ADVISORY COMMITTEE
ON
EVIDENCE RULES

Portland, ME
April 4, 2014

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ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

Portland, Maine

April 4, 2014

I. Opening Business

Opening business includes:

- Approval of the minutes of the Spring, 2013 meeting;
- A report on the January, 2014 meeting of the Standing Committee;
- A welcome to a new member, Judge Livingston; and
- A discussion about the Symposium on electronic evidence, taking place on the morning of the Committee meeting. The list of speakers and topics for the electronic evidence symposium is included in this agenda book under tab 1.

II. Proposed Amendments to Rule 801(d)(1)(B) and Rules 803(6)-(8)

The proposed amendments to Rule 801(d)(1)(B) and to Rules 803(6), (7), and (8) were approved by the Standing Committee and the Judicial Conference, and are currently before the Supreme Court. Barring any unforeseen developments, these amendments will become effective on December 1, 2014. The agenda book sets forth the rules and notes as they were approved by the Judicial Conference.

III. Possible Amendment to Rule 803(16)

The agenda book contains a memo on consideration of a possible amendment to Rule 803(16), the hearsay exception for ancient documents. The question addressed is whether the exception needs to be altered or abrogated in light of the fact that electronically stored information is widespread, does not degrade, and can be fairly easily stored for 20 years.

IV. Possible Amendment to Rule 609(a)

The agenda book contains a memo on consideration of a possible amendment to Rule 609(a) — the rule governing admission of most prior convictions to impeach a witness's character for truthfulness. The possible amendment is to abrogate the part of the rule that provides for automatic admission of all recent convictions involving a dishonest act or false statement, and to allow some judicial discretion to exclude such convictions by balancing probative value against the risk of prejudice, confusion and delay.

V. Consideration of Possible Changes to the Hearsay Exceptions

The agenda book contains the Seventh Circuit's recent decision in *United States v. Boyce.* In that case, Judge Posner in a concurring opinion recommends that the hearsay exceptions for present sense impressions and excited utterance should be reconsidered, because the rationales for these exceptions are not supported either by social science data or common sense. Judge Posner suggests more broadly that the hearsay exceptions are too complex — and that there should be a single exception for hearsay that the trial court finds to be reliable: "essentially a simplification of Rule 807." The clerk of the Seventh Circuit sent the *Boyce* opinion to the Advisory Committee for its consideration.

VI. Review of Effect of CM/ECF on Evidence Rules

A Subcommittee of the Standing Committee is investigating to what extent the national rules of procedure should be amended to accommodate electronic case filing and case management. The Reporter prepared a report to the Subcommittee on whether changes to the Evidence Rules might be necessary because of cm/ecf. That memo is set forth in the agenda book for the Committee's information.

VII. *Crawford* Outline

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

VIII. Privilege Project

Professor Broun will provide an oral report on his project surveying the law of privilege.

ADVISORY COMMITTEE ON EVIDENCE RULES

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Advisory Committee on Evidence Rules

Members	Position	District/Circuit	Start Date		End Date
Sidney A. Fitzwater Chair	D	Texas (Northern)	2010		2014
Brent R. Appel	JUST	Iowa	2010		2016
Paul S. Diamond**	D	Pennsylvania (Eastern)	2009		2015
Edward C. Dumont	ESQ	Washington, DC	2012		2015
Stuart M. Goldberg*	DOJ	Washington, DC	----		Open
John F. Keenan**	D	New York (Southern)	2007		2014
A. J. Kramer	FPD	Washington, DC	2012		2015
Debra Ann Livingston	C	Second Circuit	2013		2016
Paul Schectman	ESQ	New York	2010		2016
William K. Sessions III	D	Vermont	2011		2014
John A. Woodcock, Jr.	D	Maine	2011		2014
Daniel J. Capra Reporter	ACAD	New York	1996		Open

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

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* Ex-officio

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

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Liaison for the Advisory Committee on Appellate Rules	**Gregory G. Garre, Esq.**	***(Standing)***
Liaison for the Advisory Committee on Appellate Rules	**Judge Adalberto Jordan**	***(Bankruptcy)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Roy T. Englert, Jr., Esq.**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Neil M. Gorsuch**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules		
Liaison for the Advisory Committee on Evidence Rules	**Judge Judith H. Wizmur**	***(Bankruptcy)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge John F. Keenan**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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TAB 1

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TAB 1A

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Advisory Committee on Evidence Rules

Minutes of the Meeting of May 3, 2013

Miami, Florida

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on May 3, 2013, at the University of Miami School of Law, Coral Gables, Florida.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. William K, Sessions, III
Hon. John A. Woodcock, Jr.
Edward C. DuMont, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Public Defender, by phone

Also present were:

Hon. Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure
Hon. Judith Wizmur, Liaison from the Bankruptcy Committee, by phone
Hon. Paul Diamond, Liaison from the Civil Rules Committee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
Timothy Reagan, Esq., Federal Judicial Center
Jonathan Rose, Chief, Rules Committee Support Office
Benjamin Robinson, Esq., Rules Committee Support Office
Andrea Kuperman, Rules Clerk for Judge Sutton, by phone.

I. Opening Business

Welcoming Remarks

Judge Fitzwater, the Chair of the Committee, greeted the members and thanked Dean Patricia White and Professor Michael Graham of the University of Miami School of Law for hosting the

Committee.

The Chair welcomed Judge Sutton, the Chair of the Standing Committee. Judge Sutton spoke briefly about the pace of rulemaking, a concern that has been addressed by the Standing Committee. He noted that ideally it would be best to correlate the efforts of the Rules Committees in promulgating amendments, so that the Supreme Court is not inundated at any particular time. The Standing Committee has found, however, that the pace of rulemaking is highly affected by outside forces, most prominently from Congressional and Supreme Court activity. Thus, coordination among the Committees in promulgating rule amendments is difficult if not impossible. That said, Judge Sutton stressed the need of the Committees to be sensitive to rule fatigue, i.e., to the notion that the rules are in a constant state of flux. One way to address rule fatigue is for an Advisory Committee to package a set of amendments rather than stagger them — thus some amendments might be held back or accelerated to be put on the same timetable as others. In fact the Evidence Rules Committee does group amendments whenever possible, as the package of amendments from 2006 indicates.

Judge Sutton noted that the Evidence Rules Committee proposed the least number of amendments of all the Rules Committees over the last 15 years. The Chair noted that the attitude of the Committee has always been that Evidence Rules are not to be amended unless there is a compelling reason, and the Committee continues its review of the rules on that principle.

Approval of Minutes

The minutes of the Fall 2012 Committee meeting were approved.

Changes to the Committee

The Chair noted with sadness that it was the last meeting for Judge Brody, a valued member of the Committee and the last remaining Committee member involved with the Restyling Project. He noted that Judge Brody was invited to the next meeting and would be getting a tribute at that time.

The Chair also noted that Dr. Tim Reagan was moving to the Standing Committee as the FJC representative. He thanked Dr. Reagan for all his fine service to the Evidence Rules Committee.

New Members

Judge Fitzwater introduced and welcomed two new Committee members: 1) Edward DuMont, Partner at Wilmer Hale, vice chair of the firm's appellate and Supreme Court practice; and 2) A.J. Kramer, Public Defender for the District of Columbia. He thanked the Chief Justice for appointing members with such outstanding credentials.

June Meeting of the Standing Committee

The Chair reported on the January meeting of the Standing Committee. The Evidence Rules Committee presented no action items at the meeting. The Chair reported to the Standing Committee on the successful Rule 502 symposium that was recently published in the *Fordham Law Review*. He also reported on the Committee's plan for a symposium on technology and the rules of evidence, which is scheduled for October 11, 2013 at the University of Maine School of Law.

II. Proposed Amendment to Rule 801(d)(1)(B)

At the Spring 2012 meeting the Committee voted to recommend that a proposed amendment to Evidence Rule 801(d)(1)(B) — the hearsay exemption for certain prior consistent statements — be released for public comment. Under the proposal, Rule 801(d)(1)(B) would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility.

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

The public comment on the proposed amendment was sparse, but largely negative. The Committee found two concerns expressed in the public comment to be meritorious and to require some kind of adjustment to the rule as issued for public comment. First, there was a concern that the phrase "otherwise rehabilitates the declarant's credibility as a witness" was vague and could lead to courts admitting prior consistent statements that have heretofore been excluded for any purpose — while that technically would not be possible because the proposal requires that a prior consistent statement must be admissible for rehabilitation under existing law in order to be admissible substantively, the expressed concern was that courts might somehow use the amendment as an excuse to admit more prior consistent statements. Second, there was a more specific concern that the language could lead courts to admit prior consistent statements to rebut a charge that the witness

had a motive to falsify, even though the statement was made *after* the motive to falsify arose. If that were so, it would mean that the Supreme Court's ruling in *Tome v. United States*, 513 U.S. 150 (1995), would be undermined, as the Court in that case held that admissibility of prior consistent statements under Rule 801(d)(1)(B) was limited to those consistent statements that were made *before* a motive to falsify arose.

In response to these concerns, the Chair proposed a change to the amendment as proposed for public comment. That change was as follows (blacklined from the existing rule):

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
>
> **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
>
> * * *
>
> **(B)** is consistent with the declarant's testimony and is offered:
> (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
> (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; * * *

Committee members praised the Chair's proposal as a solution to the concerns addressed in the public comment. They concluded that the proposal preserves the *Tome* pre-motive rule as to consistent statements offered to rebut a charge of bad motive, while properly expanding substantive admissibility to statements offered to rehabilitate on other grounds — such as to explain an inconsistency or to rebut a charge of bad memory. And the proposal does so without resorting to the potentially vague "otherwise rehabilitates" language. Committee members also generally agreed that the Committee's initial reason for proposing a change to Rule 801(d)(1)(B) was a sound one — it makes no sense to provide that some prior consistent statements are admissible substantively and some only for rehabilitation, thus the current rule invites confusion for no good reason.

The Public Defender objected to the proposal on the ground that it provided an open door for admitting prior consistent statements that are made after a motive to falsify. The DOJ representative spoke in favor of the amendment, noting specifically that it preserved the *Tome* pre-motive requirement for statements offered to rebut a charge of bad motive, and that preservation evidenced the limited nature of the amendment.

