for the defendant's own statements, and so they did not violate the Confrontation Clause).

Accomplice's confession, when offered in rebuttal to explain why police did not investigate other suspects and leads, is not hearsay and therefore its admission does not violate *Crawford: United States v. Cruz-Diaz,* 550 F.3d 169 (1st Cir. 2008): In a bank robbery prosecution, defense counsel cross-examined a police officer about the decision not to pursue certain investigatory opportunities after apprehending the defendants. Defense counsel identified "eleven missed opportunities" for tying the defendants to the getaway car, including potential fingerprint and DNA evidence. In response, the officer testified that the defendant's co-defendant had given a detailed confession. The defendant argued that introducing the cohort's confession violated his right to confrontation, because it was testimonial under *Crawford.* But the court found the confession to be not hearsay --- as it was offered for the not-for-truth purpose of explaining why the police conducted the investigation the way they did. Accordingly admission of the statement did not violate *Crawford.*

The defendant argued that the government's true motive was to introduce the confession for its truth, and that the not-for-truth purpose was only a pretext. But the court disagreed, noting

that the government never tried to admit the confession until defense counsel attacked the thoroughness of the police investigation. Thus, introducing the confession for a not-for-truth purpose was proper rebuttal. The defendant suggested that "if the government merely wanted to explain why the FBI and police failed to conduct a more thorough investigation it could have had the agent testify in a manner that entirely avoided referencing Cruz's confession" --- for example, by stating that the police chose to truncate the investigation "because of information the agent had." But the court held that this kind of sanitizing of the evidence was not required, because it "would have come at an unjustified cost to the government." Such generalized testimony, without any context, "would not have sufficiently rebutted Ayala's line of questioning" because it would have looked like one more cover-up. The court concluded that "[w]hile there can be circumstances under which Clause concerns prevent the admission of the substance of a declarant's out-of-court statement where a less prejudicial narrative would suffice in its place, this is not such a case." ***See also United States v. Diaz,*** 670 F.3d 332 (1st Cir. 2012) (testimonial statement from one police officer to another to effect an arrest did not violate the right to confrontation because it was not hearsay: "The government offered Perez's out-of-court statement to explain why Veguilla had arrested [the defendant], not as proof of the drug sale that Perez allegedly witnesses. Out-of-court statements providing directions from one individual to another do not constitute hearsay.").

False alibi statements made to police officers by accomplices are testimonial, but admission does not violate the Confrontation Clause because they are not offered for their truth: ***United States v. Logan,*** 419 F.3d 172 (2nd Cir. 2005): The defendant was convicted of conspiracy to commit arson. The trial court admitted statements made by his coconspirators to the police. These statements asserted an alibi, and the government presented other evidence indicating that the alibi was false. The court found no Confrontation Clause violation in admitting the alibi statements. The court relied on *Crawford* for the proposition that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than proving the truth of the matter asserted." The statements were not offered to prove that the alibi was true, but rather to corroborate the defendant's own account that the accomplices planned to use the alibi. Thus "the fact that Logan was aware of this alibi, and that [the accomplices] actually used it, was evidence of conspiracy among [the accomplices] and Logan."

> **Note: The *Logan* court reviewed the defendant's Confrontation Clause argument under the plain error standard. This was because defense counsel at trial objected on grounds of hearsay, but did not make a specific Confrontation Clause objection.**

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's statements: *United States v. Paulino,* 445 F.3d 211 (2nd Cir. 2006): The court stated: "It has long been the rule that so long as statements are not presented for the truth of the matter asserted, but only to establish a context, the defendant's Sixth Amendment rights are not transgressed. Nothing in *Crawford v. Washington* is to the contrary."

> **Note: This typical use of "context" is not in question after *Williams*, because the focus is on the defendant's statements and not on the truth of the declarant's statements. Use of context could be *illegitimate* however if the focus is in fact on the truth of the declarant's statements. See, e.g., *United States v. Powers* from the Sixth Circuit, infra.**

Co-conspirator statements made to government officials to cover-up a crime (whether true or false) do not implicate *Crawford* because they were not offered for their truth: *United States v. Stewart,* 433 F.3d 273 (2nd Cir. 2006)**:** In the prosecution of Martha Stewart, the government introduced statements made by each of the defendants during interviews with government investigators. Each defendant's statement was offered against the other, to prove that the story told to the investigators was a cover-up. The court held that the admission of these statements did not violate *Crawford,* even though they were "provided in a testimonial setting." It noted first that to the extent the statements were false, they did not violate *Crawford* because "*Crawford* expressly confirmed that the categorical exclusion of out-of-court statements that were not subject to contemporaneous cross-examination does not extend to evidence offered for purposes other than to establish the truth of the matter asserted." The defendants argued, however, that some of the statements made during the course of the obstruction were actually true, and as they were made to government investigators, they were testimonial. The court observed that there is some tension in *Crawford* between its treatment of co-conspirator statements (by definition not testimonial) and statements made to government investigators (by their nature testimonial), where truthful statements are made as part of a conspiracy to obstruct justice. It found, however, that admitting the truthful statements did not violate *Crawford* because they were admitted not for their truth, but rather to provide context for the false statements. The court explained as follows:

> It defies logic, human experience and even imagination to believe that a conspirator bent on impeding an investigation by providing false information to investigators would lace the totality of that presentation with falsehoods on every subject of inquiry. To do so would be to alert the investigators immediately that the conspirator is not to be believed, and the effort to obstruct would fail from the outset. * * * The truthful portions of statements in furtherance of the conspiracy, albeit spoken in a testimonial setting, are intended to make

the false portions believable and the obstruction effective. Thus, the truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire testimonial presentation and thereby obstruct justice.

Note: Offering a testimonial statement to prove it is false is a typical and presumably legitimate not-for-character purpose and so would appear to be unaffected by *Williams.* That is, to the extent some members of the Court apply a distinction between legitimate and illegitimate not-for-truth usage, offering the statement to prove it is false is certainly on the legitimate side of the line. It is one of the clearest cases of a statement not being offered to prove that the assertions therein are true. Of course, the government must provide independent evidence that the statement is in fact false.

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

Confessions of other targets of an investigation were testimonial, but did not violate the Confrontation Clause because they were offered to rebut charges against the integrity of the investigation: *United States v. Christie,* 624 F.3d 558 (3rd Cir. 2010): In a child pornography investigation, the FBI obtained the cooperation of the administrator of a website, which led to the arrests of a number of users, including the defendant. At trial the defendant argued that the investigation was tainted because the FBI, in its dealings with the administrator, violated its own guidelines in treating informants. Specifically the defendant argued that these misguided law enforcement efforts led to unreliable statements from the administrator. In rebuttal, the

government offered and the court admitted evidence that twenty-four other users identified by the administrator confessed to child pornography-related offenses. The defendant argued that admitting the evidence of the others' confessions violated the hearsay rule and the Confrontation Clause, but the court rejected these arguments and affirmed. It reasoned that the confessions were not offered for their truth, but to show why the FBI could believe that the administrator was a reliable source, and therefore to rebut the charge of improper motive on the FBI's part. As to the confrontation argument, the court declared that "our conclusion that the testimony was properly introduced for a non-hearsay purpose is fatal to Christie's *Crawford* argument, since the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."

Accomplice's testimonial statement was properly admitted for impeachment purposes, but failure to give a limiting instruction was error: *Adamson v. Cathel,* 633 F.3d 248 (3rd Cir. 2011): The defendant challenged his confession at trial by arguing that the police fed him the details of his confession from other confessions by his alleged accomplices, Aljamaar and Napier. On cross-examination, the prosecutor introduced those confessions to show that they differed from the defendant's confession on a number of details. The court found no error in the admission of the accomplices' confessions. While testimonial, they were offered for impeachment and not for their truth and so did not violate the Confrontation Clause. However, the trial court gave no limiting instruction, and the court found that failure to be error. The court concluded as follows:

> Without a limiting instruction to guide it, the jury that found Adamson guilty was free to consider those facially incriminating statements as evidence of Adamson's guilt. The careful and crucial distinction the Supreme Court made between an impeachment use of the evidence and a substantive use of it on the question of guilt was completely ignored during the trial.
>
> **Note: The use of the cohort's confessions to show differences from the defendant's confession is precisely the situation reviewed by the Court in *Tennessee v. Street.* As noted above, while some Justices in *Williams* rejected the "not-for-truth" analysis as applied to expert reliance on testimonial statements, all of the Justices approved of that analysis as applied to the facts of *Street.***

Statements made in a civil deposition might be testimonial, but admission does not violate the Confrontation Clause if they are offered to prove they are false: *United States v. Holmes,* 406 F.3d 337 (5th Cir. 2005): The defendant was convicted of mail fraud and conspiracy,

stemming from a scheme with a court clerk to file a backdated document in a civil action. The defendant argued that admitting the deposition testimony of the court clerk, given in the underlying civil action, violated his right to confrontation after *Crawford*. The clerk testified that the clerk's office was prone to error and thus someone in that office could have mistakenly backdated the document at issue. The court considered the possibility that the clerk's testimony was a statement in furtherance of a conspiracy, and noted that coconspirator statements ordinarily are not testimonial under *Crawford*. It also noted, however, that the clerk's statement "is not the run-of-the-mill co-conspirator's statement made unwittingly to a government informant or made casually to a partner in crime; rather, we have a co-conspirator's statement that is derived from a formalized testimonial source --- recorded and sworn civil deposition testimony." Ultimately the court found it unnecessary to determine whether the deposition testimony was "testimonial" within the meaning of *Crawford* because it was not offered for its truth. Rather, the government offered the testimony "to establish its *falsity* through independent evidence." ***See also United States v. Acosta,*** 475 F.3d 677 (5th Cir. 2007) (accomplice's statement offered to impeach him as a witness --- by showing it was inconsistent with the accomplice's refusal to answer certain questions concerning the defendant's involvement with the crime --- did not violate *Crawford* because the statement was not admitted for its truth and the jury received a limiting instruction to that effect); ***United States v. Smith,*** 822 F.3d 755 (5th Cir. 2016)(testimonial statement from an accomplice did not violate the Confrontation Clause because it was "introduced in the context of how Agent Michalik developed suspects . . . for the charged bank robberies. This court has consistently held that out-of-court statements providing background information to explain the actions of investigators are not hearsay" and so do not violate the Confrontation Clause).

Informant's accusation, offered to explain why police acted as they did, was testimonial but it was not hearsay, and so its admission did not violate the Confrontation Clause: ***United States v. Deitz,*** 577 F.3d 672 (6th Cir. 2009): The court found no error in allowing an FBI agent to testify about why agents tailed the defendant to what turned out to be a drug transaction. The agent testified that a confidential informant had reported to them about Deitz's drug activity. The court found that the informant's statement was testimonial --- because it was an accusation made to a police officer --- but it was not hearsay and therefore its admission did not violate Deitz's right to confrontation. The court found that admitting the testimony "explaining why authorities were following Deitz to and from Dayton was not plain error as it provided mere background information, not facts going to the very heart of the prosecutor's case." The court also observed that "had defense counsel objected to the testimony at trial, the court could have easily restricted its scope." ***See also United States v. Al-Maliki,*** 787 F.3d 784 (6th Cir. 2015) (in a prosecution for child sex abuse, the trial court admitted the defendant's wife's statement to police accusing the defendant of sexual abuse; the court found no error because it was offered for the limited purpose of explaining why an official investigation began: "Two conclusions follow: It is

not hearsay, * * * and the government did not violate the Confrontation Clause"); ***United States v. Doxey,*** 833 F.3d 692 (6th Cir. 2016) (informant's tip leading to search of the defendant's vehicle was not hearsay as it was offered "merely by way of background"); ***United States v. Davis***, 577 F.3d 660 (6th Cir. 2009): A woman's statement to police that she had recently seen the defendant with a gun in a car that she described along with the license plate was not hearsay ---and so even though testimonial did not violate the defendant's right to confrontation --- because it was offered only to explain the police investigation that led to the defendant and the defendant's conduct when he learned the police were looking for him. ***Accord United States v. Napier,*** 787 F.3d 333 (6th Cir. 2015): In a child pornography prosecution, the government offered a document from Time Warner cable, obtained pursuant to a government subpoena, showing that an email address was accessed at the defendant's home and that the defendant was the subscriber to the account. The court found no confrontation violation because the document was offered not for its truth, but rather "to demonstrate how the Cincinnati office of the FBI located Napier." The court noted that the trial court gave the jury a limiting instruction that the document could be considered only to prove the course of the investigation.

Statement offered to prove the defendant's knowledge of a crime was non-hearsay and so did not violate the accused's confrontation rights: *United States v. Boyd,* 640 F.3d 657 (6th Cir. 2011): A defendant charged with being an accessory after the fact to a carjacking and murder had told police officers that his friend Davidson had told him that he had committed those crimes. At trial the government offered that confession, which included the underlying statements of Boyd. The defendant argued that admitting Davidson's statements violated his right to confrontation. But the court found no error because the hearsay was not offered for its truth: "Davidson's statements to Boyd were offered to prove Boyd's knowledge [of the crimes that Davidson had committed] rather than for the truth of the matter asserted."

Admission of complaints offered for non-hearsay purpose did not violate the Confrontation Clause: *United States v. Adams,* 722 F.3d 788 (6th Cir. 2013): The defendants were convicted for participation in a vote-buying scheme in three elections. They complained that their confrontation rights were violated when the court admitted complaints that were contained within state election reports. The court of appeals rejected that argument, because the complaints were offered for proper non-hearsay purposes. Some of the information was offered to prove it was false, and other information was offered to show that the defendants adjusted their scheme based on the complaints received. The court did find, however, that the complaints were erroneously admitted under Rule 403, because of the substantial risk that the jury would use the assertions for their truth; that the probative value for the non-hearsay purpose was "minimal at best"; and the government had other less prejudicial evidence available to prove the point. Technically, this

should mean that there was a violation of the Confrontation Clause, because the evidence was not *properly* offered for a not-for-truth purpose. But the court did not make that holding. It reversed on evidentiary grounds.

Informant's statements were not properly offered for "context," so their admission violated *Crawford*: *United States v. Powers,* 500 F.3d 500 (6th Cir. 2007): In a drug prosecution, a law enforcement officer testified that he had received information about the defendant's prior criminal activity from a confidential informant. The government argued on appeal that even though the informant's statements were testimonial, they did not violate the Confrontation Clause, because they were offered "to show why the police conducted a sting operation" against the defendant. But the court disagreed and found a *Crawford* violation. It reasoned that "details about Defendant's alleged prior criminal behavior were not necessary to set the context of the sting operation for the jury. The prosecution could have established context simply by stating that the police set up a sting operation." ***See also United States v. Hearn***, 500 F.3d 479 (6th Cir.2007) (confidential informant's accusation was not properly admitted for background where the witness testified with unnecessary detail and "[t]he excessive detail occurred twice, was apparently anticipated, and was explicitly relied upon by the prosecutor in closing arguments").

Admitting informant's statement to police officer for purposes of "background" did not violate the Confrontation Clause: *United States v. Gibbs,* 506 F.3d 479 (6th Cir. 2007): In a trial for felon-firearm possession, the trial court admitted a statement from an informant to a police officer; the informant accused the defendant of having firearms hidden in his bedroom. Those firearms were not part of the possession charge. While this accusation was testimonial, its admission did not violate the Confrontation Clause, "because the testimony did not bear on Gibbs's alleged possession of the .380 Llama pistol with which he was charged." Rather, it was admitted "solely as background evidence to show why Gibbs's bedroom was searched." ***See also United States v. Macias-Farias,*** 706 F.3d 775 (6th Cir. 2013) (officer's testimony that he had received information from someone was offered not for its truth but to explain the officer's conduct, thus no confrontation violation).

Admission of the defendant's conversation with an undercover informant does not violate the Confrontation Clause, where the undercover informant's part of the conversation is offered only for "context": *United States v. Nettles,* 476 F.3d 508 (7th Cir. 2007): The defendant made plans to blow up a government building, and the government had an

undercover informant contact him and ostensibly offer to help him obtain materials. At trial, the court admitted a recorded conversation between the defendant and the informant. Because the informant was not produced for trial, the defendant argued that his right to confrontation was violated. But the court found no error, because the admission of the defendant's part of the conversation was not barred by the Confrontation Clause, and the informant's part of the conversation was admitted only to place the defendant's part in "context." Because the informant's statements were not offered for their truth, they did not implicate the Confrontation Clause.

The *Nettles* court did express some concern about the breadth of the "context" doctrine, stating: "We note that there is a concern that the government may, in future cases, seek to submit based on 'context' statements that are, in fact, being offered for their truth." But the court found no such danger in this case, noting the following: 1) the informant presented himself as not being proficient in English, so most of his side of the conversation involved asking the defendant to better explain himself; and 2) the informant did not "put words in Nettles's mouth or try to persuade Nettles to commit more crimes in addition to those that Nettles had already decided to commit." ***See also United States v. Tolliver,*** 454 F.3d 660 (7th Cir. 2006) (statements of one party to a conversation with a conspirator were offered not for their truth but to provide context to the conspirator's statements: "*Crawford* only covers testimonial statements proffered to establish the truth of the matter asserted. In this case . . . Shye's statements were admissible to put Dunklin's admissions on the tapes into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth. As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused."); ***United States v. Bermea-Boone***, 563 F.3d 621 (7th Cir. 2009): A conversation between the defendant and a coconspirator was properly admitted; the defendant's side of the conversation was a statement of a party-opponent, and the accomplice's side was properly admitted to provide context for the defendant's statements: "Where there is no hearsay, the concerns addressed in *Crawford* do not come in to play. That is, the declarant, Garcia, did not function as a witness against the accused."; ***United States v. York,*** 572 F.3d 415 (7th Cir. 2009) (informant's recorded statements in a conversation with the defendant were admitted for context and therefore did not violate the Confrontation Clause: "we see no indication that Mitchell tried to put words in York's mouth"); ***United States v. Hicks,*** 635 F.3d 1063 (7th Cir. 2011): (undercover informant's part of conversations were not hearsay, as they were offered to place the defendant's statements in context; because they were not offered for truth their admission did not violate the defendant's right to confrontation); ***United States v. Gaytan,*** 649 F.3d 573 (7th Cir. 2011) (undercover informant's statements to the defendant in a conversation setting up a drug transaction were clearly testimonial, but not offered for their truth: "Gaytan's responses ['what you need?' and 'where the loot at?'] would have been unintelligible without the context provided by Worthen's statements about his or his brother's interest in 'rock'"; the court noted that there was no indication that the

informant was "putting words in Gaytan's mouth"); ***United States v. Foster,*** 701 F.3d 1142 (7th Cir. 2012) ("Here, the CI's statement regarding the weight [of the drug] was not offered to show what the weight *actually* was * * * but rather to explain the defendant's acts and make his statements intelligible. The defendant's statement to 'give me sixteen fifty' (because the original price was 17) would not have made sense without reference to the CI's comment that the quantity was off. Because the statements were admitted only to prove context, *Crawford* does not require confrontation."); ***United States v. Faruki,*** 803 F.3d 847 (7th Cir. 2015) (no confrontation violation where out-of-court statements were offered to place the defendant's own statements in context).

For more on "context" see ***United States v. Wright,*** 722 F.3d 1064 (7th Cir. 2013): In a drug prosecution, the defendant's statement to a confidential 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."

In ***United States v. Smith,*** 816 F.3d 479 (7th Cir. 2016), a public corruption case, the court rejected the use of "context" where placing the defendant's statement in "context" only worked if the informant's statement to the defendant were true. In *Smith*, the court gave an example of an informant saying to the defendant "Last week I paid you $7000 for a letter that my client will use to seek a grant. Do you remember?" And the defendant says "Yes." The court noted that the informant's statement puts the defendant's answer in context, but only if the informant was speaking the truth. In that situation, the informant's statement would be hearsay and potentially triggered the right to confrontation --- but that right was not violated in this case because the informant's statements were not offered for truth but rather were verbal acts establishing a corrupt agreement. ***See also United States v. Amaya,*** 828 F.3d 518 (7th Cir. 2016), where an informant's statement "that was a big ass pistol" was offered to put the officer's statement "Hell yea" in context. But the court found that context was unworkable because the informant's statement was only relevant to context if it were true --- only if a gun was present would the "Hell yea" mean anything pertinent to the case. But the informant's statement was found not testimonial, because it was simply blurted out, and so was not made with the primary motive that it would be used in a criminal prosecution.

Note: The concerns expressed in *Nettles* and the other 7th Circuit cases discussed above --- about possible abuse of the "context" usage --- are along the same

lines as those expressed by Justices Thomas and Kagan in *Williams,* when they seek to distinguish legitimate and illegitimate not-for-truth purposes. If context is a pretext and the statement is in fact offered for the truth, then the statement is not being offered for a legitimate not-for-truth purpose.

Police report offered for a purpose other than proving the truth of its contents is properly admitted even if it is testimonial: *United States v. Price,* 418 F.3d 771 (7th Cir. 2005): In a drug conspiracy trial, the government offered a report prepared by the Gary Police Department. The report was an "intelligence alert" identifying some of the defendants as members of a street gang dealing drugs. The report was found in the home of one of the conspirators. The government offered the report at trial to prove that the conspirators were engaging in counter-surveillance, and the jury was instructed not to consider the accusations in the report as true, but only for the fact that the report had been intercepted and kept by one of the conspirators. The court found that even if the report was testimonial, there was no error in admitting the report as proof of awareness and counter-surveillance. It relied on *Crawford* for the proposition that the Confrontation Clause does not bar the use of out-of-court statements "for purposes other than proving the truth of the matter asserted." ***See also United States v. Ambrose,*** 668 F.3d 943 (7th Cir. 2012) (conversation between two crime family members about actions of a cooperating witness were not offered for their truth but rather to show that information had been leaked; because the statements were not offered for their truth, there was no violation of the right to confrontation).

Accusation offered not for truth, but to explain police conduct, was not hearsay and did not violate the defendant's right to confrontation: *United States v. Dodds,* 569 F.3d 336 (7th Cir. 2009): Appealing a firearms conviction, the defendant argued that his right to confrontation was violated when the trial court admitted a statement from an unidentified witness to a police officer. The witness told the officer that a black man in a black jacket and black cap was pointing a gun at people two blocks away. The court found no confrontation violation because "the problem that *Crawford* addresses is the admission of hearsay" and the witness's statement was not hearsay. It was not admitted for its truth --- that the witness saw the man he described pointing a gun at people --- but rather "to explain why the police proceeded to the intersection of 35th and Galena and focused their attention on Dodds, who matched the description they had been given." The court noted that the trial judge did not provide a limiting instruction, but also noted that the defendant never asked the court to do so and that the lack of an instruction was not raised on appeal. ***See also United States v. Taylor,*** 569 F.3d 742 (7th Cir. 2009): An accusation from a bystander to a police officer that the defendant had just taken a gun across the street was not

hearsay because it was offered to explain the officers' actions in the course of their investigation: "for example, why they looked across the street * * * and why they handcuffed Taylor when he approached." The court noted that absent "complicating circumstances, such as a prosecutor who exploits nonhearsay statements for their truth, nonhearsay testimony does not present a confrontation problem." The court found no "complicating circumstances" in this case.

> **Note: The Court's reference in *Taylor* to the possibility of exploiting a not-for-truth purpose runs along the same lines as those expressed by Justice Thomas and Kagan in *Williams.***

Testimonial statement was not legitimately offered for context or background and so was a violation of *Crawford: United States v. Adams,* 628 F.3d 407 (7th Cir. 2010): In a narcotics prosecution, statements made by confidential informants to police officers were offered against the defendant. For example, the government offered testimony from a police officer that he stopped the defendant's car on a tip from a confidential informant that the defendant was involved in the drug trade and was going to buy crack. A search of the car uncovered a large amount of money and a crack pipe. The government offered the informant's statement not for the truth of the assertion but as "foundation for what the officer did." The trial court admitted the statement and gave a limiting instruction. But the court of appeals found error, though harmless, because the informant's statements "were not necessary to provide any foundation for the officer's subsequent actions." It explained as follows:

> The CI's statements here are different from statements we have found admissible that gave context to an otherwise meaningless conversation or investigation. [cites omitted] Here the CI's accusations did not counter a defense strategy that police officers randomly targeted Adams. And, there was no need to introduce the statements for context --- even if the CI's statements were excluded, the jury would have fully understood that the officer searched Adams and the relevance of the items recovered in that search to the charged crime.

See also United States v. Walker, 673 F.3d 649 (7th Cir. 2012) (confidential informant's statements to the police --- that he got guns from the defendant --- were not properly offered for context but rather were testimonial hearsay: "The government repeatedly hides behind its asserted needs to provide 'context' and relate the 'course of investigation.' These euphemistic descriptions cannot disguise a ploy to pin the two guns on Walker while avoiding the risk of putting Ringswald on the stand. * * * A prosecutor surely knows that hearsay results when he elicits from a government agent that 'the informant said he got this gun from X' as proof that X supplied the gun."); ***Jones v. Basinger,*** 635 F.3d 1030 (7th Cir. 2011) (accusation made to police was not

offered for background and therefore its admission violated the defendant's right to confrontation; the record showed that the government encouraged the jury to use the statements for their truth).

> **Note: *Adams, Walker* and *Jones* are all examples of illegitimate use of not-for-truth purposes and so finding a Confrontation violation in these cases is quite consistent with the analysis of not-for-truth purposes in the Thomas and Kagan opinions in *Williams.***

Statements by a confidential informant included in a search warrant were testimonial and could not be offered at trial to explain the police investigation: ***United States v. Holmes,*** 620 F.3d 836 (8th Cir. 2010): In a drug trial, the defendant tried to distance himself from a house where the drugs were found in a search pursuant to a warrant. On redirect of a government agent --- after defense counsel had questioned the connection of the defendant to the residence --- the trial judge permitted the agent to read from the statement of a confidential informant. That statement indicated that the defendant was heavily involved in drug activity at the house. The government acknowledged that the informant's statements were testimonial, but argued that the statements were not hearsay, as they were offered only to show the officer's knowledge and the propriety of the investigation. But the court found the admission to be error. It noted that informants' statements are admissible to explain an investigation "only when the propriety of the investigation is at issue in the trial." In this case, the defendant did not challenge the validity of the search warrant and did not dispute the propriety of the investigation. The court stated that if the real purpose of admitting the evidence was to explain the officer's knowledge and the nature of the investigation, "a question asking whether someone had told him that he had seen Holmes at the residence would have addressed the issue * * * without the need to go into the damning details of what the CI told Officer Singh." ***Compare United States v. Brooks,*** 645 F.3d 971 (8th Cir. 2011) ("In this case, the statement at issue [a report by a confidential informant that Brooks was selling narcotics and firearms from a certain premises] was not offered to prove the truth of the matter asserted --- that is, that Brooks was indeed a drug and firearms dealer. It was offered purely to explain why the officers were at the multi-family dwelling in the first place, which distinguishes this case from *Holmes.* In *Holmes,* it was undisputed that officers had a valid warrant. Accordingly less explanation was necessary. Here, the CI's information was necessary to explain why the officers went to the residence without a warrant and why they would be more interested in apprehending the man on the stairs than the man who fled the scene. Because the statement was offered only to show why the officers conducted their investigation in the way they did, the Confrontation Clause is not implicated here."). ***See also United States v. Shores,*** 700 F.3d 366 (8th Cir. 2012) (confidential informant's accusation made to police officer was properly offered to

prove the propriety of the investigation: "From the early moments of the trial, it was clear that Shores would be premising his defense on the theory that he was a victim of government targeting."); ***United States v. Wright,*** 739 F.3d 1160 (8th Cir. 2014) (Officer's statement to another officer, "come into the room, I've found something" was not hearsay because it was offered only to explain why the second officer came into the room and to rebut the defense counsel's argument that the officer entered the room in response to a loud noise: "If the underlying statement is testimonial but not hearsay, it can be admitted without violating the defendant's Sixth Amendment rights.").

Accusatory statements offered to explain why an officer conducted an investigation in a certain way are not hearsay and therefore admission does not violate *Crawford: United States v. Brown,* 560 F.3d 754 (8th Cir. 2009): Challenging drug conspiracy convictions, one defendant argued that it was error for the trial court to admit an out-of-court statement from a shooting victim to a police officer. The victim accused a person named "Clean" who was accompanied by a man named Charmar. The officer who took this statement testified that he entered "Charmar" into a database to help identify "Clean" and the database search led him to the defendant. The court found no error in admitting the victim's statement, stating that "it is not hearsay when offered to explain why an officer conducted an investigation in a certain way." The defendant argued that the purported nonhearsay purpose for admitting the evidence "was only a subterfuge to get Williams' statement about Brown before the jury." But the court responded that the defendant "did not argue at trial that the prejudicial effect of the evidence outweighed its nonhearsay value." The court also observed that the trial court twice instructed the jury that the statement was admitted for the limited purpose of understanding why the officer searched the database for Charmar. Finally, the court held that because the statement properly was not offered for its truth, "it does not implicate the confrontation clause."

Statement offered as foundation for good faith basis for asking question on cross-examination does not implicate *Crawford: United States v. Spears,* 533 F.3d 715 (8th Cir. 2008): In a bank robbery case, the defendant testified and was cross-examined and asked about her knowledge of prior bank robberies. In order to inquire about these bad acts, the government was required to establish to the court a good-faith basis for believing that the acts occurred. The government's good-faith basis was the confession of the defendant's associate to having taken part in the prior robberies. The defendant argued that the associate's statements, made to police officers, were testimonial. But the court held that *Crawford* was inapplicable because the associate's statements were not admitted for their truth --- indeed they were not admitted at all. The

court noted that there was "no authority for the proposition that use of an out-of-court testimonial statement merely as the good faith factual basis for relevant cross-examination of the defendant at trial implicates the Confrontation Clause."

Admitting testimonial statements that were part of a conversation with the defendant did not violate the Confrontation Clause because they were not offered for their truth: *United States v. Spencer,* 592 F.3d 866 (8th Cir. 2010): Affirming drug convictions, the court found no error in admitting tape recordings of a conversation between the defendant and a government informant. The defendant's statements were statements by a party-opponent and admitting the defendant's own statements cannot violate the Confrontation Clause. The informant's statements were not hearsay because they were admitted only to put the defendant's statements in context.

Statement offered to prove it was false is not hearsay and so did not violate the Confrontation Clause: *United States v. Yielding,* 657 F.3d 688 (8th Cir. 2011): In a fraud prosecution, the trial court admitted the statement of an accomplice to demonstrate that she used a false cover story when talking to the FBI. The court found no error, noting that "the point of the prosecutor's introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false." The court found that the government introduced other evidence to show that the declarant's assertions that a transaction was a loan were false. The court cited *Bryant* for the proposition that because the statements were not hearsay, their admission did not violate the Confrontation Clause.

Admitting testimonial statements to show a common (false) alibi did not violate the Confrontation Clause: *United States v. Young,* 753 F.3d 757 (8th Cir. 2014): Young was accused of conspiring with Mock to murder Young's husband and make it look like an accident. The government introduced the statement that Mock made to police after the husband was killed. The statement was remarkably consistent in all details with the alibi that Young had independently provided, and many of the assertions were false. The government offered Mock's statement for the inference that she had Young had collaborated on an alibi. Young argued that introducing Mock's statement to the police violated her right to confrontation, but the court disagreed. It observed that the Confrontation Clause does not bar the admission of out-of-court statements that are not hearsay. In this case, Mock's statement was not offered for its truth but rather "to show that Young and Mock had a common alibi, scheme, or conspiracy. In fact, Mock's statements to Deputy Salsberry are valuable to the government because they are false."

Statement offered for impeachment was not hearsay and therefore admission did not violate the defendant's right to confrontation: *United States v. Cotton,* 823 F.3d 430 (8th Cir. 2016): "Cotton first argued that admission of Frazier's post-arrest statement violated his rights under the Confrontation Clause. Because the statement was offered for impeachment [as a prior inconsistent statement of a hearsay declarant] and not to prove the truth of the matter asserted, there was no Confrontation Clause violation in this case."

Statements not offered for truth do not violate the Confrontation Clause even if testimonial: *United States v. Faulkner,* 439 F.3d 1221 (10th Cir. 2006): The court stated that "it is clear from *Crawford* that the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement." ***See also United States v. Mitchell,*** 502 F.3d 931 (9th Cir. 2007) (information given by an eyewitness to a police officer was not offered for its truth but rather "as a basis" for the officer's action, and therefore its admission did not violate the Confrontation Clause); ***United States v. Brinson,*** 772 F.3d 1314 (10th Cir. 2014) (In a prosecution for sex trafficking, statements made to an undercover police officer that set up a meeting for sex were properly admitted as not hearsay and so their admission did not violate the Confrontation Clause: "The prosecution did not present the out-of-court statements to prove the truth of the statements about the location, price, or lack of a condom. Rather, the prosecution offered these statements to explain why Officer Osterdyk went to Room 123, how he knew the price, and why he agreed to pay for oral sex."; the court also found that the statements were not testimonial anyway because the declarant did not know she was talking to a police officer.); ***United States v. Ibarra-Diaz,*** 805 F.3d 908 (10th Cir. 2015) (confidential informant's statements to a police officer about the defendant's interest in doing a drug deal were testimonial, but the right to confrontation was not violated because the statements were offered to "explain why the officer did not put a body wire on the CI for this significant drug transaction --- i.e., because, unlike situations where the detective is in control of the informant from the outset and * * * of the circumstances of the informant's dealings with a potential target, in this instance the CI just called the detective 'out of the blue' about the possible drug transaction"; other statements from accomplices were properly admitted because they were not offered for their truth but to explain the conduct of the detective who heard the statements).

Accomplice's confession, offered to explain a police officer's subsequent conduct, was not hearsay and therefore did not violate the Confrontation Clause: *United States v. Jiminez,* 564 F.3d 1280 (11th Cir. 2009): The court found no plain error in the admission of an accomplice's

confession in the defendant's drug conspiracy trial. The police officer who had taken the accomplice's confession was cross-examined extensively about why he had repeatedly interviewed the defendant and about his decision not to obtain a written and signed confession from him. This cross-examination was designed to impeach the officer's credibility and to suggest that he was lying about the circumstances of the interviews and about the defendant's confession. In explanation, the officer stated that he approached the defendant the way he did because the accomplice had given a detailed confession that was in conflict with what the defendant had said in prior interviews. The court held that in these circumstances, the accomplice's confession was properly admitted to explain the officer's motivations, and not for its truth. Accordingly its admission did not violate the Confrontation Clause, even though the statement was testimonial.