Discussion then shifted to the Committee Note. The Reporter had suggested changes to the Note that was submitted for public comment, in order to accommodate the changes to the text that were proposed. Committee members suggested minor changes that were added to the working draft. Professor Coquillette mentioned that the Committee Note contained a citation to *Tome* and that some past members of the Standing Committee have looked askance at citing case law in Committee

Notes, on the ground that case law could be overruled and that subsequent overruling might diminish the Note. But members noted that the citation to *Tome* was not for the purpose of establishing the validity of the rule, but rather was to emphasize that the rule was not meant to change the existing limitation on admitting prior consistent statements to rehabilitate witnesses attacked for having a bad motive. Even if *Tome* were overruled, the validity of the amendment would be unimpaired. Moreover, it was noted that the citation to *Tome* was important because it would signal to the Supreme Court that the proposed amendment was *not* intended to overturn the Court's case law on the subject.

After discussion concluded, the Committee Note as proposed for approval read as follows:

Committee Note

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

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

The amendment retains the requirement set forth in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication of improper influence or motive must have been made before the alleged fabrication or improper inference or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness — such as the charges of inconsistency or faulty memory.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior

consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

A motion was made and seconded to approve the proposed amendment to Rule 801(d)(1)(B) and the accompanying Committee Note — both as set forth above. The Committee approved the motion with one dissent.

The Chair raised the question whether, given the changes to the proposal as issued for public comment, it would be necessary to submit the proposal for a new round of comment. Committee members concluded that a new round of public comment was not necessary, because the changes simply sharpened the proposal and did no more than effectuate the intent that the Committee had from the beginning: to retain the *Tome* pre-motive requirement for consistent statements offered to rebut a charge of bad motive, while expanding substantive admissibility to prior consistent statements that rehabilitated on other grounds. Accordingly, the Committee (with one dissent) voted to recommend the proposed amendment to Rule 801(d)(1)(B) and the accompanying Committee Note to the Standing Committee with the recommendation that it refer the proposal to the Judicial Conference.

In conclusion, Judge Sutton suggested that the supporting materials for the proposed amendment should include the famous statement by Judge Friendly that Rule 801(d)(1)(B) was problematic when enacted because it relied on an insubstantial distinction between substantive and rehabilitative use. *See United States v. Quinto*, 609 F.2d 66-67 (2d Cir. 1979) (Friendly, J., concurring) ("Before adoption of the Federal Rules of Evidence, there had been . . . little need to consider the use of prior consistent statements as affirmative evidence, since they were no more probative for that purpose than what the witness had said or could say on the stand.").

III. Proposed Amendment to Rules 803(6)-(8)

The Committee considered the proposed amendments to the trustworthiness clauses of Rules Rules 803(6)-(8) — the hearsay exceptions for business records, absence of business records, and public records — that had been issued for public comment. Those exceptions in original form set forth admissibility requirements and then provided that a record meeting those requirements was admissible despite the fact it is hearsay "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The restyling changed that language to "the opponent does not show" untrustworthiness. The rules do not specifically state which party

has the burden of showing trustworthiness or untrustworthiness, and there is some conflict in the case law on which party has that burden.

The proposed amendments clarify that the *opponent* has the burden of showing that the proffered record is untrustworthy. The reasons espoused by the Committee for the amendment are: 1) to resolve a conflict in the case law by providing a uniform rule; 2) to clarify a possible ambiguity in the rule as it was originally adopted and as restyled; and 3) to provide a result that makes the most sense, as imposing a burden of proving trustworthiness on the proponent is unjustified given that the proponent must establish that all the other admissibility requirements of these rules are met — requirements that tend to guarantee trustworthiness in the first place.

There were only two public comments on the proposed amendments. Both approved of the text, but one comment suggested that the Committee Note used language that failed to track the text of the rule. The Reporter, while noting that the language of the proposed Committee Note was completely in accord with the case law, agreed with the public comment that it is always better to track the text where possible. The Reporter proposed a slight change to each of the three Committee Notes.

Committee members commented that the amendment would promote uniformity and that imposing an untrustworthiness burden on the opponent is appropriate — as requiring the proponent to prove trustworthiness along with all the other admissibility requirements would be inconsistent with the thrust of each of the rules and would improperly narrow their scope.

As to the Note, Committee members suggested minor changes that were implemented by the Reporter into the working draft.

A motion was made to approve the proposed amendments as issued for public comment, and also the accompanying Committee Notes as adjusted to respond to the public comment and with minor suggestions from Committee members. That motion was unanimously approved by the Committee. What follows are the rules and respective Committee Notes as approved by the Committee:

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

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

* * *

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

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

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

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

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

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

* * *

Committee Note

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

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

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

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

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

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

* * *

Committee Note

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

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

(A) it sets out:

(i) the office's activities;

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

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

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

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception — prepared by a public office and setting out information as specified in the Rule — then the burden is on the opponent to show that the source of information or other circumstances indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. Public records have justifiably carried a presumption of reliability, and it should be up to the opponent to "demonstrate why a time-tested and carefully considered presumption is not appropriate."

Ellis v. International Playtex, Inc., 745 F.2d 292, 301 (4th Cir. 1984). The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

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

IV. Self-Authentication of Documents Bearing the Seal of an Indian Tribe

In *United States v. Alvirez*, #11-10244 (March 14, 2013), the Ninth Circuit held that documents bearing the seal of a federally-recognized Indian tribe were not self-authenticating under Rule 902(1) of the Federal Rules of Evidence. That Rule provides as follows:

Rule 902. Evidence That Is Self-Authenticating

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

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

The Ninth Circuit used a plain meaning approach and found that because Indian tribes were not mentioned, the sealed documents of Indian tribes could not be self-authenticating under the rule.

Judge Hurwitz, a judge of the Ninth Circuit and a former member of the Committee, suggested that the Committee might consider whether federally-regulated Indian tribes should be included in the list of public entities that issue self-authenticating documents under Rule 902. He suggested that it is anomalous that self-authentication is granted to cities and, for example, the Trust Territory of the Pacific Islands, but not to Indian tribes.

The question for the Committee at the meeting was whether the Reporter should prepare materials on a proposed amendment to 902 for some future meeting. The Committee engaged in a wide-ranging discussion about the possible merits of an amendment and more broadly about whether treatment of Indian tribes warranted a systematic, trans-substantive inquiry over all of the Rules.

Judge Sutton informed the Committee of the experience of the Appellate Rules Committee in reviewing whether Indian tribes should have the right to file amicus briefs in the circuit courts. After much discussion over many meetings the Committee put the proposal in abeyance, in order to monitor the Ninth Circuit's work on a local rule. Members of the Evidence Rules Committee recognized, however, that there could not be a local rule solution to a rule on the authenticity of evidence.

Committee members exchanged a number of ideas in the course of the discussion, among them:

- It was possible that any attempt to amend the rule to affect Indian tribes could not proceed before a process of consultation.

- Indian tribes might vary in their degree of rigor in maintaining public documents, but no rule of evidence should attempt to distinguish among Indian tribes.[1]

- The absence of Indian tribes from the list in Rule 902(1) does not raise a significant problem in practice. All it means is that the proponent would have to: 1) provide an accompanying certificate by a custodian under Rule 902(4); 2) call a witness to authenticate; or 3) provide circumstantial evidence or other indication of authenticity under Rule 901.

- Because the problem for trial practice is not significant, the real issue is one of dignity — as was the case with the right to file amicus briefs. Though the contrary argument was also made that what was presented was a gap in the Rules and the Committee should consider whether to fill that gap as it would any other.

[1] If the courts are considered departments or agencies of the United States, it would be illegal to promulgate a rule that would provide a different evidentiary result for records of some tribes and not others. *See* 25 USC 476 (f) ("Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination . . . with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.").

- If Indian tribes are added to the list in Rule 902(1), the Committee would also have to consider whether other public entities should be added to the list. That is, there should be a systematic inquiry.

- Any amendment would have to be limited to federally-recognized Indian tribes and the Committee would have to make sure that it crafted the right language to cover that classification.

- If there are issues of authenticity regarding tribal documents, a rule rendering all such documents self-authenticating might raise confrontation issues in criminal cases because the defendant may have difficulty in challenging such documents.

- There may well be many places in the national rules in which Indian tribes might be included, and it would be important to have uniform treatment across the rules. For example, Civil Rule 44, which parallels Rule 902 in many ways, makes no mention of Indian tribes.

- There may be other Evidence Rules that might warrant consideration of whether Indian tribal documents should be covered. One example is Rule 609, governing impeachment by prior convictions.

- The Committee might consider asking the FJC to do some research on the use of Indian tribal documents in federal litigation.

In the end, the Committee resolved unanimously that it would be unwise to proceed at this time with an amendment to Rule 902 that would cover tribal documents. The Committee unanimously determined that treatment of Indian tribal documents raised a question that spanned all the national rules, and therefore it would await the direction of the Standing Committee.

V. Proposed Amendment to the Bankruptcy Rules on Electronic Signatures.

The Bankruptcy Rules Committee asked the Evidence Rules Committee to review a proposed amendment to Bankruptcy Rule 5005, the rule on filing and signature. The proposal would add a new subdivision (3) to govern signatures on documents filed by electronic means. Proposed Subdivision (3)(A) provides that if a filer is registered with ECF, their username and password will serve as that filer's signature on any electronic document. Subdivision (3)(B) provides that if a document is signed by a person who is not registered on ECF, a scanned signature page can be filed with the document as a single filing, without any need for the filing user to retain the original document. Both subdivisions provide that a signature in accord with the rule "may be used with the same force and effect as a written signature for the purpose of applying these rules and for any other purpose for which a signature is required in proceedings before the court."