> **Note**: **The court assumed that the accomplice's confession was admitted for a proper, not-for-truth purpose, even though there was no such finding on the record, and the trial court never gave a limiting instruction. Part of the reason for this deference is that the court was operating under a plain error standard. The defendant at trial objected only on hearsay grounds, and this did not preserve any claim of error on confrontation clause grounds. The concurring judge noted, however, "that the better practice in this case would have been for the district court to have given an instruction as to the limited purpose of Detective Wharton's testimony" because "there is no assurance, and much doubt, that a typical jury, on its own, would recognize the limited nature of the evidence."**

See also United States v. Augustin, 661 F.3d 1105 (11th Cir. 2011) (no confrontation violation where declarant's statements "were not offered for the truth of the matters asserted, but rather to provide context for [the defendant's] own statements").

Present Sense Impression

911 call describing ongoing drug crime is admissible as a present sense impression and not testimonial under *Bryant*: *United States v. Polidore*, 690 F.3d 705 (5th Cir. 2012): In a drug trial, the defendant objected that a 911 call from a bystander to a drug transaction --- together with the bystander's answers to questions from the 911 operators --- was testimonial and also admitted in violation of the rule against hearsay. On the hearsay question, the court found that the bystander's statements in the 911 call were admissible as present sense impressions, as they were made while the transaction was ongoing. As to testimoniality, the court held that the case was unlike the 911 call cases decided by the Supreme Court, as there was no ongoing emergency --- rather the caller was simply recording that a crime was taking place across the street, and no violent activity was occurring. But the court noted that under *Bryant* an ongoing emergency is relevant but not dispositive of whether statements about a crime are testimonial. Ultimately the court found that the caller's statements were not testimonial, reasoning as follows:

> [A]lthough the 911 caller appeared to have understood that his comments would start an investigation that could lead to a criminal prosecution, the primary purpose of his statements was to request police assistance in stopping an ongoing crime and to provide the police with the requisite information to achieve that objective. * * * The 911 caller simply was not acting as a witness; he was not testifying. What he said was not a weaker substitute for live testimony at trial. In other words, the caller's statements were not ex parte communications that created evidentiary products that aligned perfectly with their courtroom analogues. No witness goes into court to report that a man is currently selling drugs out of his car and to ask the police to come and arrest the man while he still has the drugs in his possession.

Present sense impression, describing an event that occurred months before a crime, is not testimonial: *United States v. Danford,* 435 F.3d 682 (7th Cir. 2005): The defendant was convicted of insurance fraud after staging a fake robbery of his jewelry store. At trial, one of the employees testified to a statement made by the store manager, indicating that the defendant had asked the manager how to disarm the store alarm. The defendant argued that the store manager's statement was testimonial under *Crawford*, but the court disagreed. The court stated that "the conversation between [the witness] and the store manager is more akin to a casual remark than it is to testimony in the *Crawford*-sense. Accordingly, we hold that the district court did not err in admitting this testimony under Fed.R.Evid. 803(1), the present-sense impression exception to the hearsay rule."

Present-sense impressions of DEA agents during a buy-bust operation were safety-related and so not testimonial: *United States v. Solorio,* 669 F.3d 943 (9th Cir. 2012): Appealing from a conviction arising from a "buy-bust" operation, the defendant argued that hearsay statements of DEA agents at the scene --- which were admitted as present sense impressions ---were testimonial and so should have been excluded under *Crawford.* The court disagreed. It concluded that the statements were made in order to communicate observations to other agents in the field and thus assure the success of the operation, "by assuring that all agents involved knew what was happening and enabling them to gauge their actions accordingly." Thus the statements were not testimonial because the primary purpose for making them was not to prepare a statement for trial but rather to assure that the arrest was successful and that the effort did not escalate into a dangerous situation. The court noted that the buy-bust operation "was a high-risk situation involving the exchange of a large amount of money and a substantial quantity of drugs" and also that the defendant was visibly wary of the situation.

Reports on forensic testing by law enforcement are testimonial: *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009): In a drug case, the trial court admitted three "certificates of analysis" showing the results of the forensic tests performed on the seized substances. The certificates stated that "the substance was found to contain: Cocaine." The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health. The Court, in a highly contentious 5-4 case, held that these certificates were "testimonial" under *Crawford* and therefore admitting them without a live witness violated the defendant's right to confrontation. The majority noted that affidavits prepared for litigation are within the core definition of "testimonial" statements. The majority also noted that the only reason the certificates were prepared was for use in litigation. It stated that "[w]e can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose --- as stated in the relevant state-law provision --- was reprinted on the affidavits themselves."

The implications of *Melendez-Diaz* --- beyond requiring a live witness to testify to the results of forensic tests conducted primarily for litigation --- are found in the parts of the majority opinion that address the dissent's arguments that the decision will lead to substantial practical difficulties. These implications are discussed in turn:

1. In a footnote, the majority declared in dictum that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." Apparently these are more like traditional business records than records prepared primarily for litigation, though the question is close --- the reason these records are maintained, with respect to forensic testing equipment, is so that the tests conducted can be admitted as reliable. At any rate, the footnote shows some flexibility, in that not every record involved in the forensic testing process will necessarily be found testimonial.

2. The dissent argued that forensic testers are not "accusatory" witnesses in the sense of preparing factual affidavits about the crime itself. But the majority rejected this distinction, declaring that the text of the Sixth Amendment "contemplates two classes of witnesses: those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." This statement raises questions about the reasoning of some lower courts that have admitted autopsy reports and other certificates after *Crawford*. These cases are discussed below.

3. Relatedly, the defendant argued that the affidavits at issue were nothing like the affidavits found problematic in the case of Sir Walter Raleigh. The Raleigh affidavits were a substitute for a witness testifying to critical historical facts about the crime. But the

majority responded that while the ex parte affidavits in the Raleigh case were the paradigmatic confrontation concern, "the paradigmatic case identifies the core of the right to confrontation, not its limits. The right to confrontation was not invented in response to the use of the ex parte examinations in Raleigh's Case."

4. The majority noted that cross-examining a forensic analyst may be necessary because "[a]t least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination." This implies that if the evidence is nothing but a machine print-out, it will not run afoul of the Confrontation Clause. As discussed earlier in this Outline, a number of courts have held that machine printouts are not hearsay at all because a machine can't make a "statement," and have also held that a machine's output is not "testimony" within the meaning of the Confrontation Clause. This case law appears to survive the Court's analysis in *Melendez-Diaz* and the later cases of *Bullcoming* and *Williams* do not touch the question of machine evidence.

5. The majority does approve the basic analysis of Federal courts after *Crawford* with respect to business and public records, i.e., that if the record is admissible under FRE 803(6) or 803(8) it is, for that reason, non-testimonial under *Crawford.* For business records, this is because, to be admissible under Rule 803(6), it cannot be prepared primarily for litigation. For public records, this is because law enforcement reports prepared for a specific litigation are excluded under Rule 803(8)(A)(ii) and (A)(iii).

6. In response to an argument of the dissent, the majority states that certificates that merely authenticate proffered documents are not testimonial. As seen below, this probably means that certificates of authenticity prepared under Rules 902(11), (13) and (14) may be admitted without violating the Confrontation Clause.

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

> Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an official record under respondent's definition --- it was prepared by a public officer in the regular course of his official duties --- and although the clerk was certainly not a "conventional witness" under the dissent's approach, the clerk was nonetheless subject to confrontation. See People v. Bromwich, 200 N. Y. 385, 388-389, 93 N. E. 933, 934 (1911).

This passage should probably be read to mean that any use of a certificate of absence of a public record in a criminal case is prohibited. But the Court did find that a

notice-and-demand provision would satisfy the Confrontation Clause because if, after notice, the defendant made no demand to produce, a waiver could properly be found. Accordingly, the Committee proposed an amendment to Rule 803(10) that added a notice-and-demand provision. That amendment was approved by the Judicial Conference and became effective December 1, 2013.

It should be noted that the continuing viability of *Melendez-Diaz* has been placed into some doubt by the death of Justice Scalia, who wrote the majority opinion.

Admission of a testimonial forensic certificate through the testimony of a witness with no personal knowledge of the testing violates the Confrontation Clause under *Melendez-Diaz: Bullcoming v. New Mexico*, 564 U.S. 647 (2011): The Court reaffirmed the holding in *Melendez-Diaz* that certificates of forensic testing prepared for trial are testimonial, and held further that the Confrontation Clause was not satisfied when such a certificate was entered into evidence through the testimony of a person who was not involved with, and had no personal knowledge of, the testing procedure. Justice Ginsburg, writing for the Court, declared as follows:

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

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

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

Warrant of deportation is not testimonial: ***United States v. Garcia****,* 452 F.3d 36 (1st Cir. 2006): In an illegal reentry case, the defendant argued that his confrontation rights were violated by the admission of a warrant of deportation. The court disagreed, finding that the warrant was not testimonial under *Crawford*. The court noted that every circuit considering the matter has held "that defendants have no right to confront and cross-examine the agents who routinely record warrants of deportation" because such officers have no motivation to do anything other than "mechanically register an unambiguous factual matter."

Note: Other circuits before Melendez-Diaz reached the same result on warrants of deportation. See, e.g., United States v. Valdez-Matos, 443 F.3d 910 (5th Cir. 2006) (warrant of deportation is non-testimonial because "the official preparing the warrant had no motivation other than mechanically register an unambiguous factual matter"); ***United States v. Torres-Villalobos,*** 487 F.3d 607 (8th Cir. 2007) (noting that warrants of deportation "are produced under circumstances objectively indicating that their primary purpose is to maintain records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts for use in future criminal prosecutions."); ***United States v. Bahena-Cardenas,*** 411 F.3d 1067 (9th Cir. 2005) (a warrant of deportation is non-testimonial "because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter."); ***United States v. Cantellano,*** 430 F.3d 1142 (11th Cir. 2005) (noting that a warrant of deportation "is recorded routinely and not in preparation for a criminal trial").

Note: Warrants of deportation still satisfy the Confrontation Clause after *Melendez-Diaz*. Unlike the forensic analysis in that case, a warrant of deportation is prepared for regulatory purposes and is clearly not prepared for the illegal reentry litigation, because by definition that crime has not been committed at the time the certificate is prepared. As seen below, post-*Melendez-Diaz* courts have found warrants of deportation to be non-testimonial. See also *United States v. Lopez,* 747 F.3d 1141 (9th Cir. 2014) (adhering to pre-*Melendez-Diaz* case law holding that deportation documents in an A-file are not testimonial when admitted in illegal re-entry cases).

Proof of absence of business records is not testimonial: *United States v. Munoz-Franco,* 487 F.3d 25 (1st Cir. 2007): In a prosecution for bank fraud and conspiracy, the trial court admitted the minutes of the Board and Executive Committee of the Bank. The defendants did not challenge the admissibility of the minutes as business records, but argued that it was constitutional error to allow the government to rely on the absence of certain information in the minutes to prove that the Board was not informed about such matters. The court rejected the defendants' confrontation argument in the following passage:

> The Court in *Crawford* plainly characterizes business records as "statements that by their nature [are] not testimonial." 541 U.S. at 56. If business records are nontestimonial, it follows that the absence of information from those records must also be nontestimonial.

Note: This analysis appears unaffected by *Melendez-Diaz,* as no certificate or affidavit is involved and the record itself was not prepared for litigation purposes.

Business records are not testimonial: *United States v. Jamieson,* 427 F.3d 394 (6th Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were business records. The court found that admitting the summaries did not violate the defendant's right to confrontation. The underlying records were not testimonial under *Crawford* because they did not "resemble the formal statement or solemn declaration identified as testimony by the Supreme Court." ***See also United States v. Baker,*** 458 F.3d 513 (6th Cir. 2006) ("The government correctly points out that business records are not testimonial and therefore do not implicate the Confrontation Clause concerns of *Crawford*.").

Note: The court's analysis of business records appears unaffected by *Melendez-Diaz,* because the records were not prepared primarily for litigation and no certificate or affidavit was prepared for use in the litigation.

Post office box records are not testimonial: *United States v. Vasilakos*, 508 F.3d 401 (6th Cir. 2007): The defendants were convicted of defrauding their employer, an insurance company, by setting up fictitious accounts into which they directed unearned commissions. The checks for the commissions were sent to post office boxes maintained by the defendants. The defendants argued that admitting the post office box records at trial violated their right to confrontation. But the court held that the government established proper foundation for the records through the testimony of a postal inspector, and that the records were therefore admissible as business records; the court noted that "the Supreme Court specifically characterizes business records as non-testimonial."

Note: The court's analysis of business records is unaffected by *Melendez-Diaz.*

Drug test prepared by a hospital with knowledge of possible use in litigation is not testimonial; certification of that business record under Rule 902(11) is not testimonial: *United States v. Ellis,* 460 F.3d 920 (7th Cir. 2006): In a trial for felon gun possession, the trial court admitted the results of a drug test conducted on the defendant's blood and urine after he was arrested. The test was conducted by a hospital employee, and indicated a positive result for methamphetamine. At trial, the hospital record was admitted without a qualifying witness; instead, a qualified witness prepared a certification of authenticity under Rule 902(11). The court held that neither the hospital record nor the certification were testimonial within the meaning of *Crawford* and *Davis* --- despite the fact that both records were prepared with the knowledge that they would be used in a prosecution. As to the medical reports, the *Ellis* court concluded as follows:

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

Note: *Ellis* is cited by the dissent in *Melendez-Diaz* (not a good thing for its continued viability), and the circumstances of preparing the toxic screen in *Ellis* are somewhat similar to those in *Melendez-Diaz.* That said, toxicology tests conducted by *private*

organizations may be found nontestimonial if it can be shown that law enforcement was not involved in or managing the testing. The *Melendez-Diaz* majority emphasized that the forensic analyst knew that the test was being done for a prosecution, as that information was right on the form. Essentially, after *Melendez-Diaz,* the less the tester knows about the use of the test, and the less involvement by the government, the better for admissibility. Primary motive for use in a prosecution is obviously less likely to be found if the tester is a private organization.

Note that the Seventh Circuit, in a case after *Melendez-Diaz,* adhered fully to its ruling in *Ellis* that business records are not testimonial. *United States v. Brown,* 822 F.3d 966 (7th Cir. 2016) (relying on *Ellis* to find that Western Union records of wire transfers were not testimonial: "Logically, if they are made in the ordinary course of business, then they are not made for the purpose of later prosecution.").

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

> The certification at issue in this case is nothing more than the custodian of records at the local hospital attesting that the submitted documents are actually records kept in the ordinary course of business at the hospital. The statements do not purport to convey information about Ellis, but merely establish the existence of the procedures necessary to create a business record. They are made by the custodian of records, an employee of the business, as part of her job. As such, we hold that written certification entered into evidence pursuant to Rule 902(11) is nontestimonial just as the underlying business records are. Both of these pieces of evidence are too far removed from the "principal evil at which the Confrontation Clause was directed" to be considered testimonial.

Note: Three circuits have held that the reasoning of *Ellis* remains sound after *Melendez-Diaz,* and that 902(11) certificates are not testimonial. *See United States v. Yeley-Davis,* 632 F.3d 673 (10th Cir. 2011), ***United States v. Johnson***, 688 F.3d 494 (8th Cir. 2012), and ***United States v. Anekwu,*** 695 F.3d 967 (9th Cir. 2012) all infra.

Odometer statements, prepared before any crime of odometer-tampering occurred, are not testimonial: *United States v. Gilbertson,* 435 F.3d 790 (7th Cir. 2006): In a prosecution for odometer-tampering, the government proved its case by introducing the odometer statements

prepared when the cars were sold to the defendant, and then calling the buyers to testify that the mileage on the odometers when they bought their cars was substantially less than the mileage set forth on the odometer statements. The defendant argued that introducing the odometer statements violated *Crawford.* He contended that the odometer statements were essentially formal affidavits, the very kind of evidence that most concerned the Court in *Crawford*. But the court held that the concern in *Crawford* was limited to affidavits prepared for trial as a testimonial substitute. This concern did not apply to the odometer statements. The court explained as follows:

> The odometer statements in the instant case are not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution. The statements were not initiated by the government in the hope of later using them against Gilbertson (or anyone else), nor could the declarants (or any reasonable person) have had such a belief. The reason is simple: each declaration was made *prior* to Gilbertson even engaging in the crime. Therefore, there is no way for the sellers to anticipate that their statements regarding the mileage on the individual cars would be used as evidence against Gilbertson for a crime he commits in the future.
>
> **Note: this result is unaffected by *Melendez-Diaz* as the records clearly were not prepared for purposes of litigation --- the crime had not occurred at the time the records were prepared.**

Tax returns are business records and so not testimonial: *United States v. Garth,* 540 F.3d 766 (8th Cir. 2008): The defendant was accused of assisting tax filers to file false claims. The defendant argued that her right to confrontation was violated when the trial court admitted some tax returns of the filers. But the court found no error. The tax returns were business records, and the defendant made no argument that they were prepared for litigation, "as is expected of testimonial evidence."

Note: this result is unaffected by *Melendez-Diaz.*

Certificate of a record of a conviction found not testimonial: *United States v. Weiland,* 420 F.3d 1062 (9th Cir. 2006): The court held that a certificate of a record of conviction prepared by a public official was not testimonial under *Crawford*: "Not only are such certifications a 'routine cataloguing of an unambiguous factual matter,' but requiring the records custodians and other officials from the various states and municipalities to make themselves available for cross-examination in the countless criminal cases heard each day in our country would present a

serious logistical challenge without any apparent gain in the truth-seeking process. We decline to so extend *Crawford*, or to interpret it to apply so broadly."

> ***Note:*** **The reliance on burdens in countless criminal cases is precisely the argument that was rejected in *Melendez-Diaz.* Nonetheless, certificates of conviction are quite probably non-testimonial, because the *Melendez-Diaz* majority states that a certificate is not testimonial if it does nothing more than authenticate another document --- and specifically uses as an example a certificate of conviction.**
>
> **In *United States v. Albino-Loe,* 747 F.3d 1206 (9th Cir. 2014), the court adhered to its ruling in *Weiland,* declaring that a routine certification of authenticity of a record (in that case documents in an A-file) are not testimonial in nature, because they "did not accomplish anything other than authenticating the A-file documents to which they were attached."**

Absence of records in database is not testimonial; and drug ledger is not testimonial: ***United States v. Mendez,*** 514 F.3d 1035 (10th Cir. 2008): In an illegal entry case, an agent testified that he searched the ICE database for information indicating that the defendant entered the country legally, and found no such information. The ICE database is "a nation-wide database of information which archives records of entry documents, such as permanent resident cards, border crossing cards, or certificates of naturalization." The defendant argued that the entries into the database (or the asserted lack of entries in this case) were testimonial. But the court disagreed, because the records "are not prepared for litigation or prosecution, but rather administrative and regulatory purposes." The court also observed that Rule 803(8) tracked *Crawford* exactly: a public record is admissible under Rule 803(8) unless it is prepared with an eye toward litigation or prosecution; and under *Crawford*, "the very same characteristics that preclude a statement from being classified as a public record are likely to render the statement testimonial."

Mendez also involved drug charges, and the defendant argued that admitting a drug ledger with his name on it violated his right to confrontation under *Crawford.* The court also rejected this argument. It stated first that the entries in the ledger were not hearsay at all, because they were offered to show that the book was a drug ledger and thus a "tool of the trade." As the entries were not offered for truth, their admission could not violate the Confrontation Clause. But the court further held that even if the entries were offered for truth, they were not testimonial, because "[a]t no point did the author keep the drug ledger for the *primary purpose* of aiding police in a criminal investigation, the focus of the *Davis* inquiry." (emphasis the court's). The court noted that it was not enough that the statements were relevant to a criminal prosecution, otherwise "any piece of evidence which aids the prosecution would be testimonial."

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

Lower Court Cases on Records and Certificates After Melendez-Diaz

Letter describing results of a search of court records is testimonial after *Melendez-Diaz: United States v. Smith,* 640 F.3d 358 (D.C. Cir. 2011): To prove a felony in a felon firearm case, the government admitted a letter from a court clerk stating that "it appears from an examination of the files in this office" that Smith had been convicted of a felony. Each letter had a seal and a signature by a court clerk. The court found that the letters were testimonial. The clerk did not merely authenticate a record, rather he created a record of the search he conducted. The letters were clearly prepared in anticipation of litigation --- they "respond[ed] to a prosecutor's question with an answer."

> **Note: The analysis in *Smith* provides more indication that certificates of the absence of a record are testimonial after *Melendez-Diaz.* The clerk's letters in *Smith* are exactly like a CNR; the only difference is that they report on the presence of a record rather than an absence.**

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

> The Office of the Medical Examiner is required by D.C.Code 5-1405(b)(11) to investigate "[d]eaths for which the Metropolitan Police Department ["MPD"], or other law enforcement agency, or the United States Attorney's Office requests, or a court orders investigation." The autopsy reports do not indicate whether such requests were made in the instant case but the record shows that MPD homicide detectives and officers from the Mobile Crimes Unit were present at several autopsies. Another autopsy report was supplemented with diagrams containing the notation: "Mobile crime diagram (not [Medical Examiner] --- use for info only)." Still another report included a "Supervisor's Review Record" from the MPD Criminal Investigations Division commenting: "Should have indictment re John Raynor for this murder." Law enforcement officers thus not only observed the autopsies, a fact that would have signaled to the medical examiner that the autopsy might bear on a criminal investigation, they participated in the creation of reports. Furthermore, the autopsy reports were formalized in signed documents titled "reports." These factors, combined with the fact that each autopsy found the manner of death to be a homicide caused by gunshot wounds, are "circumstances which would lead an objective

witness reasonably to believe that the statement would be available for use at a later trial." *Melendez-Diaz*, 129 S.Ct. at 2532 (citation and quotation marks omitted).

In a footnote, the court emphasized that it was *not* holding that all autopsy reports are testimonial:

> Certain duties imposed by the D.C.Code on the Office of the Medical Examiner demonstrate, the government suggests, that autopsy reports are business records not made for the purpose of litigation. It is unnecessary to decide as a categorical matter whether autopsy reports are testimonial, and, in any event, it is doubtful that such an approach would comport with Supreme Court precedent.

Finally, the court rejected the government's argument that there was no error because the expert witness simply relied on the autopsy reports in giving independent testimony. In this case, the autopsy reports were clearly entered into evidence. ***See also United States v. McGill,*** 815 F.3d 846 (D.C.Cir. 2016) (relying on *Moore* to find a Confrontation violation where drug analysis reports and autopsy reports were admitted through testimony from witnesses other than the reports' authors).

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

> Abstractly, an autopsy report can be distinguished from, or assimilated to, the sworn documents in *Melendez-Diaz* and *Bullcoming*, and it is uncertain how the Court would resolve the question. We treated such reports as not covered by the Confrontation Clause, *United States v. De La Cruz*, 514 F.3d 121, 133-34 (1st Cir.2008), but the law has continued to evolve and no one can be certain just what the Supreme Court would say about that issue today. However, our concern here is with "clearly established" law when the SJC acted. * * * That close decisions in the later Supreme Court cases extended *Crawford* to new situations hardly shows the outcomes were clearly preordained. And, even now it is uncertain whether, under its primary purpose test, the Supreme Court would classify autopsy reports as testimonial.

Immigration interview form was not testimonial: ***United States v. Phoeun Lang,*** 672 F.3d 17 (1st Cir. 2012): The defendant was convicted of making false statements and unlawfully applying for and obtaining a certificate of naturalization. The defendant argued that his right to

confrontation was violated because the immigration form (N-445) on which he purportedly lied contained verification checkmarks next to his false responses. Thus the contention was that the verification checkmarks were testimonial hearsay of the immigration agent who conducted the interview. But the court found no error. The court concluded that the form was not "primarily to be used in court proceedings." Rather it was a record prepared as "a matter of administrative routine, for the primary purpose of determining Lang's eligibility for naturalization." For essentially the same reasons, the court held that the form was admissible under Rule 803(8)(A)(ii) despite the fact that the rule appears to exclude law enforcement reports. The court distinguished between "documents produced in an adversarial setting and those produced in a routine non-adversarial setting for purposes of Rule 803(8)(A)(ii)." The court relied on the passage in *Melendez-Diaz* which declared that the test for admissibility or inadmissibility under Rule 803(8) was the same as the test of testimoniality under the Confrontation Clause, i.e., whether the primary motive for preparing the record was for use in a criminal prosecution.

> **Note: This case was decided before *Williams,* but it would appear to satisfy both the Alito and the Kagan version of the "primary motive" test. Both tests agree that a statement cannot be testimonial unless the primary motive for making it is to have it used in a criminal prosecution. The difference is that Justice Alito provides another qualification --- the statement is testimonial only if it was made to be used in the *defendant's* criminal prosecution. In *Phoeun Lang* the first premise was not met --- the statements were made for administrative purposes, and not primarily for use in *any* criminal prosecution.**

Expert's reliance on standard samples for comparison does not violate the Confrontation Clause because any communications regarding the preparation of those samples was not testimonial: *United States v. Razo*, 782 F.3d 31 (1st Cir. 2015). A chemist testified about the lab analysis she performed on a substance seized from the defendant's coconspirator. The crime lab used a "known standard" methamphetamine sample to create a reference point for comparison with seized evidence. That sample was received from a chemical company. The chemist testified that in comparing the seized sample with the known standard sample, she relied on the manufacturer's assurance that the known standard sample was 100% pure. The court found no confrontation violation because the known standard sample --- and the manufacturer's assurance about it --- were not testimonial. Any statements regarding the known standard sample were not made with the primary motivation that they would be used at a criminal trial, because the sample was prepared for general use by the laboratory. The court noted that the chemist's conclusions about the *seized* sample would raise confrontation questions, but the government produced the chemist to be cross-examined about those conclusions. As to the

standard sample, it was prepared "prior to and without regard to any particular investigation, let alone any particular prosecution."

In reaching its result, the *Razo* court provided a good interpretation of *Williams*. The court saw support in the fact that the Alito plurality would find any communications regarding the known standard sample to be non-testimonial because that sample was "not prepared for the primary purpose of accusing a targeted individual." And the fifth vote of support would come from Justice Thomas, because nothing about the known standard sample was in the nature of a formalized statement.

Certain records of internet activity sent to law enforcement found testimonial: *United States v. Cameron*, 699 F.3d 621 (1st Cir. 2012): In a child pornography prosecution, the court held that admission of certain records about suspicious internet activity violated the defendant's right to Confrontation Clause. The evidence principally at issue related to accounts with Yahoo. Yahoo received an anonymous report that child pornography images were contained in a Yahoo account. Yahoo sent a report --- called a "CP Report"--- to the National Center for Missing and Exploited Children (NCMEC), listing the images being sent with the report, attaching the images, and listing the date and time at which the image was uploaded and the IP Address from which it was uploaded. NCMEC in turn sent a report of child pornography to the Maine State Police Internet Crimes Against Children Unit (ICAC), which obtained a search warrant for the defendant's computers. The government introduced testimony of a Yahoo employee as to how certain records were kept and maintained by the company, but the government did not introduce the Image Upload Data indicating the date and time each image was uploaded to the Internet. The government also introduced testimony by a NCMEC employee explaining how NCMEC handled tips regarding child pornography. The court held that admission of various data collected by Yahoo and Google automatically in order to further their business purposes was proper, because the data was contained in business records and was not testimonial for Sixth Amendment purposes. But the court held, 2-1, that the reports Yahoo prepared and sent to NCMEC were different and were testimonial because the primary purpose for the reports was to record past events that were potentially relevant to a criminal prosecution. The court relied on the following considerations to conclude that the CP Reports were testimonial: 1) they referred to a "suspect" screen name, email address, and IP address --- and Yahoo did not treat its customers as "suspects" in the ordinary course of its business; 2) before a CP Report is created, someone in the legal department at Yahoo has to determine that an account contained child pornography images; 3) Yahoo did not simply keep the reports but sent them to NCMEC, which was under the circumstances an agent of law enforcement, because it received a government grant to accept reports of child pornography and forward them to law enforcement. The government argued that Confrontation was not at issue because the CP Reports contained business records that were unquestionably nontestimonial, such

as records of users' IP addresses. But the court responded that the CP Reports were themselves statements. The court noted that "[i]f the CP Reports simply consisted of the raw underlying records, or perhaps underlying records arranged and formatted in a reasonable way for presentation purposes, the Reports might well have been admissible."

The government also argued that the CP Reports were not testimonial under the Alito definition of primary motive in *Williams.* Like the DNA reports in *Williams*, the CP Reports were prepared at a time when the perpetrator was unknown and so they were not targeted toward a particular individual. The court distinguished *Williams* by relying on a statement in the Alito opinion that at the time of the DNA report, the technicians had "no way of knowing whether it will turn out to be incriminating or exonerating." In contrast, when the CP Reports were prepared, Yahoo personnel knew that they were incriminating: "Yahoo's employees may not have known *whom* a given CP Report might incriminate, but they almost certainly were aware that a Report would incriminate *somebody."*

Finally, the court held that the NCMEC reports sent to the police were testimonial, because they were statements independent of the CP Reports, and they were sent to law enforcement for the primary purpose of using them in a criminal prosecution. One judge, dissenting in part, argued that the connection between an identified user name, the associated IP address, and the digital images archived from that user's account all existed well before Yahoo got the anonymous tip, were an essential part of the service that Yahoo provided, and thus were ordinary business records that were not testimonial.

> **Note: *Cameron* cannot be read to hold that business records admissible under Rule 803(6) can be testimonial under *Crawford.* The court notes that under *Palmer v. Hoffman,* 318 U.S. 109 (1943), records are not admissible as business records when they are calculated for use in court. *Palmer* is still good law under Rule 803(6), as the Court recognized in *Melendez-Diaz.* The *Cameron* court noted that the Yahoo reports were subject to the same infirmity as the records found inadmissible in *Hoffman:* they were not made for business purposes, but rather for purposes of litigation. Thus according to the court, the Yahoo reports were probably not admissible as business records anyway.**

Telephone records are not testimonial: *United States v. Burgos-Montes,* 786 F.3d 92 (1st Cir. 2015): The government introduced phone records of a conspirator. They were accompanied by a certification made under Rule 902(11). The defendant argued that the phone records were testimonial but the court disagreed. The defendant argued that the records were produced by the phone company in response to a demand from the government, but the court

found this irrelevant. The records were gathered and maintained by the phone company in the routine course of business. "The fact that the print-out of this data in this particular format was requested for litigation does not turn the data contained in the print-out into information created for litigation."

Routine autopsy report was not testimonial: ***United States v. James,*** 712 F.3d 79 (2nd Cir. 2013): The court considered whether its *pre-Melendez-Diaz* case law --- stating that autopsy reports were not testimonial --- was still valid. The court adhered to its view that "routine" autopsy reports were not testimonial because they are not prepared with the primary motivation that they will be used in a criminal trial. Applying the test of "routine" to the facts presented, the court found as follows:

> Somaipersaud's autopsy was nothing other than routine --- there is no suggestion that Jindrak or anyone else involved in this autopsy process suspected that Somaipersaud had been murdered and that the medical examiner's report would be used at a criminal trial. [A government expert] testified that causes of death are often undetermined in cases like this because it could have been a recreational drug overdose or a suicide. The autopsy report itself refers to the cause of death as "undetermined" and attributes it both to "acute mixed intoxication with alcohol and chlorpromazine" combined with "hypertensive and arteriosclerotic cardiovascular disease."
>
> The autopsy was completed on January 24, 1998, and the report was signed June 16, 1998, substantially before any criminal investigation into Somaipersaud's death had begun. [N]either the government nor defense counsel elicited any information suggesting that law enforcement was ever notified that Somaipersaud's death was suspicious, or that any medical examiner expected a criminal investigation to result from it. Indeed, there is reason to believe that none is pursued in the case of most autopsies.

The court noted that "something in the order of ten percent of deaths investigated by the OCME lead to criminal investigations." It distinguished the 11th Circuit's opinion --- discussed below --- which found an autopsy report to be testimonial, noting that "the decision was based in part on the fact that the Florida Medical Examiner's Office was created and exists within the Department of Law Enforcement. Here, the OCME is a wholly independent office." Thus, an autopsy report prepared outside the auspices of a criminal investigation is very unlikely to be found testimonial under the Second Circuit's view.

> **Note: In considering the effect of *Williams,* the court found that in fact there was no lesson at all to be derived from *Williams,* as there was no rationale on which**

five members of the Court could agree. Thus, the Court found that *Williams* controlled only cases exactly like it.

Business records are not testimonial: *United States v. Bansal,* 663 F.3d 634 (3rd Cir. 2011): In a prosecution related to a controlled substance distribution operation, the trial court admitted records kept by domestic and foreign businesses of various transactions. The court rejected the claim that the records were testimonial, stating that "the statements in the records here were made for the purpose of documenting business activity, like car sales and account balances, and not for providing evidence to law enforcement or a jury."

Admission of credit card company's records identifying customer accounts that had been compromised did not violate the right to confrontation: *United States v. Keita,* 742 F.3d 184 (4th Cir. 2014): In a prosecution for credit card fraud, the trial court admitted "common point of purchase" records prepared by American Express. These were internal documents revealing which accounts have been compromised. American Express creates the reports daily as part of regular business practice, and they are used by security analysts to determine whether to contact law enforcement or to investigate the matter internally in the first instance. The court held that the records were not testimonial (even though they could possibly be used for criminal prosecution), relying on the language in *Melendez-Diaz* stating that "business records are generally admissible absent confrontation." The court concluded that the records were primarily prepared for the administration of Amex's regularly conducted business.