Judge Wizmur, the liaison from the Bankruptcy Committee, made the presentation on the proposal. She noted that the use of electronic signatures has been a matter for local rulemaking. It is basically standard practice that the username and password of a filing user constitutes a valid electronic signature. Thus proposed (3)(A) thus does not appear to be controversial. With respect to non-filing users, however, the local rules diverge, most importantly with respect to retention requirements. While most courts require the filing attorney to retain the original, retention periods vary widely. Moreover, many local rules require the signer to execute a declaration that is filed separately, and the filing and retaining requirements for that declaration vary widely. Concerns have also been expressed that requiring the filing attorney to retain the original is burdensome and could lead to ethical issues when, for example, the government requires the attorney to turn over the original as part of a fraud investigation. Yet it would also be burdensome to shift the retention requirements to the courts — when a model local rule on the subject was first being drafted, court clerks from across the country objected to a proposal that would require the courts to retain the originals of documents signed by non-filing users. Thus, proposed (3)(B) is intended to provide needed uniformity and also to remediate the burdens and other problems that come with retaining the originals.

In a wide-ranging discussion, members of the Committee provided preliminary feedback on the proposed amendment to Bankruptcy Rule 5005. Comments included the following:

- There was consensus that the amendment would not require any kind of corresponding amendment to the Evidence Rules. Questions of authenticity will arise but they can be handled by existing Rule 901. The Bankruptcy amendment does have an effect on the best evidence rule (Rule 1002) because it treats the scanned signatures as originals rather than duplicates. But no amendment to the Evidence Rules is required for that to happen, and it would not appear that treatment of scanned signatures as originals rather than duplicates would have any effect on the operation of Rule 1002 in practice.

- Because the document is separate from the signature, the signer may not have read the document but simply signed a signature page. Thus there is room for abuse because the filing party may act without proper authorization.

- The DOJ representative noted concerns about the effect of the proposal on criminal fraud prosecutions when the original document is not retained. There are indications that it is more difficult for experts to examine and compare electronic signatures. It also may be difficult to prove that the signer actually saw the documents or knew which ones were covered by the declaration.

- The question of electronic signatures is one that goes beyond Bankruptcy, and probably affects all the Rules. In that regard, Judge Sutton noted that the Standing Committee has just established a subcommittee on the effect of CM/ECF on the rules of practice and procedure — a subcommittee including members from each of the Advisory Committees, all the reporters, and a member of CACM. The Executive Office of the U.S. Attorney is also conducting a review of the impact of electronic signatures beyond bankruptcy cases.

In the end, Committee members agreed that any rule on electronic signatures by non-filing users should require some form of verification by the filing user that the scanned signature was part of the original document. That would not be a certification as to the truth of the contents of the original document, as such a certification would not necessarily be within the personal knowledge of the filing user. Rather it would be a certification only that the signature was a signature to the actual document that is filed. This could be done by a rule requiring either an actual certification, or verification by a notary public, to be filed with the document. Or the rule could state that the filing user's username and password is deemed to be a certification. Committee members thought that some kind of verification requirement was necessary to remediate the possibility of mischief inherent in filing a separate signature page.

Committee members expressed thanks to Judge Wizmur and to the Bankruptcy Rules Committee for the opportunity to comment on the proposal.

VI. *Crawford* Developments — Presentation on *Williams v. Illinois*

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

The Reporter noted that one of the most important areas of dispute among the courts is whether autopsy reports are testimonial. The courts have split about equally on the subject after the Supreme Court's fractious set of opinions in *Williams v. Illinois.*

Committee members noted that the law of Confrontation was in flux, especially after *Williams*, and it was not appropriate at this point to consider any amendment to the Evidence Rules to deal with Confrontation issues. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VII. Symposium on Technology and the Federal Rules of Evidence

The Evidence Rules Committee is sponsoring a symposium on whether the Evidence Rules should be amended to accommodate technological advances in the presentation of evidence. This Symposium is intended to follow the same process as the previous symposia on the Restyling and

Rule 502. The Committee has already invited a number of outstanding members of the bench, bar and legal academia to make presentations. The Committee also plans to invite some of the leading people in the area of electronic information management. This symposium will take place on the morning before the Fall 2013 meeting of the Committee, and the proceedings will be published in the Fordham Law Review. The Reporter and the Chair invited suggestions from the members for additional symposium panelists.

VIII. Privileges Report

Professor Broun, the Committee's consultant on privileges, presented his analysis of the clergy-penitent privilege and the trade secret privilege. This presentation was part of Professor Broun's continuing work to develop an article that he will publish on the federal common law of privileges. Professor Broun's work, when it is published, will neither represent the work of the Committee nor suggest explicit or implicit approval by the Standing Committee or the Advisory Committee.

Professor Broun noted that he would add to his analysis of the clergy-penitent privilege by discussing a possible crime-fraud exception. Committee members expressed gratitude to Professor Broun for keeping the Committee apprised of developments in the area of privileges.

IX. Next Meeting

The Fall 2013 meeting of the Committee is scheduled for Friday, October 11, in Portland, Maine.

Respectfully submitted,

Daniel J. Capra

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 9-10, 2014
Phoenix, Arizona
Draft Minutes as of March 13, 2014

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 9 and 10, 2014. The following members were present:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Susan P. Graber
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Larry D. Thompson, Esquire
Judge Richard C. Wesley
Judge Jack Zouhary

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

Professor Geoffrey C. Hazard, Jr., consultant to the committee, and Professor R. Joseph Kimble, the committee's style consultant, participated. Judge Jeremy D. Fogel, Director of the Federal Judicial Center, also participated.

Professor Daniel R. Coquillette, the committee's reporter, chaired a panel discussion on the political and professional context of rulemaking with the following panelists: Judge Lee H. Rosenthal, former chair of the committee; Judge Diane P. Wood, former member of the committee; Judge Marilyn L. Huff, former member of the committee; Judge Anthony J. Scirica (by telephone), former chair of the committee; Peter G. McCabe, Esq., former secretary to the committee.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Jonathan C. Rose	The committee's secretary and Rules Committee Officer
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman	Chief Counsel to the Rules Committees
Tim Reagan	Senior Research Associate, Federal Judicial Center
Frances F. Skillman	Rules Office Paralegal Specialist
Toni Loftin	Rules Office Administrative Specialist

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Steven M. Colloton, Chair
Professor Catherine T. Struve, Reporter (by telephone)
Advisory Committee on Bankruptcy Rules —
Judge Eugene R. Wedoff, Chair
Professor S. Elizabeth Gibson, Reporter (by telephone)
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Reena Raggi, Chair

Professor Sara Sun Beale, Reporter (by telephone)
Professor Nancy J. King, Associate Reporter (by telephone)
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by welcoming everyone and thanking the Rules Office staff for arranging the logistics of the meeting, including a very economical rate for the hotel.

Committee Membership Changes

Judge Sutton announced that the terms of Judges Huff and Wood had ended on October 1, 2013. He thanked them for their distinguished service on the committee, described their many contributions to the committee's work, and presented each with a plaque. Judge Sutton also announced that Mr. McCabe, who had served as secretary to the committee for 21 years, had recently retired from the Administrative Office. Judge Sutton noted that Mr. McCabe had been the longest serving employee of the Administrative Office and had dedicated 49 years to government service. Judge Sutton thanked Mr. McCabe for his extraordinary service to the committee and the courts. He also noted that the committee would be losing three great musicians, as Judges Huff and Wood and Mr. McCabe were all talented musicians.

Judge Sutton introduced the new committee members, Judge Graber and Judge St. Eve, and he summarized their impressive legal backgrounds.

Judge Sutton noted that the representatives from the Civil Rules Committee were at the courthouse holding a hearing on the proposals that are currently out for public comment, but that they would be joining the second day of the meeting.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee, without objection and by voice vote, approved the minutes of the last meeting, held on June 3–4, 2013.

REPORT OF THE ADMINISTRATIVE OFFICE

Judge Sutton reported that the rules committees had been engaged with Congress recently. He said that last June Congress had introduced legislation to deal with patent assertion entities. He said the first draft from the House was aggressive in attempting to

preempt the Rules Enabling Act process. He reported that he and Judge Campbell had met several times with congressional staffers, that the original draft legislation had been modified, that there were several bills under consideration, and that discussions are continuing.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Struve presented the report of the advisory committee, as set out in Judge Colloton's memorandum and attachments of December 16, 2013 (Agenda Item 3). Judge Colloton reported that the advisory committee's fall meeting had been cancelled due to the lapse in appropriations during the government shutdown and that it had no action items to present.

Informational Items

Judge Colloton highlighted a few items that the advisory committee currently has on its agenda.

FED. R. APP. P. 4(a)(4)

Judge Colloton reported that a lopsided circuit split has developed concerning whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Appellate Rule 4(a)(4), which provides that the "timely" filing of certain motions tolls the time to appeal. The advisory committee is considering whether and how to amend the rule to answer this question. Civil Rule 6(b) provides that a district court may not extend the time for filing motions under Civil Rules 50, 52, or 59. Nonetheless, district courts sometimes extend the time to file such motions even though Civil Rule 6(b) does not allow it. In other instances, a party files a motion late, the opposing party does not object, and the district court rules on it on the merits. Thus, the question has arisen whether a motion is "timely" under Appellate Rule 4(a)(4) if it is not within the time set in the Civil Rules but is nonetheless considered on the merits by the district court either because of an erroneous extension or the failure of the opposing party to object.

The Sixth Circuit has held that where the non-movant forfeits its objection to the motion's untimeliness, the motion is timely for purposes of Rule 4(a)(4). However, the Third, Seventh, Ninth, and Eleventh Circuits have held to the contrary. The courts holding that such motions are not timely reason that Rule 4(a)(4) was designed to provide a uniform deadline for the named motions in order to set a definite point in time when litigation would come to an end. Making the time for filing these motions depend on developments in the district court introduces a disparity that Rule 4(a)(4) was designed to eliminate. Judge Colloton noted that the Seventh Circuit has commented that the Sixth

Circuit's approach was uncomfortably close to the "unique circumstances" doctrine that was overruled in *Bowles v. Russell*, 551 U.S. 205 (2007). He added that the advisory committee will address these issues at its spring meeting.

A member stated that he supported the minority view that would forgive a late filing if it was done in reliance on a court order. Judge Sutton questioned whether doing so would overrule *Bowles*. The member responded that it would not; the rules could provide that if the deadline is set by rule and the judge purports to extend it in error, then a litigant who has relied on the erroneous extension is excused from the consequences of late filing. Another member noted it is different if the deadline is set by statute.