Admission of purported drug ledgers violated the defendant's confrontation rights where the proof of authenticity was the fact that they were produced by an accomplice at a proffer session: *United States v. Jackson,* 625 F.3d 875 (5th Cir. 2010), amended 636 F.3d 687 (5th Cir. 2011): In a drug prosecution, purported drug ledgers were offered to prove the defendant's participation in drug transactions. An officer sought to authenticate the ledgers as business records but the court found that he was not a "qualified witness" under Rule 803(6) because he had no knowledge that the ledgers came from any drug operation associated with the defendant. The court found that the only adequate basis of authentication was the fact that the defendant's accomplice had produced the ledgers at a proffer session with the government. But because the production at the proffer session was unquestionably a testimonial statement --- and because the accomplice was not produced to testify --- admission of the ledger against the defendant violated his right to confrontation under *Crawford.*

Note: **The *Jackson* court does *not* hold that business records are testimonial. The reasoning is muddled, but the best way to understand it is that the evidence used to *authenticate* the business record --- the cohort's production of the records at a proffer session --- was testimonial.**

Pseudoephedrine logs are not testimonial: *United States v. Towns,* 718 F.3d 404 (5th Cir. 2013): In a methamphetamine prosecution, the agent testified to patterns of purchasing pseudoephedrine at various pharmacies. This testimony was based on logs kept by the pharmacies of pseudoephedrine purchases. The court found that the logs --- and the certifications to the logs provided by the pharmacies --- were properly admitted as business records. It further held that the records were not testimonial. As to the Rule 803(6) question, the court found irrelevant the fact that the records were required by statute to be kept and were pertinent to law enforcement. The court stated that "the regularly conducted activity here is selling pills containing pseudoephedrine; the purchase logs are kept in the course of that activity. Why they are kept is irrelevant at this stage." As to the certifications from the records custodians of the pharmacies, the court found them proper under Rule 803(6) and 902(11) ---the certifications tracked the language of Rule 803(6) and there was no requirement that the custodians do anything more, such as explain the process of record keeping. As to the Confrontation Clause, the court noted that the Supreme Court in *Melendez-Diaz* had declared that business records are ordinarily non-testimonial. Moreover, the logs were not prepared solely with an eye toward trial. The court concluded as follows:

> The pharmacies created these purchase logs *ex ante* to comply with state regulatory measures, not in response to an active prosecution. Additionally, requiring a driver's license for purchases of pseudoephedrine deters crime. The state thus has a clear interest in businesses creating these logs that extends beyond their evidentiary value. Because the purchase logs were not prepared specifically and solely for use at trial, they are not testimonial and do not violate the Confrontation Clause.

Court rejects the "targeted individual" test in reviewing an affidavit pertinent to illegal immigration: *United States v. Duron-Caldera,* 737 F.3d 988 (5th Cir. 2013): The defendant was charged with illegal reentry. The dispute was over whether he was in fact an alien. He claimed he was a citizen because his mother, prior to his birth, was physically present in the U.S. for at least ten years, at least five of which were before she was 14. To prove that this was not the case, the government offered an affidavit from the defendant's grandmother, prepared 40 years before the instant case. The affidavit was prepared in connection with an investigation into document fraud, including the alleged filing of fraudulent birth certificates by the defendant's

parents and grandmother. The affidavit accused others of document fraud, and stated that the defendant's mother did not reside in the United States for an extended period of time. The trial court admitted the affidavit but the court of appeals held that it was testimonial and reversed. The government argued that the affidavit was a business record because it was found in regularly kept immigration records. But the court noted that it could not qualify as a business record because the grandmother was not acting in the ordinary course of regularly conducted activity.

The court found that the government had not shown that the affidavit was prepared outside the context of a criminal investigation, and therefore the affidavit was testimonial under the primary motive test. The government relied on the Alito opinion in *Williams*, under which the affidavit would not be testimonial, because it clearly was not targeted toward the defendant, as he was only a child when it was prepared. But the court rejected the targeted individual test. It noted first that five members of the court in *Williams* had rejected the test. It also stated that the targeted individual limitation could not be found in any of the *Crawford* line of cases before *Williams*: noting, for example, that in *Crawford* the Court defined testimonial statements as those one would expect to be used "at *a* later trial." Finally, the court contended that the targeted individual test was inconsistent with the terms of the Confrontation Clause, which provide a right of the accused to be confronted with the "*witnesses against him."* In this case, the grandmother, by way of affidavit, was a witness against the defendant.

> ***Reporter's Note:*** **The Court's construction of the Confrontation Clause could come out the other way. The reference to "witnesses against him" in the Sixth Amendment could be interpreted as *at the time the statement was made*, it was being directed at the defendant. The *Duron-Caldera* court reads "witnesses" as of the time the statement is being introduced. But at that time, the witness is not there. All the "witnessing" is done at the time the statement is made; and if the witness is not targeting the individual at the time the statement is made, it could well be argued that the witness is not testifying "against *him*."**
>
> **Another note from *Duron-Caldera:* The court notes that there is no rule to be taken from *Williams* under the *Marks* test --- under which you take the narrowest view on which the plurality and the concurrence can agree. In *Williams,* there is nothing on which the plurality and Justice Thomas agreed.**

Pseudoephedrine purchase records are not testimonial: *United States v. Collins,* 799 F.3d 554 (6th Cir. 2015): Relying on the Fifth Circuit's decision in *United States v. Towns, supra,* the court held that pharmaceutical records of pseudoephedrine purchases were not testimonial. The

court noted that while law enforcement officers use the records to track purchases, the "system is designed to prevent customers from purchasing illegal quantities of pseudoephedrine by indicating to the pharmacy employee whether the customer has exceeded federal or state purchasing restrictions" and accordingly was not primarily motivated to generate evidence for a prosecution.

Preparing an exhibit for trial is not testimonial: ***United States v. Vitrano,*** 747 F.3d 922 (7th Cir. 2014): In a prosecution for fraud and perjury, the government offered records of phone calls made by the defendant. The defendant argued that there was a confrontation violation because the technician who prepared the phone calls as an exhibit did not testify. The court found that the confrontation argument was properly rejected, because no statements of the technician were admitted at trial. The court declared that "[p]reparing an exhibit for trial is not itself testimonial."

Records of wire transfers are not testimonial: ***United States v. Brown,*** 822 F.3d 966 (7th Cir. 2016): In a drug prosecution, the government offered records of Western Union wire transfers. The court found that the records were not testimonial, noting that "[l]ogically, if they are made in the ordinary course of business, then they are not made for the purpose of later prosecution." It concluded that the records were "routine and prepared in the ordinary course of business, not in anticipation of prosecution."

> **Note: The Western Union records in *Brown* were proven up by way of certificates offered under Rule 902(11). The court did not even mention any possible concern that those certifications would themselves be testimonial. It focused only on the testimoniality of the underlying records.**

Records of sales at a pharmacy are business records and not testimonial under *Melendez-Diaz: United States v. Mashek,* 606 F.3d 922 (8th Cir. 2010): The defendant was convicted of attempt to manufacture methamphetamine. At trial the court admitted logbooks from local pharmacies to prove that the defendant made frequent purchases of pseudoephedrine. The defendant argued that the logbooks were testimonial under *Melendez-Diaz,* but the court disagreed and affirmed his conviction. The court first noted that the defendant probably waived his confrontation argument because at trial he objected only on the evidentiary grounds of hearsay and Rule 403. But even assuming the defendant preserved his confrontation argument, "*Melendez-Diaz* does not provide him any relief. The pseudoephedrine logs were kept in the ordinary course of business pursuant to Iowa law and are business records under Federal Rule of Evidence 803(6). Business records under Rule 803(6) are not testimonial statements; *see*

Melendez-Diaz, 129 S.Ct. At 2539-40 (explaining that business records are typically not testimonial)." ***Accord, United States v. Ali,*** 616 F.3d 745 (8th Cir. 2010) (business records prepared by financial services company, offered as proof that tax returns were false, were not testimonial, as "*Melendez-Diaz* does not apply to the HSBC records that were kept in the ordinary course of business."); ***United States v. Wells,*** 706 F.3d 908 (8th Cir. 2013) (*Melendez-Diaz* did not preclude the admission of pseudoephedrine logs, because they constitute non-testimonial business records under Federal Rule of Evidence 803(6)).

Rule 902(11) authentication was not testimonial: ***United States v. Thompson,*** 686 F.3d 575 (8th Cir. 2012): To prove unexplained wealth in a drug case, the government offered and the court admitted a record from the Iowa Workforce Development Agency showing no reported wages for Thompson's social security number during 2009 and 2010. The record was admitted through an affidavit of self-authentication offered pursuant to Rule 902(11). The court found that the earnings records themselves were non-testimonial because they were prepared for administrative purposes. As to the exhibit, the court stated that "[b]ecause the IWDA record itself was not created for the purpose of establishing or proving some fact at trial, admission of a certified copy of that record did not violate Thompson's Confrontation Clause rights." The court emphasized that "[b]oth the majority and dissenting opinions in *Melendez-Diaz* noted that a clerk's certificate authenticating a record --- or a copy thereof --- for use as evidence was traditionally admissible even though the certificate itself was testimonial, having been prepared for use at trial." It concluded that "[t]o the extent Thompson contends that a copy of an existing record or a printout of an electronic record constitutes a testimonial statement that is distinguishable from the non-testimonial statement inherent in the original business record itself, we reject this argument." ***See also United States v. Johnson***, 688 F.3d 494 (8th Cir. 2012) (certificates of authenticity presented under Rule 902(11) are not testimonial, and the notations on the lab report by the technician indicating when she checked the samples into and out of the lab did not raise a confrontation question because they were offered only to establish a chain of custody and not to prove the truth of any matter asserted).

GPS tracking reports were properly admitted as non-testimonial business records: ***United States v. Brooks,*** 715 F.3d 1069 (8th Cir. 2013): Affirming bank robbery and related convictions, the court rejected the defendant's argument that admission at trial of GPS tracking reports violated his right to confrontation. The reports recorded the tracking of a GPS device that was hidden by a teller in the money taken from the bank. The court held that the records were properly admitted as business records under Rule 803(6), and they were not testimonial. The court reasoned that the primary purpose of the tracking reports was to track the perpetrator in an ongoing

pursuit --- not for use at trial. The court stated that "[a]lthough the reports ultimately were used to link him to the bank robbery, they were not *created* . . . to establish some fact at trial. Instead, the GPS evidence was generated by the credit union's security company for the purpose of locating a robber and recovering stolen money."

Certificates attesting to Indian blood are not testimonial: *United States v. Rainbow,* 813 F.3d 1097 (8th Cir. 2016): To prove a jurisdictional element of a charge that the defendants committed an assault within Indian Country, the government offered certificates of degree of Indian blood. The certificates certified that the respective defendants possessed the requisite degree of Indian blood. The defendants argued that, because the certificates were formalized and prepared for litigation, they were testimonial and so admitting them violated their right to confrontation. The certificates were prepared by a clerk of an officer of the BIA, and introduced at trial by the assistant supervisor of that office. The certificates reflected information about what was in records regularly kept by the BIA. The court found that the certificates were not testimonial. It explained as follows:

> Although Archambault [the assistant supervisor] testified that he had these particular certificates prepared for his testimony, BIA officials regularly certify blood quantum for the purpose of establishing eligibility for federal programs available only to Indians. Archambault explained that his office maintained the records of tribal enrollment and of each member's blood quantum. He could look up an individual's enrollment status and blood quantum at any time—that information existed regardless of whether any crime was committed. Unlike the analysts in *Melendez–Diaz* and *Bullcoming*, the enrollment clerk here did not complete forensic testing on evidence seized during a police investigation, but instead performed the ministerial duty of preparing certificates based on information that was kept in the ordinary course of business. An objective witness would not necessarily know that the certificates would be used at a later trial, because certificates of degree of Indian blood are regularly used in the administration of the BIA's affairs. Simply put, the enrollment clerk prepared certificates using records maintained in the ordinary course of business by the Standing Rock Agency, and the BIA routinely issues certificates in the administration of its affairs. Thus, the certificates were admissible as non-testimonial business records.

Prior conviction in which the defendant did not have the opportunity to cross-examine witnesses cannot be used in a subsequent trial to prove the facts underlying the conviction: *United States v. Causevic,* 636 F.3d 998 (8th Cir. 2011): The defendant was charged with making materially false statements in an immigration matter --- specifically that he

lied about committing a murder in Bosnia. To prove the lie at trial, the government offered a Bosnian judgment indicating that the defendant was convicted in absentia of the murder. The court held that the judgment was testimonial to prove the underlying facts, and there was no showing that the defendant had the opportunity to cross-examine the witnesses in the Bosnian court. The court distinguished proof of the *fact* of a conviction being entered (such as in a felon-firearm prosecution), as in that situation the public record is prepared for recordkeeping and not for a trial. In contrast the factual findings supporting the judgment were obviously generated for purposes of a criminal prosecution.

> **Note: The statements of facts underlying the prior conviction are testimonial under both versions of the primary motive test contested in *Williams.* They meet the Kagan test because they were obviously prepared for purpose of --- indeed as part of --- a criminal prosecution. And they meet the Alito proviso because they targeted the specific defendant against whom they were used at trial.**

Affidavit that birth certificate existed was testimonial: *United States v. Bustamante,* 687 F.3d 1190 (9th Cir. 2012): The defendant was charged with illegal entry and the dispute was whether he was a United States citizen. The government contended that he was a citizen of the Philippines but could not produce a birth certificate, as the records had been degraded and were poorly kept. Instead it produced an affidavit from an official who searched birth records in the Philippines as part of the investigation into the defendant's citizenship by the Air Force 30 years earlier. The affidavit stated that birth records indicated that the defendant was born in the Philippines, and the affidavit purported to transcribe the information from the records. The court held that the affidavit was testimonial under *Melendez-Diaz* and reversed the conviction. The court distinguished this case from cases finding that birth records and certificates of authentication are not testimonial:

> Our holding today does not question the general proposition that birth certificates, and official duplicates of them, are ordinary public records "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial." *Melendez-Diaz*, 129 S.Ct. at 2539-40. But Exhibit 1 is not a copy or duplicate of a birth certificate. Like the certificates of analysis at issue in *Melendez-Diaz*, despite being labeled a copy of the certificate, Exhibit 1 is "quite plainly" an affidavit. It is a typewritten document in which Salupisa testifies that he has gone to the birth records of the City of Bacolod, looked up the information on Napoleon Bustamante, and summarized that information at the request of the U.S. government for the purpose of its investigation into

Bustamante's citizenship. Rather than simply authenticating an existing non-testimonial record, Salupisa created a new record for the purpose of providing evidence against Bustamante. The admission of Exhibit 1 without an opportunity for cross examination therefore violated the Sixth Amendment.

Filed statement of registered car owner, made after impoundment, that he sold the car to the defendant, was testimonial: *United States v. Esparza,* 791 F.3d 1067 (9th Cir. 2015): The defendant was arrested entering the United States with marijuana hidden in the gas tank and dashboard; the fact in dispute was the defendant's knowledge, and specifically whether he owned the car he was driving. At the time of arrest, the registered owner was Donna Hernandez. The government relied on two hearsay statements made in records filed with the DMV by Hernandez that she had sold the car to the defendant six days before the defendant's arrest. But these records were filed *after* the defendant was arrested and Hernandez had received a notice indicating that the car had been seized because it was used to smuggle marijuana into the country. Under the circumstances, the court found that the post-hoc records filed by Hernandez with the DMV were testimonial. The court noted that Hernandez did not create the record "for the routine administration of the DMV's affairs." Nor was Hernandez merely "a private citizen who, in the course of a routine sale, simply notified the DMV of the transfer of her car. Instead, her car had already been seized for serious criminal violations, and she sent the transfer form to the DMV only after receiving a notice of seizure from [Customs and Border Protection]."

Note: This is an interesting case in which a statement was found testimonial in the absence of significant law enforcement involvement in the generation of the statement. As the Court has noted in *Bryant* and *Clark*, law enforcement involvement is critical to finding a statement testimonial, because a statement not made to or with law enforcement is unlikely to be sufficiently formal, and unlikely to be primarily motivated for use in a criminal trial. But at least it can be said that there is formality here --- Hernandez filed formal statements claiming that the ownership was transferred. And there was involvement of the state both in spurring her interest in filing (by sending her the notice) and in receiving her filing.

Government concedes a *Melendez-Diaz* error in admitting affidavit on the absence of a public record: *United States v. Norwood,* 603 F.3d 1063 (9th Cir. 2010): In a drug case, the government sought to prove that the defendant had no legal source for the large amounts of cash found in his car. The trial court admitted an affidavit of an employee of the Washington Department of Employment Security, which certified that a diligent search failed to disclose any record of wages reported for the defendant in a three-month period before the crime. On appeal,

the government conceded that the affidavit was erroneously admitted in light of the intervening decision in *Melendez-Diaz.* (The court found the error to be harmless).

CNR is testimonial but a warrant of deportation is not: *United States v. Orozco-Acosta,* 607 F.3d 1156 (9th Cir. 2010): In an illegal reentry case, the government proved removal by introducing a warrant of deportation under Rule 803(8), and it proved unpermitted reentry by introducing a certificate of non-existence of permission to reenter (CNR) under Rule 803(10). The trial was conducted and the defendant convicted before *Melendez-Diaz.* On appeal, the government conceded that introducing the CNR violated the defendant's right to confrontation because under *Melendez-Diaz* that record is testimonial. The court in a footnote agreed with the government's concession, stating that its previous cases holding that CNRs were not testimonial were "clearly inconsistent with *Melendez-Diaz*" because like the certificates in that case, a CNR is prepared solely for purposes of litigation, after the crime has been committed. In contrast, however, the court found that the warrant of deportation was properly admitted even under *Melendez-Diaz.* The court reasoned that "neither a warrant of removal's sole purpose nor even its primary purpose is use at trial." It explained that a warrant of removal must be prepared in every case resulting in a final order of removal, and only a "small fraction of these warrants are used in immigration prosecutions." The court concluded that "*Melendez-Diaz* cannot be read to establish that the mere possibility that a warrant of removal --- or, for that matter, any business or public record --- could be used in a later criminal prosecution renders it testimonial under *Crawford*." The court found that the error in admitting the CNR was harmless and affirmed the conviction. ***See also United States v. Rojas-Pedroza,*** 716 F.3d 1253 (9th Cir. 2013) (adhering to *Orozco-Acosta* in response to the defendant's argument that it had been undermined by *Bullcoming* and *Bryant;* holding that a Notice of Intent in the defendant's A-File --- which apprises the alien of the determination that he is removable --- was non-testimonial because its "primary purpose is to effect removals, not to prove facts at a criminal trial."); ***United States v. Lopez,*** 762 F.3d 852 (9th Cir. 2014) (verification of removal, recording the physical removal of an alien across the border, is not testimonial; like a warrant of removal, it is made for administrative purposes and not primarily designed to be admitted as evidence at a trial; the only difference from a warrant of removal "is that a verification of removal is used to record the removal of aliens pursuant to expedited removal procedures, while the warrant of removal records the removal of aliens following a hearing before an immigration judge"; also holding that, for the same reasons, the verification of removal was admissible as a public record under Rule 803(8)(A)(ii), despite the Rule's apparent exclusion of law enforcement reports); ***United States v. Albino-Loe,*** 747 F.3d 1206 (9th Cir. 2014) (statements concerning the defendant's alienage in a notice of removal --- which is the charging document for deportation --- are not testimonial in an illegal entry case; the primary purpose of a notice of removal "is simply to effect removals, not to prove facts at a criminal trial"); ***United States v. Torralba-Mendia,*** 784 F.3d 652 (9th Cir. 2015) (I-213 Forms, offered to show that passengers

detained during an investigation were deported, were admissible under the public records hearsay exception and were not testimonial: "The admitted record of a deportable alien contains the same information as a verification of removal: The alien's name, photograph, fingerprints, as well as the date, port and method of departure . . . .[T]he admitted forms are a ministerial, objective observation [and] Agents complete I-213 forms regardless of whether the government decides to prosecute anyone criminally.").

Documents in alien registration file not testimonial: *United States v. Valdovinos-Mendez,* 641 F.3d 1031 (9th Cir. 2011): In an illegal re-entry prosecution, the defendant argued that admission of documents from his A-file violated his right to Confrontation. The court held that the challenged documents a --- Warrant of Removal, a Warning to Alien ordered Deported, and the Order from the Immigration Judge --- were not testimonial. They were not prepared with the primary motive of use in a criminal prosecution, because at the time they were prepared the crime of illegal reentry had not occurred.

Forms prepared by border patrol agents interdicting aliens found not testimonial: *United States v. Morales,* 720 F.3d 1194 (9th Cir. 2013): In a prosecution for illegally transporting aliens, the trial court admitted Field 826 forms, prepared by Border Patrol agents who interviewed the aliens. The Field 826 form records the date and location of arrest, the funds found in the alien's possession, and basic biographical data about the alien, and also provides the alien options, including the making of a concession that the alien is illegally in the country and wishes to return home. The court of appeals rejected the defendant's argument that these forms were testimonial. It stated that "a Border Patrol agent uses the form in the field to document basic information, to notify the aliens of their administrative rights, and to give the aliens a chance to request their preferred disposition. The Field 826s are completed whether or not the government decides to prosecute the aliens or anyone else criminally. The nature and use of the Field 826 makes clear that its primary purpose is administrative, not for use as evidence at a future criminal trial. Even though statements within the form may become relevant to later criminal prosecution, this potential future use does not automatically place the statements within the ambit of 'testimonial.'" The court did find that the part of the report that contained information from the aliens was improperly admitted in violation of the *hearsay* rule. The Field 826 is a public record but information coming from the alien is not information coming from a public official. The court found the violation of the hearsay rule to be harmless error. (The court appears wrong about the hearsay rule because statements coming from the alien would be admissible as party-opponent statements in a public record.)

Social Security application was not testimonial as it was not prepared under adversarial circumstances: *United States v. Berry*, 683 F.3d 1015 (9th Cir. 2012): The court affirmed the defendant's conviction for social security fraud for taking money paid for maintenance of his son while the defendant was a representative payee. The trial judge admitted routine Social Security Administration records showing that the defendant applied for benefits on behalf of the son. The defendant argued that an SSA application was tantamount to a police report and therefore the record was inadmissible under Rule 803(8), and also that its admission violated his right to confrontation. The court disagreed, reasoning that "a SSA interviewer completes the application as part of a routine administrative process" and such a record is prepared for each and every request for benefits. "No affidavit was executed in conjunction with preparation of the documents, and there was no anticipation that the documents would become part of a criminal proceeding. Rather, every expectation was that Berry would use the funds for their intended purpose." The court quoted *Melendez-Diaz* for the proposition that "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because --- having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial --- they are not testimonial." The court concluded as follows:

> [N]o reasonable argument can be made that the agency documents in this case were created solely for evidentiary purposes and/or to aid in a police investigation. Importantly, no police investigation even existed when the documents were created. * * * Because the evidence at trial established that the SSA application was part of a routine, administrative procedure unrelated to a police investigation or litigation, we conclude that the district court did not abuse its discretion by admitting the application under Fed.R.Evid. 803(8), and no constitutional violation occurred.

Affidavit seeking to amend a birth certificate, prepared by border patrol agents for use at trial, was testimonial: *United States v. Macias,* 789 F.3d 1011 (9th Cir. 2015): The defendant was arrested for illegal reentry but claimed that he had a California birth certificate and was a U.S. citizen. He was charged with illegal reentry and making a false claim of citizenship. During his trial he introduced a "delayed registration of birth" document issued by the State of California, and the jury deadlocked. After the trial, border patrol agents conducted an investigation into the defendant's place of birth, interviewing family members and reviewing family documents, and determined that he had been born in Mexico. They then attempted to correct the birthplace on the California document; pursuant to California law, they submitted sworn affidavits in an application to amend the California document. At the second trial, the government introduced the delayed registration as well as the amending affidavit. On appeal, the defendant argued that the amending affidavit was testimonial and its admission violated his right to confrontation. The court

reviewed this claim for plain error because at trial the defendant's objection was on hearsay grounds only. The court found that the amending affidavit was clearly testimonial, as its sole purpose was to create evidence for the defendant's second trial. However, the court found that the plain error did not affect the defendant's substantial rights, because the government at trial introduced the defendant's Mexican birth certificate, as well as testimony from family members that the defendant was born in Mexico.

Affidavits authenticating business records and foreign public records are not testimonial: *United States v. Anekwu,* 695 F.3d 967 (9th Cir. 2012): In a fraud case, the government authenticated foreign public records and business records by submitting certificates of knowledgeable witnesses. This is permitted by 18 U.S.C.§ 3505 for foreign records in criminal cases. The court found that the district court did not commit plain error in finding that the certificates were not testimonial. The certificates were not themselves substantive evidence but rather a means to authenticate records. The court relied on the 10th Circuit's decision in *Yeley-Davis*, immediately below, and on the statement in *Melendez-Diaz* that certificates that do no more than authenticate other records are not testimonial.

Records of cellphone calls kept by provider as business records are not testimonial, and Rule 902(11) affidavit authenticating the records is not testimonial: *United States v. Yeley-Davis,* 632 F.3d 673 (10th Cir. 2011): In a drug case the trial court admitted cellphone records indicating that the defendant placed calls to coconspirators. The foundation for the records was provided by an affidavit of the records custodian that complied with Rule 902(11). The defendant argued that both the cellphone records and the affidavit were testimonial. The court rejected both arguments and affirmed the conviction. As to the records, the court found that they were not prepared "simply for litigation." Rather, the records were kept for Verizon's business purposes, and accordingly were not testimonial. As to the certificate, the court relied on pre-*Melendez-Diaz* cases such as *United States v. Ellis, supra*, which found that authenticating certificates were not the kind of affidavits that the Confrontation Clause was intended to cover. The defendant responded that cases such as *Ellis* had been abrogated by *Melendez-Diaz*, but the court disagreed:

> If anything, the Supreme Court's recent opinion supports the conclusion in *Ellis.* * * * Justice Scalia expressly described the difference between an affidavit created to provide evidence against a defendant and an affidavit created to authenticate an admissible record: "A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant." Id. at 2539. In addition, Justice Scalia

> rejected the dissent's concern that the majority's holding would disrupt the long-accepted practice of authenticating documents under Rule 902(11) and would call into question the holding in *Ellis*. See *Melendez-Diaz*, 129 S.Ct. at 2532 n. 1 ("Contrary to the dissent's suggestion, ... we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the ... authenticity of the sample ... must appear in person as part of the prosecution's case."); see also id. at 2547 (Kennedy, J., dissenting) (expressing concern about the implications for evidence admitted pursuant to Rule 902(11) and future of *Ellis*). The Court's ruling in *Melendez-Diaz* does not change our holding that Rule 902(11) certifications of authenticity are not testimonial.

The court found *Yeley-Davis* "dispositive" in *United States v. Brinson,* 772 F.3d 1314 (10th Cir. 2014), in which the court admitted a certificate of authenticity of credit card records. The court again distinguished *Melendez-Diaz* as a case concerned with affidavits showing the results of a forensic analysis --- whereas the certificate of authenticity "does not contain any 'analysis' that would constitute out-of-court testimony. Without that analysis, the certificate is simply a non-testimonial statement of authenticity." ***See also United States v. Keck,*** 643 F.3d 789 (10th Cir. 2011): Records of wire-transfer transactions were not testimonial because they "were created for the administration of Moneygram's affairs and not the purpose of establishing or proving some fact at trial. And since the wire-transfer data are not testimonial, the records custodian's actions in preparing the exhibits [by cutting and pasting the data] do not constitute a Confrontation Clause violation."

Immigration forms containing biographical data, country of origin, etc. are not testimonial: *United States v. Caraballo,* 595 F.3d 1214 (11th Cir. 2010): In an alien smuggling case, the trial court admitted I-213 forms prepared by an officer who found aliens crammed into a small room in a boat near the shore of the United States. The forms contained basic biographical information, and were used at trial to prove that the persons were aliens and not admittable. The defendant argued that the forms were inadmissible hearsay and also testimonial. The court of appeals found no error. On the hearsay question, the court held that the forms were properly admitted as public records --- the exclusion of law enforcement records in Rule 803(8) did not apply because the forms were routine and nonadversarial documents requested from every alien entering the United States. Nor were the forms testimonial, even after *Melendez-Diaz.* The court distinguished *Melendez-Diaz* in the following passage:

> Like a Warrant of Deportation * * * (and unlike the certificates of analysis in *Melendez-Diaz*), the basic biographical information recorded on the I-213 form is routinely requested from every alien entering the United States, and the form itself is filled out for

anyone entering the Untied States without proper immigration papers. * * * Rose gathered that biographical information from the aliens in the normal course of administrative processing at the Pembroke Pines Border Patrol Station in Pembroke Pines, Florida. * * *

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

Summary charts of admitted business records is not testimonial: *United States v. Naranjo,* 634 F.3d 1198 (11th Cir. 2011): In a prosecution for concealing money laundering, the defendant argued that his confrontation rights were violated when the government presented summary charts of business records. The court found no error. The bank records and checks that were the subject of the summary were business records and "[b]usiness records are not testimonial." And "[s]ummary evidence also is not testimonial if the evidence underlying the summary is not testimonial."

Autopsy reports prepared as part of law enforcement are found testimonial under *Melendez-Diaz: United States v. Ignasiak,* 667 F.3d 1217 (11th Cir. 2012): In a prosecution against a doctor for health care fraud and illegally dispensing controlled substances, the court held that autopsy reports of the defendant's former patients were testimonial under *Melendez-Diaz.* The court relied heavily on the fact that the autopsy reports were filed by an arm of law enforcement. The court reasoned as follows:

We think the autopsy records presented in this case were prepared "for use at trial." Under Florida law, the Medical Examiners Commission was created and exists within the Department of Law Enforcement. Fla. Stat. 406.02. Further, the Medical Examiners Commission itself must include one member who is a state attorney, one member who is a public defender, one member who is sheriff, and one member who is the attorney general or his designee, in addition to five other non-criminal justice members. Id. The medical

examiner for each district "shall determine the cause of death" in a variety of circumstances and "shall, for that purpose, make or have performed such examinations, investigations, and autopsies as he or she shall deem necessary or as shall be requested by the state attorney." Fla. Stat. 406.11(1). Further, any person who becomes aware of a person dying under circumstances described in section 406.11 has a duty to report the death to the medical examiner. Failure to do so is a first degree misdemeanor.

* * *

In light of this statutory framework, and the testimony of Dr. Minyard, the autopsy reports in this case were testimonial: "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." As such, even though not all Florida autopsy reports will be used in criminal trials, the reports in this case are testimonial and subject to the Confrontation Clause.

Note: The Court's test for testimoniality is broader than that used by the Supreme Court. The Supreme Court finds statements to be testimonial only when they are *primarily motivated* to be used in a criminal prosecution. The 11th Circuit's "reasonable anticipation" test would cover many more statements, and accordingly the court's decision in *Ignasiak* is subject to question.

State of Mind Statements

Statement admissible under the state of mind exception is not testimonial: *Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004): Horton was convicted of drug-related murders. At his state trial, the government offered hearsay statements from Christian, Horton's accomplice. Christian had told a friend that he was broke; that he had asked a drug supplier to front him some drugs; that the drug supplier declined; and that he thought the drug supplier had a large amount of cash on him. These statements were offered under the state of mind exception to show the intent to murder and the motivation for murdering the drug supplier. The court held that Christian's statements were not "testimonial" within the meaning of *Crawford*. The court explained that the statements "were not ex parte in-court testimony or its equivalent; were not contained in formalized documents such as affidavits, depositions, or prior testimony transcripts; and were not made as part of a confession resulting from custodial examination. . . . In short, Christian did not make the statements under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial."

Testifying Declarant

Cross-examination sufficient to admit prior statements of the witness that were testimonial: *United States v. Acosta,* 475 F.3d 677 (5th Cir. 2007): The defendant's accomplice testified at his trial, after informing the court that he did not want to testify, apparently because of threats from the defendant. After answering questions about his own involvement in the crime, he refused on direct examination to answer several questions about the defendant's direct participation in the crime. At that point the government referenced statements made by the accomplice in his guilty plea. On cross-examination, the accomplice answered all questions; the questioning was designed to impeach the accomplice by showing that he had a motive to lie so that he could receive a more lenient sentence. The government then moved to admit the accomplice's statements made to qualify for a safety valve sentence reduction --- those statements directly implicated the defendant in the crime. The court found that statements made pursuant to a guilty plea and to obtain a safety valve reduction were clearly testimonial. However, the court found no error in admitting these statements, because the accomplice was at trial subject to cross-examination. The court noted that the accomplice admitted making the prior statements, and answered every question he was asked on cross-examination. While the cross-examination did not probe into the underlying facts of the crime or the accomplice's previous statements implicating the defendant, the court noted that "Acosta could have probed either of these subjects on cross-examination." The accomplice was therefore found sufficiently subject to cross-examination to satisfy the Confrontation Clause. ***See also, United States v. Smith,*** 822 F.3d 755 (5th Cir. 2016) (defendant's accomplice gave testimonial statements to a police officer, but admission of those statements did not violate the right to confrontation because the accomplice testified at trial subject to cross-examination).

Crawford **inapplicable where hearsay statements are made by a declarant who testifies at trial: *United States v. Kappell,*** 418 F.3d 550 (6th Cir. 2005): In a child sex abuse prosecution, the victims testified and the trial court admitted a number of hearsay statements the victims made to social workers and others. The defendant claimed that the admission of hearsay violated his right to confrontation under *Crawford.* But the court held that *Crawford* by its terms is inapplicable if the hearsay declarant is subject to cross-examination at trial. The defendant complained that the victims were unresponsive or inarticulate at some points in their testimony, and therefore they were not subject to effective cross-examination. But the court found this claim foreclosed by *United States v. Owens*, 484 U.S. 554 (1988). Under *Owens,* the Constitution requires only an opportunity for cross-examination, not cross-examination in whatever way the defendant might wish. The defendant's complaint was that his cross-examination would have been more effective if the victims had been older. "Under *Owens,* however, that is not enough to establish a Confrontation Clause violation."

Admission of testimonial statements does not violate the Confrontation Clause because declarant testified at trial --- even though the declarant did not recall making the statements: *Cookson v. Schwartz,* 556 F.3d 647 (7th Cir. 2009): In a child sex abuse prosecution, the trial court admitted the victim's hearsay statements accusing the defendant. These statements were testimonial. The victim then testified at trial, describing some incidents perpetrated by the defendant. But the victim could not remember making any of the hearsay statements that had previously been admitted into evidence. The court found no error in admitting the victim's testimonial hearsay, because the victim had been subjected to cross-examination at trial. The defendant argued that the victim was in effect unavailable because she lacked memory about the statements. But the court found this argument was foreclosed by *United States v. Owens*, 484 U.S. 554 (1988). The court noted that the defendant in this case was better off than the defendant in *Owens* because the victim in this case "could remember the underlying events described in the hearsay statements."