Another member suggested a wording change to one of the tentative sketches of possible amendments to address this issue, asking if there was a more sensitive way to reference the limits on judicial authority in the phrase: "a court order that exceeds the court's authority (if any) to extend the deadline . . . ." The reporter responded that she understood the concern, but she did not want the rule language to imply that a court had authority to extend deadlines outside the time allowed in the rules, as judges exceeding their authority in this regard is the root of the problem. She said that all suggestions on wording are welcome. Another member suggested instead using language along the lines of: "a court order that extends the deadline beyond that otherwise permitted by the rules . . . ."

FED. R. APP. P. 4(C)

Judge Colloton reported that the advisory committee has also begun a project to examine Rule 4(c)(1)'s inmate-filing provision for notices of appeal. The advisory committee is considering amendments to the rule that might address, among other things, whether an inmate must prepay postage in order to benefit from the inmate-filing rule; whether and when an inmate must provide a declaration attesting to the circumstances of the filing; whether the inmate must use a legal mail system when one exists in the relevant institution; and whether a represented inmate can benefit from the inmate-filing rule. The project grew out of a 2007 suggestion by Judge Diane Wood, suggesting that the committee consider clarifying whether Rule 4(c)(1)'s inmate-filing rule requires prepayment of postage. Judge Colloton reported that there is ambiguity in the case law on whether prepayment of postage is required; whether inmates must file a declaration; and the meaning of the sentence in the rule that says that if a legal mail system exists, the inmate must use the system. He said that a subcommittee is working on these and related issues.

LENGTH LIMITS

Judge Colloton reported that the Appellate Rules have some length limits set out in type-volume terms and some set out in pages. He said that the advisory committee is considering whether all the limits should be measured by type-volume given the

ubiquitous use of computers, and if so, the best means of appropriately converting current limits that are set in pages to type-volume limits. He noted that when the rules governing the length of briefs were changed to convert to type-volume limits, the rules set a type-volume limit that approximated the conversion from a page limit and provided a shorter safe harbor set in pages. The advisory committee is considering the option of taking a similar approach for other limits that are currently set in pages.

Judge Colloton stated that a safe harbor set in pages must be shorter than the type-volume limit to prevent lawyers from using the safe harbor to get around the type-volume limit, but the shorter page limit can create a hardship for pro se litigants. As a result, another option the advisory committee is considering would differentiate between papers prepared on a computer and papers prepared without the aid of a computer. Judge Colloton noted that it was unlikely that lawyers would switch to using typewriters in order to get around the type-volume limits. Another issue is that there is evidence that when the brief page limit was converted from 50 pages to a type-volume limit of 14,000 words, it resulted in an increase in the permitted length of a brief. The advisory committee is considering whether to adjust that limit to 12,500 or 13,000 words as part of the length-limit project.

AMICUS BRIEFS ON REHEARING

Judge Colloton reported that the advisory committee is also considering the possibility of addressing amicus filings in connection with petitions for panel rehearing and/or rehearing en banc. He stated that the advisory committee had heard that lawyers are frustrated that there is no rule with respect to rehearing that sets out when an amicus brief must be filed or how long it must be. The committee is considering whether there should be a national rule on these topics. Judge Colloton noted that some circuits have no local rule on these matters. However, there is a concern that any rule that addresses amicus briefs on petitions for rehearing might stimulate more such amicus briefs, which some courts do not desire. Judge Colloton noted that some courts even have rules that generally prohibit amicus filings on rehearing, or that only allow them with leave of court. Matters that could be addressed by a proposed rule include length, timing, and other topics that Rule 29 addresses with respect to amicus filings at the merits-briefing stage.

A judge member noted that amicus briefs are usually helpful on rehearing. She stated that sometimes there are sleeper issues that the appellate court may not be aware of and that she favored explicitly clarifying that such amicus briefs are permissible. Judge Colloton noted that the suggestion, if implemented, would not require allowing amicus briefs on rehearing, but instead would set out the procedure to be followed if the circuit allowed such amicus briefs.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professors Gibson and McKenzie presented the report of the advisory committee, as set out in Judge Wedoff's memorandum and attachments of December 12, 2013 (Agenda Item 4).

Amendment for Final Approval

FED. R. BANKR. P. 1007(a)

Judge Wedoff reported that the advisory committee was seeking approval to make a technical and conforming amendment to Rule 1007(a). Subdivisions (a)(1) and (a)(2) of Rule 1007 require the filing at the outset of a case of the names and addresses of all entities included on "Schedules D, E, F, G, and H." The restyled schedules for individual cases that were published for comment in August 2013 use slightly different designations. Under the new numbering and lettering protocol of the proposed forms, the schedules referred to in Rule 1007(a)(1) and (a)(2) will become Official Forms 106 D, E/F, G, and H—reflecting a combination of what had been separate Schedules E and F into a single Schedule E/F. Judge Wedoff stated that in order to make Rule 1007(a) consistent with the new form designations, the advisory committee was proposing a conforming amendment to subdivisions (a)(1) and (a)(2) of that rule. Judge Wedoff reported that the revised schedules would not go into effect until December 1, 2015, so he asked that the conforming rule change be held back to go into effect on the same date.

The committee, without objection and by voice vote, approved the proposed amendment to Rule 1007(a) for transmission to the Judicial Conference for final approval without publication.

Informational Items

CHAPTER 13 PLAN FORM

Professor McKenzie reported on comments received on the published proposed chapter 13 plan form and related rule amendments. The advisory committee had drafted an official form for plans in chapter 13 cases and had proposed related amendments to nine of the Bankruptcy Rules. Professor McKenzie reported that the form and rule amendments were published in August 2013 and have drawn over 30 comments so far. He said that very few comments expressed opposition to the form, but many were long and detailed. Professor McKenzie reported that since so many comments had already come in, the working group had already begun categorizing and reviewing the comments, although of course its work could not be completed until the comment period closed in February and all the comments were received.

Professor McKenzie said that one common theme that had emerged was what to do when the form provides a number of choices to the debtor even though some choices may not be available in the debtor's district. The advisory committee did not take a position on the differences in these choices between districts, but one concern is that providing the choice of various options on the form might indicate that the committee was stating that both choices are available to a debtor. Professor McKenzie noted that the concern is that this might lead to confusion and increased litigation. Judge Wedoff provided an example. He said one open question is, if the debtor wants to pay a mortgage, whether he can pay the mortgagee directly or instead must pay the trustee. If the payment is to the trustee, there is a fee assessed on the payment, meaning that more has to be paid on the mortgage claim. Some jurisdictions require it to be paid through the trustee, while others allow the debtor to be the payment manager. Judge Wedoff noted that providing both options on the form might imply that both options are available in all jurisdictions. Professor McKenzie added that one way to respond to the comments would be to include a warning on the form that the provision of an option does not mean it is available in the debtor's district. The working group will report to the advisory committee at the spring meeting.

A participant asked whether the advisory committee had gotten feedback that the form will be confusing to pro se debtors. Professor McKenzie responded that so far there had only been a couple of comments on how the form might impact pro se litigants. One comment had said it might attract additional pro se litigants, and the other had said it would be confusing to pro se litigants. The participant asked how the advisory committee could get more input from pro se litigants, since such litigants do not often comment on published proposals. Professor McKenzie stated that the advisory committee hopes to get comments from consumer bankruptcy groups, who often think about the nature of pro se litigation, and he noted that it is very difficult for pro se litigants to get through chapter 13 bankruptcies successfully. He said that one thing the working group is considering is more prominent language about that difficulty. Judge Wedoff noted that providing a plan form might help pro se litigants because it would set out what needs to be done and might allow some debtors to do it on their own without an attorney.

Judge Wedoff noted that as part of its Forms Modernization Project, the advisory committee had been looking closely at whether the forms can be used by pro se debtors. He said one of the goals of that project is to make the forms more user-friendly. Another participant noted that law students use the forms when they represent clients in bankruptcy clinics, and he suggested that the advisors for such clinics might be a good source of information on how the forms might be used by law students, which can be analogized to the pro se context. Judge Wedoff noted that the advisory committee, with the help of the Federal Judicial Center, had been vetting the proposed forms with a group of law students.

ELECTRONIC SIGNATURES

Judge Wedoff reported on the comments received on proposed amendments to Rule 5005 on filing and transmittal of papers, which is designed to address the question of how to deal with electronic signatures by someone other than the attorney who is filing a document in a bankruptcy case. He noted that there is no problem with signatures of attorneys who file documents because they have to have a login and password, which constitutes their signature. To date, the rules have not addressed the signatures of nonfilers, which in bankruptcy is primarily the debtor. Judge Wedoff noted that the typical practice has been for local rules to require the filing attorney to retain the original document signed by the nonfiler for a period of time, usually five years. Attorneys have pointed out that this becomes a problem in terms of storage space. Some bankruptcy firms may generate thousands of case filings a year, making the volume of original documents to retain substantial. In addition, some lawyers have reported that they are uncomfortable retaining documents that might later be used to prosecute a crime against their clients. Further, the prosecutor in a future criminal prosecution will be relying on the attorney's good faith in retaining documents with the original signatures.

The proposal published for comment provides that, instead of requiring the retention of a "wet" signed copy, the original signature could be scanned into a computer readable document and the scanned signature would be usable in lieu of the original for all purposes. Judge Wedoff noted that the published proposal asked for comment on two alternatives. One would have a notary certify that it is the debtor signing and that it is the complete document. The other would deem filing by a registered person equivalent to the person's certification that the scanned signature was part of the original document.

Professor Gibson said that only four comments had been received so far. One expressed confusion about when original documents must be retained under the proposed rule. Another erroneously read the proposal to require the entire document, not just the signature page, to be scanned, which would require much more electronic storage space. She said that two recent comments support the proposed amendment and urge adoption without requiring a notary's certification.

The representative for the Department of Justice noted that the Evidence Rules Committee had been planning to host a symposium on electronic evidence this past fall, which would have included a discussion of this issue of electronic signatures, but that the symposium was cancelled due to the government shutdown. She noted that the scheduling of the symposium had nonetheless prompted the Department to come to some tentative conclusions on this issue. While the Department will be submitting formal comments, the representative previewed the initial views of the Department. She reported that there was resistence in the Department to removing the retention of original signatures. She noted that there was a great amount of work done within the Department

in examining this issue. There was a working group that cut across disciplines and there was a survey conducted of U.S. Attorney's offices. She said that prosecutors overwhelmingly thought there was no problem with the current system. They also reported that taking away the requirement of retaining originals would lead to more cases where signatures were repudiated. The vast majority of survey respondents thought the proposed rule would make it much harder to prove authenticity in situations where the signatures were repudiated. She noted that the FBI has a policy that it will not provide definitive testimony to authenticate a signature without the original document. With an electronic signature, the FBI cannot determine certain characteristics that they would look at in comparing signatures, like pressure points and whether there were tremors. Without having an FBI expert, prosecutors would have to resort to circumstantial evidence to prove authenticity, which would often involve measures such as getting warrants to search computers to show that a document was generated from that computer, conducting forensic analysis, tracing IP addresses, and similar actions that would add burden and expense.

The Department's representative explained that the Department also looked at the tax experience because Evidence Rule 902(10) makes certain types of documents self-authenticating when a statute provides for prima facie presumption of authenticity. The advisory committee note states that the tax statute is one example. However, in looking into the possibility of creating a statutory presumption, the Department found that it would have to be either a generic statute that addressed this subject holistically or a bankruptcy-specific statute. The problem with a bankruptcy-specific statute, she said, was that the Department had found at least 101 different crimes that require the authenticity of the signature to be proven as an element of the crime. If a bankruptcy-specific statute were implemented, she said, there was the possibility of needing to do seriatim statutes because bankruptcy might just be the first area to start doing everything electronically. She said eventually there might need to be dozens of statutes. Yet, the alternative of crafting a generic statute now to address the subject holistically created the concern that it would have unintended consequences if all the possibly affected criminal statutes were not first examined. Thus, she noted, it was premature to start trying to get a statute without knowing all of the ramifications. She also stated that survey respondents felt the tax statute was somewhat unique in that taxpayers are required by law to sign a return and if they repudiate their signature on the return that means they have violated the law by not filing a tax return if there is no other valid tax return with their signature. She noted that Judge Wedoff has explained that there are some parallels in bankruptcy.

The Department participant also stated that the working group did not find persuasive the concerns that have been raised about why the rule should be changed. She stated that publicly-filed documents are not privileged, so an attorney should not be concerned about being called upon to produce a client's documents. Further, professional responsibility rules prohibit an attorney from assisting with a crime or fraud. She said

that while storage can be burdensome, there are retention periods, so there should be recycling of the documents and not an ever-increasing amount of documents needing to be retained. She noted that one possibility raised by Judge Wedoff was that perhaps the whole document could be scanned and saved electronically and only the signature page would need to be kept in its original format, and she noted that this option was something to think about. Finally, the working group was not persuaded by the rationale that there are varying retention periods across the country. The group felt that if that was a concern, then it could be fixed simply by creating a uniform retention period. The prosecutors thought that the varying periods actually hurt them the most because the retention periods are often shorter than the statute of limitations for the crimes being prosecuted. In sum, she said, the Department feels that it is premature to remove the retention requirements. There was a feeling in the Department, she said, that technology is continuing to move forward. It might be that in the near future things like thumb prints and biometrics will serve as signatures, which would solve the problem of authenticating without the need to store lots of documents. The participant stated that the Department would have presented this summary of its views in greater detail at the symposium, and that the Department is committed to working with the committee on this issue.

Judge Wedoff said that the advisory committee will await the formal comment from the Department and expressed gratitude for hearing their initial views in the interim. He noted that the prosecuting community has not had the experience of having to use scanned signatures in lieu of having an FBI expert testify to the validity of a wet signature. Whether scanned signatures would present a problem in persuading the trier of fact is not yet clear. Bankruptcy presents a special circumstance, he said. Even without the change to Rule 5005, he said, every document filed by a debtor's attorney is filed under Civil Rule 11, which requires certifying that the filing is authentic. Rule 5005 would only underline the Rule 11 requirement that the signature is authentic. So, the debtor who asserts that a signature on a filed document is not his own will have to overcome the fact that the signature appears to be his own and will have to assert that his attorney lied when the document was filed. It may be that it is not that difficult to persuade a trier of fact of the legitimacy of a debtor's signature on a bankruptcy document. He also noted that, in this regard, there may be some source of empirical evidence as to the difficulty of not having wet signatures because there is at least one jurisdiction in the country—Chicago—that does not have a requirement for retaining wet signatures for debtors' filings for several years. Any prosecutions that have taken place in that district would have taken place on the basis of the debtor's scanned copy. He stated that there are not a lot of these types of prosecutions that come up and that when they do come up, debtors do not contest the legitimacy of their signature. He noted that he had encountered situations where a United States Trustee had filed a motion to deny the debtor a discharge because the debtor supplied deliberately false information on the debtor's schedules. The debtors defend against those arguments not on the basis that they did not sign the schedules, but by arguing things like they told their attorney about the

matter at issue and the attorney did not put it in the schedule or they did not realize it was required to be put on the schedule. He stated that he had never encountered a case where the debtor denied his own signature. Judge Wedoff reported that the Department of Justice representative had agreed to look into the Department's survey results that had come from Chicago.

A member questioned whether the concern was with ensuring the integrity of the judicial process or collateral consequences and enabling future prosecutions. Judge Wedoff responded that the advisory committee's initial approach was designed to ensure the integrity of the judicial process. We want to make sure, he said, that the documents being filed are legitimately signed by the debtor. The informal feedback from the Department has to do with collateral consequences, and the concern is the potential difficulty in proving malfeasance by the debtor. The member responded that a similar concern may be true in many areas of the law and he wondered whether the rules committees' focus ought to be on the judicial process, not necessarily to make it easier or harder for the Department of Justice to prosecute crimes years later.

Judge Sutton emphasized that this is just now out for publication and the advisory committee is awaiting the formal response from the Department. He asked whether the rescheduled Evidence Rules technology symposium will include this issue. Professor Capra responded that it would not because the original idea had been to get ahead of the public comment and to get the Department's views on this issue, which has already been accomplished. While others were going to participate, they now had the ability to comment during the public comment process, which would be over by the time a new symposium could be scheduled. Professor Capra noted that one thing that came up in putting the original symposium together is that the issue is not forgery, but that the true signature might be improperly attached to the document. He said that is the issue that concerned the CM/ECF Subcommittee—someone could just scan a signature and put it on any document. Judge Wedoff said that this is why the two alternative means of assuring that the signature was authentic and was attached to the proper document were published for public comment. The Department's representative noted that the Department did not think that the option of requiring a notary's signature was a good one.

Judge Wedoff noted that it might be that bankruptcy could serve as an experiment for testing this. There are extra protections in bankruptcy, he said, like the attorney certification, that would not necessarily exist in other areas. He said that the advisory committee would have a better idea of what to do next after the comment period ends. The Department of Justice's representative noted that as a matter of evidence, the attorney's certification could not be introduced because it would be hearsay, so there would still be the need for a witness to testify to the person's signature, which might lead to calling lawyers to testify.

A member noted that the Department's concerns were about collateral prosecutions years down the road, and that he was not sure the judiciary should be too concerned about that. He said the requirements to authenticate the signature might impose a burden in current proceedings for the benefit of possible later collateral proceedings. He added that the advisory committee's concerns should be that this document in this litigation is what it purports to be. A certification by the attorney, as an officer of the court, should normally be sufficient for that purpose, he said. He said he was open to the possibility of the need for further assurances, but that the question should be focused on assuring that the document is authentic for the current litigation, not on assuring its authenticity for use in possible later collateral proceedings.

Professor Coquillette commented that the rules committees have a goal of transsubstantive rulemaking, but bankruptcy is really different in this area because of the factors mentioned by Judge Wedoff, such as attorney certification.

A member asked whether the advisory committee is studying what is going on in Chicago, where there is no requirement to retain wet signatures. Judge Wedoff reported that the Department of Justice had done a survey and was going to see if it could pull out data on prosecutions in Chicago. Judge Wedoff said that he would talk to the local United States Trustee's office to find out their experience. He noted that he is not aware of any criminal prosecutions for bankruptcy fraud in Chicago that raised a question of validity of the debtor's signature. The number of prosecutions for bankruptcy fraud is very small to begin with, he said, and then it would be a very small subset of that small subset that would involve the validity of the debtor's signature. So, he said, there would not be a huge amount of empirical data to gather on this.

Judge Sutton thanked Judge Wedoff for the summary of the issues and thanked the Department's representative for previewing the results of the Department's work on this issue.

FORMS MODERNIZATION PROJECT

Judge Wedoff provided an update on the advisory committee's Forms Modernization Project, a multi-year project to revise many of the official bankruptcy forms. The work began in 2008 and is being carried out by an ad hoc group composed of members of the advisory committee's subcommittee on forms, working with representatives of other relevant Judicial Conference committees. The goals of the project are to improve the official bankruptcy forms by providing a uniform format and using non-legal terminology, and to make the forms more accessible for data collection and reporting. The advisory committee decided to implement the modernized forms in stages in order to allow for fuller testing of the technological features and to facilitate a smoother transition. Judge Wedoff said that the first two phases of the project were

nearly complete: a small number of the modernized forms became effective on December 1, 2013, and the balance of the forms used by individual debtors is currently out for comment. Their effective date will be delayed until December 1, 2015, to coincide with the effective date of the non-individual forms. Judge Wedoff said that, surprisingly, not many comments had been received yet on the individual forms out for public comment. He said the comment period was not yet over, but that so far the revised forms seem to have been met with general acceptance.

The final batch will be non-individual forms, which were separated from individual forms because they ask for different information in many situations, and which would be expected to become effective on December 1, 2015. Judge Wedoff noted that people filling out non-individual forms are likely to have access to a more sophisticated legal understanding of the bankruptcy system. Non-individuals have to be represented by an attorney, and are usually associated with corporations or other entities that are likely to have a better understanding of the information called for on the forms.