Witness's reference to statements made by a victim in a forensic report did not violate the Confrontation Clause because the declarant testified at trial: *United States v. Charbonneau,* 613 F.3d 860 (8th Cir. 2010): Appealing from child-sex-abuse convictions, the defendant argued that it was error for the trial court to allow the case agent to testify that he had conducted a forensic interview with one of the victims and that the victim identified the perpetrator. The court recognized that the statements by the victim may have been testimonial. But in this case the victim testified at trial. The court declared that "*Crawford* did not alter the principle that the Confrontation Clause is satisfied when the hearsay declarant, here the child victim, actually appears in court and testifies in person."

Statements of interpreter do not violate the right to confrontation where the interpreter testified at trial: *United States v. Romo-Chavez,* 681 F.3d 955 (9th Cir. 2012): The court held that even if the translator of the defendant's statements could be thought to have served as a witness against the defendant, there was no confrontation violation because the translator testified at trial. "He may not have remembered the interview, but the Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. All the Confrontation Clause requires is the ability to cross-examine the witness about his faulty recollections."

Statements to police officers implicating the defendant in the conspiracy are testimonial, but no confrontation violation because the declarant testified: *United States v.*

Allen, 425 F.3d 1231 (9th Cir. 2005): The court held that a statement made by a former coconspirator to a police officer, after he was arrested, identifying the defendant as a person recruited for the conspiracy, was testimonial. There was no error in admitting this statement, however, because the declarant testified at trial and was cross-examined. ***See also United States v. Lindsey,*** 634 F.3d 541 (9th Cir. 2011) ("Although Gibson's statements to Agent Arbuthnot qualify as testimonial statements, they do not offend the Confrontation Clause because Gibson himself testified at trial and was cross-examined by Lindsey's counsel.").

Admitting hearsay accusation did not violate the right to confrontation where the declarant testified and was subject to cross-examination about the statement: *United States v. Pursley,* 577 F.3d 1204 (10th Cir. 2009): A victim of a beating identified the defendant as his assailant to a federal marshal. That accusation was admitted at trial as an excited utterance. The victim testified at trial to the underlying event, and he also testified that he made the accusation, but he did not testify on either direct or cross-examination *about* the statement. The defendant argued that admitting the hearsay statement violated his right to confrontation. The court assumed arguendo that the accusation was testimonial --- even though it had been admitted as an excited utterance. But even if it was testimonial hearsay, the defendant's confrontation rights were not violated because he had a full opportunity to cross-examine the victim about the statement. The court stated that the defendant's "failure to seize this opportunity demolishes his Sixth Amendment claim." The court observed that the defendant had a better opportunity to confront the victim "than defendants have had when testifying declarants have indicated that they cannot remember their out-of-court statements. Yet, courts have found no Confrontation Clause violation in that situation."

Statement to police admissible as past recollection recorded is testimonial but admission does not violate the right to confrontation: *United States v. Jones*, 601 F.3d 1247 (11th Cir. 2010): Affirming firearms convictions, the court held that the trial judge did not abuse discretion in admitting as past recollection recorded a videotaped police interview of a 16-year-old witness who sold a gun to the defendant and rode with him to an area out of town where she witnessed the defendant shoot a man. The court also rejected a Confrontation Clause challenge. Even though the videotaped statement was testimonial, the declarant testified at trial --- as is necessary to qualify a record under Rule 803(5) --- and was subject to unrestricted cross-examination.

Waiver

Waiver found where defense counsel's cross-examination opened the door for testimonial hearsay: ***United States v. Lopez-Medina,*** 596 F.3d 716 (10th Cir. 2010): In a drug trial, an officer testified about the investigation that led to the defendant. On cross-examination, defense counsel inquired into the information that the officer received from an informant --- presumably to discredit the basis for the police having targeted the defendant. The trial court then on redirect allowed the government to question the officer and elicit some of the accusations about the defendant that the informant's had made to the officer. The court found no error. It recognized that "a confidential informant's statement to a law enforcement officer are clearly testimonial." But the court concluded that the defendant "opened the door to further questioning on Officer Johnson regarding the information he received from the confidential informant. Where, as here, defense counsel purposefully and explicitly opens the door on a particular (and otherwise inadmissible) line of questioning, such conduct operates as a limited waiver allowing the government to introduce further evidence on that same topic." The court observed that a waiver would not be found if there was any indication that the defendant had disagreed with defense counsel's decision to open the door. But there was no indication of dissent in this case. ***Accord, United States v. Acosta,*** 475 F.3d 677 (5th Cir. 2007) (waiver found where defense counsel opened the door to testimonial hearsay). ***Contra, and undoubtedly wrong, United States v. Cromer,*** 389 F.3d 662, 679 (6th Cir. 2004) ("the mere fact that Cromer may have opened the door to the testimonial, out-of-court statement that violated his confrontation right is not sufficient to erase that violation").

SUPPLEMENTAL MATERIALS REGARDING RULE 404(B)

FORDHAM

University School of Law

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

Daniel J. Capra
Philip Reed Professor of Law

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

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Consideration of Possible Changes to Rule 404(b) --- Supplementary Memo
Date: April 11, 2017

The Justice Department representative has prepared a memo setting forth the DOJ's position on the changes discussed in the Rule 404(b) memo in the Agenda Book for the April 21 Committee meeting. It is being sent by email to the Committee. I am personally grateful to Betsy for preparing the memo in advance of the meeting.

This supplementary memo is not going to take the DOJ comments point by point. That can be done at the Committee meeting. The reason for this supplementary memo is that, when the Committee's new consultant, Professor Liesa Richter, read the DOJ memo she had an idea for a different amendment to Rule 404(b) --- one that would provide more protection to criminal defendants than the current rule, while allowing more flexibility than the alternatives discussed in the Rule 404(b) memo in the agenda book. Here is a lightly edited version of what Liesa wrote to me in an email after receiving the DOJ memo:

> In reading over all the DOJ concerns and the emphasis on fact-specific determinations, I had an idea: Could it address some of the really bad cases like the 8th Circuit *Geddes* case in your memo to add a "reverse 403" standard to the admission of 404(b) evidence against a criminal defendant? This would mirror the approach of Rule 609 to prior felony convictions of testifying criminal defendants where propensity concerns are also the issue. It would eliminate any pro forma admissibility or "rule of inclusion." It would reach the right result in those intent cases where the defendant claims mistake or accident. A reversed balancing could also eliminate admissibility in most cases where there is no "active contest" of a particular element by a defendant, while still preserving the government's ability to argue for admissibility in a specific intent scenario where it felt that the probative value of a prior act was particularly strong and needed. I understand that DOJ would reject this idea because it favors exclusion, but it seems to capture the baseline standard (which is the 404(b)(1) prohibition) while preserving that case-by-case flexibility that DOJ is talking about. A committee note could spell out the

particular concerns about certain propensity uses and uses in cases where there is no genuine dispute about the issue to which the other act is relevant, rather than enshrining these precise concerns in rule text.

Providing a more protective balancing test for criminal defendants is a solution that has much to recommend it. It avoids larding up Rule 404(b) with a lot of language about "active disputes" and "propensity inferences." It leaves civil cases untouched, where at least it can be said that Rule 404(b) can be applied equally to both sides and so any unfairness of application might tend to wash out. It can be coupled with changes to the notice requirement that are discussed in the original memo --- or not. And as Liesa notes, there is precedent for a different balancing test in Rule 609, which deals with a related problem of impermissibly drawing character inferences.

Here is what the 403-based proposal could look like:

(b) Other Crimes, Wrongs, or ~~Other~~ Acts.

(1) ***Prohibited Uses.*** Evidence of ~~a~~ any other crime, wrong, or ~~other~~ act --- when offered as indirect evidence of a matter in dispute --- 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~~ Other 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. If the evidence is offered against a criminal defendant, its probative value must [substantially] outweigh its prejudicial effect to that defendant. In all other cases, admissibility is subject to Rule 403. ~~On request by a defendant in a criminal case, the prosecutor~~

(3) Notice. The proponent must:

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

(B) articulate in the notice the non-propensity purpose for which the proponent intends to offer the evidence;

(C) articulate the chain of reasoning supporting the purpose for offering the evidence; and

(~~B~~ D) do so at least 14 days before trial — or ~~during trial~~ at a later date if the court, for good cause, excuses this requirement ~~lack of pretrial notice~~.

Reporter's comments:

1. "Substantially" is in brackets. It depends on how much protection should be provided --- obviously a question for the Committee, assuming it wants to go down this road at all. One possibility is a "reverse 403" test, which would provide maximum protection, and which is found in three other rules --- 412 (civil cases), 609(b) and 703. This test has made a difference in a number of reported cases --- meaning that courts have actually stated that the evidence would be admissible under Rule 403 but excluded under this stricter balancing test. The other, milder protection is that the probative value outweigh the prejudice, a balancing test that is found in Rule 609(a)(1). This test has also made a difference in some reported cases, though obviously its outcome-determinativeness is less significant than a reverse Rule 403.

2. The draft excludes language about non-propensity inferences and active disputes, because the idea is that a stricter balancing test will work in a flexible way to deal with those issues on a case by case basis.

3. The draft includes the changes to the notice requirement that are discussed in the memo in the Agenda Book, but these proposals are severable from the Rule 403 balancing change.

4. The draft includes the changes that are intended to address the "inextricably intertwined" problem. One consequence of changing the balancing test is that the "inextricably intertwined" problem becomes more important to regulate. Under current law, the only practical difference between evidence of "other acts" and "charged acts" is that the government has to disclose the former and not the latter. Substantively there is no real difference because Rule 403 applies to both sets of acts. But under the draft, there would be a different balancing test for charged acts and "other" acts, so there is all the more reason to give guidance to the courts about the dividing line --- if it is possible to do so.

5. If the balancing test is changed for criminal defendants, then it is important to add in text that Rule 403 applies to everything else. It is true that Rule 403 applies now, even though it is not specified. But there will be a negative inference that could be drawn if a specific balancing test is added for criminal defendants and nothing is said about other cases. The precedent for including a reference to Rule 403 is found in Rule 609(a)(1). It wasn't absolutely necessary to mention Rule 403 there, as it applies by default. But it was considered helpful to do so in order to differentiate the Rule 403 test from the special balancing test set forth for criminal defendants in Rule 609(a)(1), and to clarify that Rule 403 applies wherever the special balancing test does not.

Draft Committee Note for a New Balancing Test

The rule has been amended to provide a more protective balancing test for criminal defendants. The Committee has determined that in many cases bad acts have been admitted against criminal defendants and are, in effect, used as proof of the

defendant's bad character and propensity to commit a crime. The chances of such an outcome are reduced by a more protective balancing test. The new test will help to ensure that other bad acts are admissible only when they are highly probative for a non-character purpose. It will also help to ensure that other bad acts, even when offered for a proper purpose, are admissible only when the government shows a substantial need for admitting them, such as when the issue is actively disputed by the defendant. For example, the balancing test is unlikely to be met when a bad act is offered to prove the defendant's intent to commit the charged crime, and the defense is that the defendant did not commit the crime at all.

U.S. Department of Justice

Washington, DC 20530

Memorandum

To: Daniel J. Capra, Reporter,
Advisory Committee on Evidence Rules
From: Elizabeth J. Shapiro, U.S. Department of Justice
Re: Consideration of Possible Changes to Rule 404(b)
Date: April 4, 2017

We write to provide you with the Department's initial views in response to your memorandum setting forth a number of possible amendments to Federal Rule of Evidence 404(b). At the outset, we thank you for the tremendous work you have done thinking through the issues and presenting the committee with a thoughtful and comprehensive work product. We hope that adding our perspective will assist the committee's forthcoming deliberations.

Before addressing specific proposals, there are several general points to keep in mind in considering whether and how to amend FRE 404(b), some of which you have already noted in your memorandum. First, FRE 404(b) is likely the most heavily litigated of all the evidence rules. Accordingly, any significant amendment has the potential to upset decades of precedent and be more disruptive to courts and practitioners than the changes are beneficial. Second, the 404(b) analysis as applied is extremely fact intensive and case specific. Whether prior-act evidence is admissible turns on a host of considerations, including the purpose for which the evidence is admitted, the relevance of the evidence to that purpose (which may depend on such factors as the similarity of the prior act to the charged offense and its proximity in time), the probative value of the evidence, and the danger of unfair prejudice. To effectively engage in this balance courts require discretion and flexibility.

Finally, the legislative history of 404(b) suggests that significant amendments to 404(b) will attract congressional attention. As the Supreme Court has noted, Congress, in adopting FRE 404(b), was not primarily concerned with keeping out other-act evidence. To the contrary, it was concerned that such evidence be admitted, subject to Rule 403. *See Huddleston v. United States*, 485 U.S. 681, 688–89 (1988) ("Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence"), citing S. Rep. No. 93-1277 at 24 (1974) ("It is anticipated that with respect to permissible uses for such evidence the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e., prejudice, confusion, or waste of time."); H.R. Rep. No. 93-650, p. 7 (1973). As we discuss below, some of the proposed amendments likely would be perceived as putting a thumb on the scale in favor of non-admissibility. If Congress perceives the amendments in that way, we may unwittingly encourage Congress to more actively engage in the rulemaking process in ways that ultimately undermine the Rules Enabling Act.

I. Proposal A: Requiring a Showing that the Non-Character Purpose Does Not Proceed through a Propensity Inference.

This proposal derives from the premise that the courts of appeal are divided in the way they approach 404(b) evidence and the analytical framework they apply. Your memorandum notes as examples the Seventh Circuit's opinion in *Gomez* and the Third Circuit's opinion in *Caldwell*. The Department has formally taken the position in the Supreme Court that these decisions do not constitute a circuit split, nor is the Court's intervention necessary to settle what it means to be a "rule of inclusion." In a case arising in the Eighth Circuit, for example, appellees argued in a petition for certiorari that a general circuit split existed with respect to whether Rule 404(b) permits the use of propensity inferences to support the relevance of the prior-act evidence for a non-propensity purpose. In opposing the petition, the Solicitor General acknowledged the *Gomez/Caldwell* decisions, but argued that those decisions neither changed 404(b) nor created a circuit split:

> "Some courts of appeals recently have emphasized that the proponent of the evidence should specify how the other-act evidence is relevant to an issue in the case without relying on a prohibited propensity inference. *See, e.g., United States v. Gomez*, 763 F.3d 845, 856 (7th Cir. 2014) (en banc) ("[T]he district court should not just ask whether the proposed other-act evidence is relevant to a non-propensity purpose but how exactly the evidence is relevant to that purpose -- or more specifically, how the evidence is relevant without relying on a propensity inference."); *Caldwell*, 760 F.3d at 276-277 ("In proffering such evidence, the government must explain how it fits into a chain of inferences -- a chain that connects the evidence to a proper purpose, no link of which is a forbidden propensity inference.") (Citation omitted). **That approach ensures that the proffered evidence is offered for a permissible purpose. . . . But no disagreement exists on the underlying principle that the relevance of the prior-act evidence cannot be based on a propensity inference**, and this Court's intervention is not needed to emphasize that already-established point."

Curtis Adams v. United States, 2016 WL 4540212 (SGBRIEFS), *cert denied* 136 S. Ct. 2449 (2016) (emphasis added) (court of appeals held the admission of prior gun possession convictions to be error, but harmless in light of the other evidence).

We believe, therefore, that the rule itself is clear and regularly applied by courts without any resulting unfairness. It is true that some circuits have noted the need for courts to remain vigilant in applying the rule and holding the government to its burden to demonstrate a non-propensity purpose. But even these circuits understand that the application of facts to the rule can be nuanced. The Third Circuit, for example, recognizes that there are cases where properly admitted 404(b) evidence could also be said to show propensity. *See, e.g., United States v. Green*, 617 F.3d 233, 244 (3d Cir. 2010). But that alone does not make the evidence inadmissible. Take the example of the classic 404(b) purpose of intent: The defendant is charged with filing a false tax return that omitted $100,000 in gambling winnings. His defense is that he simply forgot about the income, and had no intent to endorse a false return. The government presents evidence that two years earlier, the defendant did the same thing, and at the time, told the complicit accountant who

prepared the return, "I never report my gambling winnings because there is no paper trail of these winnings and the government has no way to prove I received the money." That is obviously proof of intent. Yet, the same evidence could also be used to show propensity – he did it before, and he did it again. The evidence, however, is admissible. In *Green*, Judge Smith made this clear, explaining that Rule 404(b) provides that "evidence of other wrongful acts was admissible so long as it was not introduced *solely* to prove criminal propensity." *United States v. Green*, 617 F.3d at 244 (emphasis in original). Any resulting concern is ameliorated by Rule 403 balancing and a proper jury instruction, advising the jury of the limited purpose for which the evidence is relevant, and directing the jury not to draw and rely on an inference of propensity. The key is that, while some evidence may have dual purposes, the government must be able to articulate the non-propensity purpose, an analysis that already occurs under the existing rule.

Although not the stated intent, the proposed amendments could easily change the substance of the law, leading to the exclusion of evidence that should be admitted. For example, by adding the phrase "the probative value may not depend on a propensity inference" into the section of the rule that identifies proper purposes, a court will be left to wonder how that phrase differs from what the rule currently requires and what exactly it means. Subsection (1) prohibiting propensity use already says that other-act evidence 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. Thus, the new language is either entirely redundant, or it must mean something more: that the evidence must never be susceptible to a propensity use even if the actual purpose for which it is being offered is for a proper purpose. That is clearly not the law.