Judge Wedoff said the agenda materials provided an example of a non-individual form to show the differences from the individual form. The non-individual form is shorter and uses more technical accounting language than the individual form, but not legalese. He said that this is a preview of what the advisory committee will likely be presenting for approval for publication at the Spring 2014 Standing Committee meeting. When this last batch of forms is approved, he said, the advisory committee will be finished with the complete package of form changes.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of December 6, 2013 (Agenda Item 9).

Amendments for Publication

FED. R. CIV. P. 82

Professor Cooper reported that the advisory committee sought approval to publish at an appropriate time changes to Rule 82 on venue for admiralty or maritime claims to reflect changes Congress had made to the venue statutes. It has long been understood that the general venue statutes do not apply to actions in which the district court exercises admiralty or maritime jurisdiction, except that the transfer provisions do apply. This proposition could become ambiguous when a case either could be brought in the admiralty or maritime jurisdiction or could be brought as an action at law under the "saving to suitors" clause. Rule 82 has addressed this problem by invoking Rule 9(h) to ensure that the Civil Rules do not appear to modify the venue rules for admiralty or

maritime actions. It provides that an admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391–1392. Rule 9(h) provides that an action cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for purposes of Rule 82. It further provides that if a claim for relief is within the admiralty or maritime jurisdiction but also is within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim.

Professor Cooper reported that legislation had added a new § 1390 to the venue statutes and repealed the former § 1392. The reference to § 1392 in current Rule 82 clearly needs to be deleted as a technical amendment, he said. The advisory committee also thought it was appropriate to add a reference to § 1390, but the reason was a little more complicated.

Professor Cooper explained that new § 1390(b) provides that the whole chapter on venue, apart from the transfer provisions, does not apply in a civil action when the district court exercises jurisdiction conferred by § 1333. Section 1333 provides jurisdiction for admiralty and maritime cases, "saving to suitors in all cases all other remedies to which they are otherwise entitled." By referring to § 1333, § 1390(b) removes application of the general venue statutes for cases that can be brought only in the admiralty or maritime jurisdiction and for cases that might have been brought in some other grant of subject-matter jurisdiction but that have been designated as admiralty or maritime claims under Rule 9(h). Since the general venue provisions do not apply when the court is exercising admiralty or maritime jurisdiction, it seems wise to add § 1390 to Rule 82. Doing so would make claims designated as admiralty or maritime claims under Rule 9(h) exempt from the general venue provisions just as those that get admiralty or maritime jurisdiction under § 1333 are so exempt. Professor Cooper noted that the advisory committee had sent the proposed revision to the Maritime Law Association, which had approved of the proposal. Nonetheless, the advisory committee recommended the proposal for publication, not for approval as a technical amendment, because of the complexity of the subject matter.

The committee, without objection and by voice vote, approved the proposed amendment to Civil Rule 82 for publication.

FED. R. CIV. P. 6(d)

Judge Campbell reported that the advisory committee recommended for publication at a suitable time an amendment to Rule 6(d), which currently provides three extra days for responding to certain types of service, including service by electronic means. The proposed amendment would strike the reference in Rule 6(d) to Rule 5(b)(2)(E), which references electronic service. This change would remove the three extra days for electronic service. Judge Campbell said that the Appellate, Bankruptcy,

and Criminal Rules Committees were working through this same issue now with respect to parallel provisions in each set of rules. He stated that, depending on the timing of approval of similar changes to the other sets of rules, they could all be published together, or the Civil Rules change could be published first as a bellwether. He added that the advisory committee also recommended adding parenthetical explanations to Rule 6(d) that would provide brief explanations of the type of service referenced. This would prevent users from having to flip back to the cross-referenced rules to find the types of service that receive the three added days. The committee note, he said, could explain that service via CM/ECF does not constitute service under Rule 5(b)(2)(F), which covers service by other means to which the party being served has consented, and which is subject to the three-day rule.

A member asked whether the advisory committee had considered removing "consent" from the three-day rule as well. Judge Campbell responded that it had not; the issue was just brought to his attention this morning. The member noted that the three-day rule was invented for mail. He questioned the rationale behind applying it to leaving papers with the clerk when no one knows where the party is. He suggested that the advisory committee consider restricting the three-day rule to service by mail. Judge Campbell said that the advisory committee could consider this point. He added that these other methods of service have always been subject to the three-day rule and the advisory committee had not heard of a problem. Clearly, he said, electronic service no longer requires three extra days; the committee could look more broadly at whether three extra days are warranted in other circumstances. Judge Wedoff noted that there is a proposal to remove the added three days as widely as possible in the Bankruptcy Rules. Judge Sutton added that the member's point about whether three extra days were needed in other circumstances was a good one. At least, he said, the question could be raised in publication as to whether to remove other types of service from the three-day rule. He suggested that the advisory committee discuss it at their next meeting.

Judge Campbell said that the advisory committee would consider these issues and that he would want to hear the views of court clerks as well. However, he said, the advisory committee's plate was so full right now with considering the next steps for the proposals that were published last August, that he would prefer not to do that investigation now. One option, he said, would be to publish the proposal to eliminate electronic service from the three-day rule and ask for comment on whether the committee should also eliminate service by leaving the paper with the clerk or by other means consented to. Judge Sutton noted that the simplest route would be to delay publication during the investigation into the other means of service, but he saw no reason to hold off on removing the extra three days for electronic service. The member who had made the suggestion stated that he would not oppose publication, but that he thought it should ask for comment on whether the three-day rule should be abolished altogether. He noted that service by mail is now mostly limited to pro se litigants or people who do not have

computers. He said the committee could publish the proposal to remove electronic service from the three-day rule and ask for comments as to whether it would be wise to restrict it just to service by mail or to abolish it altogether.

Professor Capra noted that the idea of restricting the three-day rule came from the CM/ECF Subcommittee, and the idea was to have a uniform approach. He said all of the advisory committees would be considering this issue, except for the Evidence Rules Committee, but it was unlikely that it would be resolved by the spring.

A member asked whether there should be a separate three-day rule for pro se litigants. She noted that this is an issue primarily affecting pro se litigants, who often only receive service by mail. Judge Campbell noted that some courts do have CM/ECF for pro se litigants, so some do get instantaneous service.

Judge Sutton suggested that the committee could tentatively approve the proposal for publication with a slight variation in the committee note and questions requesting comment on whether the three-day rule should be deleted altogether or limited to service by mail. The hope, he said, would be for publication this summer. Judge Campbell agreed that this sounded like a fine approach.

The committee, without objection and by voice vote, tentatively approved the proposed amendment to Civil Rule 6(d) for publication, with a slight change in the committee note to address service under Rule 5(b)(2)(F), together with questions on whether the three-day rule should be abolished altogether or limited to service by mail. The committee will consider the final proposal again before publication, likely at its spring meeting.

Informational Items

FED. R. CIV. P. 17(c)(2)

Judge Campbell reported that the advisory committee had decided against further action on Rule 17(c)(2), which directs that "[t]he court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action." He stated that in *Powell v. Symons*, 680 F.3d 301 (3d Cir. 2012), the Third Circuit had noted the lack of guidance as to when a court should appoint a lawyer or guardian to assist an unrepresented party. He said that research had revealed that six circuits have adopted standards similar to that of the Third Circuit, which is that there is no obligation to *sua sponte* inquire into competence. Under this view, Rule 17(c)(2) only applies when there is verifiable evidence of incompetence. Judge Campbell said that all circuits agree that there is no obligation to appoint a guardian just because a party exhibits odd behavior.

The advisory committee had concluded that it should not attempt to write a rule in this area. Judge Campbell explained that if judges were obligated to inquire about a guardian whenever they saw something less than full competence, the issue would become unmanageable. Further, he said, there were no resources readily available to pay for guardians. In fact, he said, there were not usually funds available to pay for appointed lawyers either. Judge Campbell said that to write a rule that sets standards for the wide variety of circumstances in which this could arise would be nearly impossible. He added that relevant considerations would include evidence of incompetence, other resources available to assist the person, the merits of the claim, the risk to the opposing party in terms of time and delay, case management steps, and more. The advisory committee concluded that this was best left to the common law. Judge Campbell said the advisory committee felt that these issues need to be decided on a case-by-case basis and that principles will develop over time. As a result, he said the advisory committee recommended no action at this time.

A member stated that he agreed with the advisory committee's conclusion, noting that it is a case-by-case judgment call as to how to handle incompetence. Further, he said, there can be verifiable evidence of incompetence even with lawyers involved.

E-RULES

Judge Campbell reported that the advisory committee, along with the other advisory committees, is in the early stages of addressing the question of what to do with electronic communications under the rules. He said one option is to adopt a rule that says anything that can be done in writing can be done electronically, but that raises all kinds of complications. Another option is to go rule by rule and determine what to do with the issue of electronic communications.

DISCOVERY COST SHIFTING

Judge Campbell stated that the advisory committee's discovery subcommittee is in the early stages of examining the question of whether the rules should expand the circumstances in which a party requesting discovery should pay part or all of the costs of responding. He said that Congress and some bar groups had asked for a review of this issue. The proposals published for comment last August include revision of Rule 26(c) to make explicit the authority to enter a protective order that allocates the costs of responding to discovery. If this proposal is adopted, experience in administering it may provide some guidance on the question of whether more specific rule provisions may be useful. Judge Campbell said the advisory committee is in the early stages of examining this issue and will report on its progress in the future.

CACM PROJECTS

Judge Campbell reported that the Court Administration and Case Management Committee (CACM) has raised a number of topics that may lead to Civil Rules amendments, but that action on all of these topics has been deferred pending further development by CACM.

PUBLISHED PROPOSALS

Judge Campbell reported that the advisory committee had held two of the three scheduled public hearings on the proposals published for comment. He said 40 more witnesses were scheduled for an upcoming hearing in Dallas, with 29 more on the waiting list. He said the advisory committee was not scheduling another hearing because it would be too difficult to fit a fourth hearing in all of the members' schedules, and the advisory committee was committed to reading all of the written submissions. He said 405 submissions had already been received and that the committee will review them all carefully. He noted that the hearings have been very valuable and there is work to do to refine the proposals. He added that the advisory committee will decide what to do at its April meeting and will make a recommendation to the Standing Committee at its May meeting.

A participant asked if that schedule was too expedited. He asked whether the advisory committee would have enough time to do the job by the May meeting. Judge Campbell said he thought there was sufficient time. He noted that the advisory committee had been working on the published proposals for five years. He said the committee's task in April will not be gathering information, but using its best judgment in light of everything it had heard through public comment.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professors Beale and King presented the report of the advisory committee, as set forth in Judge Raggi's memorandum of December 20, 2013 (Agenda Item 5), and her supplemental memorandum of December 30, 2013.

Amendment for Final Approval

FED. R. CRIM. P. 12

Judge Sutton reported that the advisory committee had been considering amendments to FED. R. CRIM. P. 12 on motions that must be raised before trial and the consequences of late-filed motions since 2006. He provided some background on the current proposals. He noted that the Judicial Conference had approved the proposed

amendment to Rule 12 that the committee had approved at its last meeting and had transmitted it to the Supreme Court. The Court had raised several questions about the proposed amendment. Judge Sutton noted that the package of proposals, including Criminal Rule 12, had been submitted to the Court earlier than in years past to give the Court flexibility in terms of timing its review of the proposals. He noted that one benefit of submitting the proposals early is that if the Court had questions, they might be able to be addressed within the same rulemaking cycle. He stated that this was uncharted territory because in the past, when the proposals were submitted to the Court later, if the Court had questions about the proposals, it would simply recommit them to the advisory committee for further consideration. In this case, however, there might be time to propose changes and have them considered by the Court in the same rulemaking cycle.

Judge Sutton noted that the Court had raised several questions about the Rule 12 proposal. First, as transmitted to the Court, the proposed amendment had stated that the court could consider an untimely motion raising a claim of failure to state an offense (FTSO) if the defendant showed prejudice. The Court had asked to whom the required prejudice would be. Judge Sutton noted that the intent of the amendment was that it would be prejudice to the defendant. Second, the Court had asked, if the prejudice is to the defendant, how the defendant would show prejudice before trial. Judge Sutton stated that one form of prejudice is lack of notice, and another occurs if the grand jury did not properly indict under the elements of the crime. Third, the Court had noted the anomaly of having in proposed Rule 12(c)(3)(A) a required showing of "good cause" for relief from the consequences of failing to timely raise most Rule 12(b)(3) motions, while proposed Rule 12(c)(3)(B) would require prejudice for consideration of late-raised FTSO claims. Judge Sutton noted that by requiring "good cause" alone in (A) and "prejudice" alone in (B), the implication was that there was no requirement of showing "prejudice" in (A). That is not what the committee intended. On the other hand, by requiring "good cause" in (A), and only "prejudice" in (B), the committee had intended the negative implication to be that there was no requirement of showing "cause" under (B) for claims of failure to state an offense. Judge Sutton added that it was odd to have language in the same subsection that intended one negative implication but not another negative implication.

Judge Raggi then explained that the advisory committee recommended resolving the third concern raised by the Court by having one standard for relief from failure to timely raise all Rule 12(b)(3) motions — "good cause," the standard currently used in the rule. She noted that there was disquiet, especially among the members of the defense bar on the committee, about making an FTSO claim a required pre-trial motion when for so long it had been viewed as the equivalent of jurisdiction and something that could be raised at any time. She added that, faced with the fact that it is now recognized as something that should be raised early on, some members of the defense bar had suggested that the committee use a different standard for FTSO claims that would be easier to meet

than "good cause." That is why the advisory committee eventually decided to use just "prejudice" for FTSO claims, no matter what the cause for failing to raise it in timely manner. She noted that everyone recognized that it was a bit curious to have two standards for granting relief from the consequences of belatedly filing a required pretrial motion. She said that the advisory committee has now had more time to think about the proposal. The advisory committee did not want to put the Rule 12 proposal in jeopardy by insisting on two standards. The subcommittee had given it enormous thought and decided that pursuing a separate standard for FTSO claims was not worth the risk to the whole proposal and that "good cause" would be adequate for those claims.

Judge Raggi noted that no one stands convicted of a crime unless every element of the crime is proven beyond a reasonable doubt. The proposed rule addresses only those situations where even though a defendant is proven guilty beyond a reasonable doubt on every element, a failure to charge it correctly should for some reason be heard late on a showing of prejudice. But, she asked, what would the prejudice be in that situation? The advisory committee, she said, had asked what they were really putting at risk by insisting on two standards. She stated that it was now the subcommittee's view and the unanimous view of the advisory committee that it was not worthwhile to pursue a separate standard for FTSO claims, and that a "good cause" standard should apply for all late-raised claims that are not jurisdictional.

Judge Raggi noted that, at the suggestion of a member of the advisory committee, the committee note had been revised to explain that "good cause" is "a flexible standard that requires consideration of all interests in the particular case." She said that this language was in brackets, but that it would be part of the text of the committee note, if approved. This language, she said, would make clear that the court should consider cause, consider prejudice, and consider everything that might be relevant. She explained that the reason the words "cause and prejudice" were not used was to avoid confusion with the use of that phrase in the habeas corpus context. Instead, the revised note language is intended to make clear that "good cause" is a holistic inquiry. She stated that it made sense to trust the district judges to understand that.

Judge Raggi requested that the committee approve the revised proposed amendment to Rule 12 and the accompanying committee note. Finally, Judge Raggi noted that the advisory committee was unsure about whether the change could be accomplished in the current rulemaking cycle. One of the questions the advisory committee had raised, she said, was whether this was a change that would require republication. She reported that the advisory committee was not sure and had consulted with Professor Coquillette, who did not think republication was necessary. She noted that if the committee approved the revised proposal, it could potentially go back to the Court and be considered in this year's rulemaking cycle. She said it was the Standing Committee's decision whether to republish.

Professor Coquillette noted that traditionally the committee republishes when anyone would be surprised by the changes after publication and would feel that they did not have a chance to debate the proposal. But, he noted that in this case, the appropriate standard for relief from late-raised FTSO claims had been debated back and forth for the seven year history of this proposal. Everyone had notice that the appropriate standard was at issue and had a chance to comment on that during the public comment period. Judge Sutton also noted that for the past eight years or so, everyone has known that the rule was being changed to require FTSO claims to be brought before trial and the standard for raising such claims late has been on the table the whole time.

A member stated that his initial reaction was to republish, but that he realized that the Court had the authority to make changes to the committee's proposals itself. If the Court wanted to make a change and just wanted to make sure the rules committees agreed, then it would seem to be a procedure contemplated by the Rules Enabling Act. However, if the proposal is really back in the committee's court, then he said he would have to grapple with the republication question. He stated that he tended to think it is better to republish in the case of a "tie."

Judge Sutton stated that the Court could have proceeded in different ways and this is uncharted territory, but that he believed the committee should treat the proposal as if it were back in front of the committee. Another member asked what the procedure would be if the proposal had gone to a vote in the Court and been rejected. Judge Sutton responded that it depends, and that if a subsequent change by the committees had already been fully vetted, it would not be republished. The reason for republication is if the committee thinks it will get new insights or if someone will be surprised by a change. The member noted that the republication question is similar to a court amending an opinion and giving another opportunity for filing a petition for rehearing. She said that if the changes on rehearing are responsive to the comments already received, the courts usually do not give another opportunity for rehearing.

Professor Beale noted that there had been a previous occasion in which the advisory committee had made changes in response to a remand from the Supreme Court and the committee had not republished. Professor Capra noted that the Evidence Rules Committee had not republished when it made changes after a proposed amendment to Evidence Rule 804(b)(3) was returned by the Court.

Judge Raggi noted that not only had the advisory committee heard lots on this subject, but what it is proposing now is to leave the standard in the current rule in place.

Another member stated that he had no views on the need to republish, but questioned whether there is a negative implication in the new proposed committee note language describing "good cause" as a "flexible standard that requires consideration of all

interests in the particular case." The member explained that the existing standard has been interpreted to require showing, among other things, prejudice, and he wondered whether the note language could potentially be understood to relieve a defendant of having to show prejudice.

Judge Raggi responded that she could not foreclose the possibility of the language being read that way, but from a practical perspective, this is how Rule 12 now treats FTSO claims. She added that, up until the time the jury is empaneled and jeopardy attaches, Rule 12, in another section, lets a trial judge entertain any motion. She stated that presumably on appeal, circuit courts will continue to apply a plain error standard to late-raised claims. So, she said, we are talking about what the judge will entertain in the window of time between when jeopardy attaches and when judgment is entered. Judge Raggi stated that she would be surprised if trial judges would entertain such late motions without a showing of prejudice once jeopardy has attached. She added that if the committee were to see that happening in practice, it could consider amending the rule to spell out a prejudice requirement in the rule, but, given that district judges are constrained by this portion of the rule only in the time between jeopardy attaching and judgment, she thought most judges would require a showing of prejudice. The member stated that as a practical matter that is true, but that he was not sure that the new language in the note added anything. He stated that if it does not add anything substantive, it is not needed.

Judge Raggi explained that the note language explaining that "good cause" is a "flexible standard" makes one of the defense bar members supportive of the proposal, which is something that should not be discounted. She stated that all three advisory committee members who represent defendants voted for this rule in part because of this new language in the note. In fact, she said, something even more detailed had been proposed originally by a defense bar member.

Judge Sutton noted that "good cause" suggests flexibility and that to the extent some have concerns about putting FTSO defenses with all other claims required to be raised before trial, emphasizing flexibility is important to make clear that courts might treat different types of late-raised motions differently, depending on the circumstances.

Another member asked if the new note language is a comfort blanket for some members of the advisory committee. Judge Raggi agreed that it was in part, but noted that the language was derived from the fact that some members wanted to ensure that judges would understand that the seriousness of the motion should also be taken into account in deciding the consequences of a late-raised motion, while recognizing that it would not be appropriate to assume that every FTSO motion is more important than every multiplicity motion, for example.