Take another example of how the proposed amendment could be used to deny otherwise admissible evidence: The defendant is charged with distributing cocaine, but claims that he did not know that the substance he was carrying was cocaine. The prosecution wants to introduce a prior incident where the defendant had knowingly engaged in cocaine distribution. The evidence is probative of the defendant's knowledge of what cocaine is, and that on the occasion charged in the indictment, he knew it was cocaine because he had prior experiences dealing with cocaine. That evidence, however, could also be used to show propensity. But because the government is *not* using it to show propensity, but for a proper purpose, *i.e.*, knowledge, the evidence should come in, subject to Rule 403 balancing and an appropriate instruction.

If the proposed amendment is not intended to put a thumb on the scale, but simply as a reminder to courts to correctly apply the rule, then it is redundant and unnecessary, and susceptible to misinterpretation. In legislating of any kind, words are assumed to have meaning – otherwise, why add them. The likely impact of the amendment will be for courts to exclude evidence that should be admitted. These decisions, moreover, will rarely if ever be subject to review, given that the government cannot appeal from an acquittal. If the intent of the amendment is in fact to exclude more evidence, then that would be a significant public policy decision – arguably one contrary to the original intent of the rule -- that should be subjected to substantially more study and debate.

As some courts have pointed out, *see, e.g., Leon v. FedEx Ground Package Sys., Inc.*, 313 F.R.D. 615, 625 (D.N.M. 2016), the tests that circuit courts employ for analyzing 404(b)

evidence may differ slightly, but they are all constrained by the analytical framework set forth by the Supreme Court. *See Huddleston v. United States,* 485 U.S. 681 (1988). In *Huddleston,* the Supreme Court outlined a rules-based approach to ensuring fairness with respect to other-act evidence:

> "We share petitioner's concern that unduly prejudicial evidence might be introduced under Rule 404(b). We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted."

Huddleston, 485 U.S. at 691–92.

We believe district courts are well equipped to correctly apply *Huddleston,* that they get it right most of the time, and when they do not, appellate courts do not hesitate to find error. Moreover, to the extent the overriding concern is to make uniform the approach embraced by the Seventh and Third Circuits, courts on their own are examining those decisions. The Eighth Circuit, for example, has determined that, at least in drug possession cases, the district courts should probe specifically into the non-propensity purpose for which the evidence is offered. Before admitting prior act evidence, "the district court should ask why the government seeks to admit it" and how the evidence is relevant to show knowledge and intent. "Simply asserting" that the evidence is relevant to knowledge or intent "is not enough." Rather, a court must "ask why the government seeks to admit it" and "if the only answer to these questions is that [the] prior conviction (*i.e.*, wrongdoing) shows [that the defendant] intended to commit another wrongdoing[,] . . . then the evidence shows nothing more than criminal propensity and under Rule 404(b)(1) is inadmissible." *United States v. Turner*, 781 F.3d 374, 390-91 (8th Cir.), cert denied 136 S. Ct. 208, 136 S. Ct. 280, 136 S. Ct. 493 (2015); *see also See United States v. Scott*, 677 F.3d 72, 79 (2d Cir. 2012) (cautioning against "propensity evidence in sheep's clothing").

Defense lawyers are also keenly aware of the *Gomez* and *Caldwell* decisions, and are arguing for their analysis to be applied in other circuits. *See, e.g., United States v. Burnett*, 827 F.3d 1109 (D.C. Cir. 2016) (acknowledging but not needing to address defense argument that *Gomez/Caldwell* analysis should apply). Rather than amend the rule, the committee should wait to see whether other circuits adopt the *Gomez/Caldwell* approach. Given that defense motions and cert petitions are already framing the issue, it is quite likely we will see additional decisions. Indeed, in the time it would take to adopt an amendment, many more circuits may examine and opine on their analytical approaches to prior-act evidence.

In addition to continuing to follow the trend in the courts, there are other ways to ensure rigor in enforcing the rules other than a rule change primarily designed to tell judges to follow

the rule. Judicial education, for example, including for new judges, can instruct courts on the analytical steps they should employ when considering the admission of 404(b) evidence. Amending the rule, however, will only engender confusion and lead to unintended consequences, in addition to throwing decades of case law into question.

II. Proposal B: Conditioning Admissibility of Other Act Evidence on the Defendant Actively Contesting the Purpose for Which the Evidence is Offered, Beyond Pleading Not Guilty.

Your memorandum suggests that courts are split as to whether 404(b) evidence can be admitted when the defendant has not actively contested the issue on which the evidence is offered (i.e., there is a stipulation). The memorandum proposes for the committee's consideration an amendment that would limit 404(b) evidence to situations where the proffered purpose has been actively contested by the opponent of the evidence.

As a practical matter, we believe such a proposal is unworkable, and, as your memorandum notes, it conflicts with the Supreme Court's language in *Old Chief v. United States*, 519 U.S. 172 (1997). With respect to the practical application, we should keep in mind the obvious but important point that in a criminal case, the government bears the burden of proof. Criminal defendants frequently formulate their defense as the trial progresses. The government cannot wait until the defendant formally challenges an element to the offense before deciding to introduce 404(b) evidence. In addition, an "active contest" requirement would be difficult to police, add unnecessary disputes to trials, and provide opportunities for gamesmanship. Defense counsel, for example, could wait and argue (or subtly allude to lack of evidence on) the elements of the crime in closing argument when it is too late for the government to admit the 404(b) evidence. Where the government has non-propensity 404(b) evidence probative of an element of the offense, it should be permitted to introduce such evidence, absent a Rule 403 analysis showing that the evidence is more prejudicial than probative.

The proposed amendment, moreover, would apply to all cases, including specific intent crimes. Even the Seventh Circuit has "repeatedly rejected a similar rule for specific-intent crimes because in this class of cases 'intent is automatically at issue.'" *Gomez*, 763 F.3d at 858-59. In tax cases, for example, where the defendant rarely contests solely the *actus reus*, the proposed change would work particular havoc, as defense attorneys would routinely seek to use the rule to preclude the admission of evidence (*i.e.*, past compliance or non-compliance with tax requirements to show knowledge and intent) that all courts have recognized is central to this type of prosecution.

The Supreme Court, in *Old Chief*, stressed that the government must be free to prove its case by way of evidence. Thus, "if there were a justification for receiving evidence of the nature of prior acts on some issue other than status (i.e., to prove 'motive, opportunity, intent, preparation, plan, knowledge, identify or absence of mistake or accident,' Fed. Rule Evid. 404(b)), **Rule 404(b) guarantees the opportunity to seek its admission**." *Old Chief*, 519 U.S. at 190. *See also Huddleston*, 485 U.S. at 689 (emphasis added). Although one can argue that

this language is dictum, it suggests at a minimum that the Court would not approve of limiting the government's ability to offer relevant evidence with respect to the charged offense, subject to ordinary Rule 403 balancing.

The main concern animating an "active contest" amendment seems to be that the admission of other-act evidence as to a purportedly uncontested fact would be unduly prejudicial to the defendant. But the concern for undue prejudice is exactly what Rule 403 is designed to address. There is no reason to amend Rule 404(b) to inject a new term – "actively contested" – that is itself vague, undefined and likely to engender litigation. That is especially true given the government's burden of proof, the case-by-case, factual nature of the inquiry, and the fact that the Rules are already fully equipped to handle issues of alleged undue prejudice.

III. Proposal C: Limiting the "Inextricably Intertwined" Doctrine

This proposal arises from the concern that courts do not uniformly apply the "inextricably intertwined" doctrine, such that other acts are found to be part of the charged crime when they arguably should come within 404(b). Your memorandum recognizes, correctly, that there will always be line-drawing in this area, and that to the extent a problem exists, it is not likely to be solved through rule-making.

We believe, moreover, that there is not a serious problem applying this doctrine. Notwithstanding decisions in the D.C., Third and Seventh Circuits, there remains a well-established, existing body of case law on the "inextricably intertwined" doctrine that is routinely applied without confusion. *See, e.g.*, *United States v. Gobbi*, 471 F.3d 302, 311 (1st Cir. 2006) (citing *United States v. Epstein*, 426 F.3d 431, 438-39 (1st Cir. 2005)); *United States v. Kaiser*, 609 F.3d 556, 570 (2d Cir. 2010); *United States v. Lighty*, 616 F.3d 321. 352 (4th Cir. 2010); *United States v. Randall*, 887 F.2d 1262, 1268 (5th Cir. 1989); *United States v. Rice*, 607 F.3d 133, 141 (5th Cir. 2010); *United States v. Roberts*, 933 F.2d 517, 520 (7th Cir. 1991); *United States v. Nguyen*, 608 F.3d 368, 377 (8th Cir. 2010); *United States v. Ford*, 613 F.3d 1263, 1267 (10th Cir. 2010); *United States v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007);; *United States v. Bowie*, 232 F.3d 923, 927 (D.C. Cir. 2000). *But see United States v. Allen*, 960 F.2d 1055, 1058 (D.C. Cir. 1992); *United States v. Glover*, 736 F.3d 509, 517 (D.C. Cir. 2013); *United States v. Green*, 617 F.3d 233, 249-50 (3d Cir. 2010); *United States v. Gorman*, 613 F.3d 711, 719 (7th Cir. 2010).

The proposed amendment is unlikely to improve the existing rule, and will inject more confusion with respect to decades of precedent applying the doctrine. Given that the application of the doctrine is entirely dependent on the particular facts of any given case, uniformity will never be achieved regardless of how the doctrine is defined. There will always be line-drawing, and courts will still apply Rule 403 to avoid undue prejudice. In addition, from a practical perspective, prosecutors typically err on the side of providing 404(b) notice for evidence that falls under this doctrine. No prosecutor wants to risk evidence not being admitted for failure to provide notice if the court finds the proffered evidence not to be inextricably intertwined with the charged crime. Accordingly, we believe this proposed amendment is unnecessary.

IV. Proposal D: Amendments to the Notice Requirement

Your memorandum makes a number of suggestions with respect to the advance notice courts should require to permit a fair opportunity to contest the admission of 404(b) evidence. As we have already noted, the government must satisfy all elements of the charged crime, and often knows only a limited amount about what the defense will be. As a result, it can be difficult to know in advance how the defense will respond to the government's case, which can necessitate last minute changes and additions. The current reasonableness standard affords courts the necessary flexibility to respond to case specific needs.

The memorandum notes that the notice provisions would run both directions, and thus defense lawyers seeking to introduce 404(b) evidence would be similarly bound by the additional requirements. Realistically, however, criminal defendants rarely offer 404(b) evidence. And, in any event, courts do not often punish criminal defendants for their counsel's violation of the rules.

A. More Specificity of the Evidence to be Proffered

It was suggested at the committee's last meeting that the rule's requirement to provide notice of the "general nature" of the evidence did not always give defense lawyers important information, such as the name of the witness and the facts and circumstances of the proposed testimony. The argument is that this information is needed in advance in order to know whether the government is relying on a propensity inference.

We do not believe, however, that there is a demonstrated need to change the rule from "general nature" to something more specific. The cases cited in the memorandum do not demonstrate that there exists any systemic problem, that courts are struggling to apply the "general nature" provision, or that injustice has resulted due to the generality of the notice being provided. Rather, we read the cases to demonstrate the need for flexibility to adapt to the factual circumstances presented in each case.

Take for example, *United States v. Watson*, 409 F.3d 458 (D.C. Cir. 2005), *as amended on reh'g* (Sept. 14, 2005). In that case, the appellant complained about the timing of the government's notice (the morning of voir dire), and its lack of specificity with respect to the name of the witness. But the reason for the late notice with respect to the name was because, due to security concerns for a cooperating witness, the prosecutor could not disclose the witness' identity until the day of trial. With respect to the timing, the court found that, even if inadequate, there was no prejudice, and therefore no need to determine whether the timing equated to a failure of notice. With respect to the witness' name, the court found that defense counsel had "specifically declared at trial that introduction of the evidence at such a late time did not impede the defense" *United States v. Watson*, 409 F.3d at 466. Rather than demonstrate a problem with the rule, this case shows the case specific and fact specific analysis that judges employ to ensure fairness, which might include not providing a witness' name prior to trial in order to protect that witness' safety.

United States v. Kern, 12 F.3d 122 (8th Cir. 1993), similarly does not support the notion that courts are overly-lenient with respect to the content of 404(b) notices. In *Kern*, the government explained fourteen days before trial that it may present prior evidence of local robberies, but that it did not yet have the information from the local government. On the same day that the government obtained the state reports on the prior robberies, a week before trial, it provided the reports to the defense, with all its particulars. Thus, the court in that case did not hold that the government's statement that it "might use evidence from some local robberies" alone satisfied 404(b)'s general notice requirement. Rather, the court held that the earlier notice, coupled with production of the state reports a week before trial when the government received the reports, satisfied the government's obligation. *See Kern*, 12 F.3d at 124.

United States v. Schoeneman, 893 F. Supp. 820, 823 (N.D. Ill. 1995), similarly is not indicative of a notice problem. The court in that case was faced with a routine discovery motion from the defense that demanded a number of items, including with respect to 404(b) evidence, "the dates, times, places and persons involved in such acts; the statements of each participant; any documents that contain evidence of such other crimes or acts; and a statement of the issue or issues to which the government believes such other crimes or acts of evidence may relate." The government in response stated that it would give appropriate notice of 404(b) evidence, but it objected to the detail requested. The court correctly concluded that the defendant's demand was more expansive than the rule required. The court did not, however, hold that "dates, times, places and persons" need not be provided as part of the general nature of 404(b) evidence. It held simply that the much more expansive demand of the defendant went beyond what the rule required. *See Schoeneman*, 893 F. Supp. at 823.

In the absence of a demonstrated problem, we see no need to upset current case law, and, on the flip side, we see substantial merit to allowing district courts to retain the flexibility to make case-by-case determinations without adding another layer of litigation.

B. Specifying the Time by Which 404(b) Notice Must Be Provided

For reasons similar to those warranting the retention of the general notice provision, we do not see a need to specify a time certain for 404(b) notice, such as fourteen days. We have not seen evidence that courts are failing to respond to the defendants' need for advance notice of 404(b) evidence, or that courts are otherwise failing to apply the current reasonableness standard in a just way. The rule uses a reasonableness standard in order to ensure flexibility to account for the very fact specific circumstances that come before district judges. *See, e.g., United States v. White*, 816 F.3d 976, 983 (11th Cir. 2016) (Rule 404(b)'s notice standard is flexible because "[w]hat constitutes a reasonable ... disclosure will depend largely on the circumstances of each case.") (*citing United States v. Green*, 275 F.3d 694, 701 (8th Cir. 2001)).

While the proposed amendment allows courts to excuse the fourteen day requirement for good cause, building a default requirement into the rule ignores the realities of case development and trial preparation, both of which can be fluid. This change would inevitably lead to additional, and unnecessary, litigation concerning whether the government has shown sufficient good cause in the event that additional evidence comes to light less than fourteen days prior to

trial or the government slightly alters its theory of the case. Without a concrete demonstration that the "reasonableness" standard is resulting in injustice, this rule change is unwarranted.

The change is also unnecessary for the additional reason that courts can and do issue their own pre-trial orders setting deadlines, including requirements to provide 404(b) notice within a time certain before trial. Whether the circumstances require in any particular case that the court deviate from that time frame is an issue best left for the trial court in individual cases.

C. Extending 404(b) Notice Requirements to Civil Cases

The Department opposes the extension of 404(b) evidence to civil cases, where no problem or need has ever been demonstrated. Such an extension would be something entirely new in civil practice, for no compellinreason. Discovery in civil cases ensures that the parties are on notice of potential 404(b) evidence well in advance of trial, and admission of 404(b) evidence is virtually always addressed in pre-trial conferences and litigated via early motions *in limine*.

D. Deletion of the Demand Requirement

In 2015, the committee unanimously agreed to eliminate the words "On request by a defendant" from Rule 404(b)(2)'s notice provision. We continue to support this change to the notice provision.

V. Proposal E: Deletion of the Proper Purposes Language in Rule 404(b)(2)

As your memorandum notes, the proper purpose language is cited in literally thousands of cases, and deleting it will be perceived by courts as affecting a substantial and substantive change in the rule. That will inevitably engender confusion and result in courts rejecting probative evidence that should be admitted.

The Department has agreed with the Third Circuit in *Caldwell* that "the term "inclusionary" refers to the Rule's non-exclusive list of non-propensity purposes of other-act evidence. 760 F.3d at 275-276 ("By introducing the list of permissible purposes with the words 'such as,' the drafters [of Rule 404(b)] made clear that the list was not exclusive or otherwise limited to a strictly defined class.")." *Curtis Adams v. United States, supra*. We do not agree, however, that the term "inclusionary" means that courts are considering other-act evidence as presumptively admissible under Rule 404(b) without weighing its relevance to a non-propensity purpose. *See, e.g., United States v. Basham*, 561 F.3d 302, 326 (4th Cir. 2009); *United States v. Mosquere-Murillo*, 153 F. Supp. 3d 130, 177-78 (D.D.C. 2015). Indeed, relevant evidence that is not offered for a propensity purpose and which is not unduly prejudicial *is* presumptively admissible. Accordingly, we do not support what would be a very dramatic change to this oft-cited part of the rule.