A member questioned whether there are examples of a change like this going through without being republished. Judge Sutton responded that there were, both with respect to Criminal Rules proposals and Evidence Rules proposals, but the fact that there were other instances in which the committee had made changes after remand from the Supreme Court without republishing does not mean that there should never be republication in response to comments from the Court. But here, he noted, the Rule 12 proposed changes seemed more like the instances in which the committees had not republished. Judge Raggi noted that the advisory committee had already made changes to the Rule 12 proposal after publication without republishing. She added that the advisory committee had received many comments from the defense bar on the published proposals and that while there is the possibility that someone might argue that the last version they saw had a separate standard for FTSO claims, she was not sure that the committee was ever obliged to have two different standards as opposed to the one that is there. The cost of republishing, she noted, would be putting off the effective date of the rule change by another two years. She was comforted by the fact that not one of the defense members of the advisory committee had urged republication.

Judge Sutton noted that the advisory committee had made more substantive changes after publication and before sending it back to the Standing Committee than the current proposed change. Judge Raggi agreed, but noted that the changes after public comment had been made in response to comments received during the public comment period. Professor Coquillette noted that the history of this rule proposal did not require republication here, where the defense bar members of the advisory committee did not have concerns and the issues have been fully discussed. He added that none of the defense bar members of the advisory committee had argued that this change would be a surprise.

A member moved to approve the proposed amendment to Rule 12. The member who had questioned the note language seconded the motion, explaining that as a practical matter, district judges will have no problem applying the amendment and note language. The committee unanimously approved the proposed amendment without republication. Judge Sutton noted that if the proposal is approved in the rest of the Rules Enabling Act process, the committees will closely monitor what happens with FTSO defenses and the "good cause" standard. Judge Sutton thanked Professors Beale and King for their hard work on this proposal.

The committee, without objection and by voice vote, approved the proposed amendment to Criminal Rule 12 for transmission to the Judicial Conference for final approval.

Informational Items

Judge Raggi noted that the advisory committee did not meet in the fall because of the lapse in appropriations due to the government shutdown, but that the advisory committee had a full agenda for its spring meeting.

FED. R. CRIM. P. 4

Judge Raggi reported that the advisory committee was considering the Department of Justice's request to amend Rule 4, which deals with service of summons. The Department had suggested that the rule is deficient for serving foreign organizations who have no agent or place of business in the United States, but whose conduct has criminal consequences in the United States. The current rule allows serving organizations at their last known mailing address in the United States, but these foreign entities do not have any such address. Until there is an appearance by the foreign entity, it cannot be prosecuted, but the Department asserted that if there was a way to properly serve such entities, many of them would enter an appearance rather than risk consequences like forfeiture. Judge Raggi noted that the request appeared to be driven by a desire to have a means of service that would either get foreign entities to respond or would permit the Department to begin forfeiture proceedings if the foreign entity did not respond. Judge Raggi noted that whether it is appropriate for forfeiture proceedings to be instituted based on service is a matter for future litigation.

As to what methods a proposed rule might approve for service, Judge Raggi reported that it is clear that the advisory committee will recommend that if there is an applicable treaty that provides for service in a particular manner, such service will suffice. Similarly, she said, compliance with an agreement with a foreign country on the proper means of service will also suffice. Judge Raggi added that the Department also seeks to have a "catch-all" provision that anything that a judge signs off on will suffice, but some members of the advisory committee were uncomfortable with that because a judge might order service by a U.S. official that would violate the foreign country's laws. She noted that if the object of service is a person, it does not matter how he or she got before the court. She said that the proposal has moved towards including a catch-all provision that would instruct the Department to serve in whatever manner it thinks is reasonable and then the court can deal with the issue of due process once the defendant enters an appearance.

The proposed amendment would ensure organizations that are committing domestic offenses are not able to avoid liability through the expedient of declining to maintain an agent, place of business, or mailing address within the United States. A subcommittee has been assigned to consider the proposal and has approved a proposed amendment for discussion by the full advisory committee. The advisory committee will

take it up at its April meeting.

FED. R. CRIM. P. 41

Judge Raggi reported that the Department has also submitted a proposal to amend Rule 41 to enlarge the territorial limits for warrants to search electronic storage media and electronically stored information. The purpose of the proposed amendment is to enable law enforcement to investigate and prosecute botnets and crimes involving Internet anonymizing technologies. Rule 41(b) does not directly address the circumstances that arise when officers seek to execute search warrants, via remote access, over modern communications networks such as the Internet. The proposed amendment is intended to address two increasingly common situations: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown, and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts. The Department reports problems with determining the district in which to seek the warrant when it does not know where the computer to be searched is located.

The proposed amendment would authorize a court in a district where activities related to a crime have occurred to issue a warrant to be executed by remote access for electronic storage media and electronically stored information whether located within or outside the district. Judge Raggi noted that there were potential concerns about the particularity requirements of warrants when the Department does not know exactly what it is searching. Thus, the advisory committee had asked the Department to draft some warrants of the sort that it thinks might need judicial authorization. Judge Raggi added that once the advisory committee sees examples of the types of warrants that might be presented to federal judges, it will have a better idea of how to proceed. She said that the proposal has been referred to a subcommittee, which is expected to report at the advisory committee's April meeting.

OTHER PROPOSALS

Judge Raggi noted that other proposals under consideration were in the agenda materials and did not need an oral report at this time. One such proposal involved the question of whether there is any need to clarify Rule 53, which prohibits "broadcasting" judicial proceedings in order to clarify the rule's application to tweets from the courtroom. Another requests the committee to consider amending Rules 11 and 32 to make presentence reports available in advance of a guilty plea so that all parties will be aware of the potential sentence. Another proposal under consideration would amend Rule 45(c) to eliminate the three extra days currently provided to respond when service is made by electronic means.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum of December 2, 2013 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Informational Items

Judge Fitzwater reported that the proposed amendment to Rule 803(10), the hearsay exception for the absence of public records, which the Standing Committee approved in June 2012, took effect on December 1, 2013.

He noted that four proposals from the advisory committee were pending before the Supreme Court. The proposed amendments to Rules 801(d)(1)(B) and 803(6)–(8) had been approved by the Standing Committee in June 2013, were approved by the Judicial Conference on the consent calendar at its September 2013 meeting, and had been transmitted to the Supreme Court for consideration.

Judge Fitzwater reported that the Fall 2013 meeting, which would have included a technology symposium and which had been cancelled due to the government shutdown, was rescheduled at the same location for Spring 2014. He said the Department of Justice would not be presenting on the electronic signature issue, as had been planned for the original symposium, although the advisory committee would be willing to host them if continuing dialogue would be desirable. Judge Sutton commented that the advisory committee should think about whether it would be useful to bring people together to discuss the electronic signature issue. Judge Fitzwater noted that it does dovetail with the technology symposium that the advisory committee is planning in conjunction with its next meeting. He added that the symposium might examine things like the ancient document exception to the hearsay rule, which may seem anachronistic in the current era of data storage.

Judge Sutton noted that Professor Capra recently appeared on the cover of the *Fordham Lawyer*, a magazine published by the Fordham Law School, and that the complimentary article featured Professor Capra's work for the rules committees.

PANEL DISCUSSION ON THE POLITICAL AND PROFESSIONAL CONTEXT OF RULEMAKING

Professor Coquillette presided over a panel discussion on the political and professional context of rulemaking. The other panelists included Judge Huff, a former committee member; Judge Wood, a former committee member; Judge Rosenthal, former chair of the Standing and Civil Rules Committees; Judge Anthony Scirica (by phone),

former chair of the committee and former chair of the Executive Committee of the Judicial Conference; and Peter G. McCabe, former secretary to the committee. Professor Coquillette introduced each member and stated their relevant background.

PROFESSOR COQUILLETTE

Professor Coquillette provided background on opposition to the rules committees' work. He noted that historically there have been three groups who are suspicious about the rules committees' work, including the traditional formalists, who believed that the judge's role is to decide cases, not to do anything prospective; the rule skeptics, who thought that uniformity through codification, with transsubstantive rules that apply in all types of cases, was not practical; and the political populists, who believe that rulemaking ought to be done by elected representatives of the people. Professor Coquillette noted that while the rules committees could never please these three groups, they should continue to be sensitive to their concerns.

PETER G. MCCABE

Mr. McCabe provided background on the history of the Rules Enabling Act. He discussed changes the rules committees made over time to make the process more open, transparent, and easily accessible. Mr. McCabe also discussed the committees' efforts to make sure there was a strong empirical basis for amendments. He also emphasized the committees' efforts to ensure evenhandedness and the nonpolitical nature of their role. To get a wide range of views, the rules committees take measures such as inviting members of the bar to come to meetings, conducting surveys and miniconferences, and reaching out to congressional members and staff to inform them about the rulemaking process and about pending rule amendments. Mr. McCabe concluded that the rulemaking system is healthy, effective, and credible, but that the challenge of balancing authority between the judicial and legislative branches will continue to exist and will be an area that the committees will continuously need to focus their attention.

JUDGE ANTHONY J. SCIRICA

Judge Scirica spoke about his experience with the Private Securities Litigation Reform Act and the Class Action Fairness Act and their impact on the rules committees' work. He emphasized the benefits of delegating rulemaking authority to the judiciary through the careful process set out in the Rules Enabling Act, but noted that substantive matters are best addressed by Congress.

JUDGE LEE H. ROSENTHAL

Judge Rosenthal discussed how the rules committees can engage with Congress without becoming politicized. She emphasized the importance of effective and energetic

explanation of the careful, transparent, open, and deliberate nature of the Rules Enabling Act and its process, as well as clear explanation of the purpose behind the delegation of authority under that Act. She noted that the rules committees have worked closely with Congress on a number of issues, including the enactment of Evidence Rule 502 and statutory changes to correspond to recent changes to the Appellate Rules and to the recent Time Computation Project. She concluded that the rules committees need to continue to be vigilant in explaining the importance of the rulemaking process under the Rules Enabling Act and in informing Congress of upcoming changes, while remaining distant from political pressures.

JUDGE MARILYN L. HUFF

Judge Huff discussed her experience with the Time Computation Project, which went through each set of rules to make counting time uniform and easier to apply. She said that as part of the project, the committees had examined the federal statutes that would be affected by such changes and that Congress ultimately amended 29 statutes in conjunction with the project. Judge Huff also discussed her experience as the liaison to the Evidence Rules Committee and as a member of the Standing Committee's Style Subcommittee during the project to restyle the Evidence Rules. Finally, Judge Huff discussed her experience serving on the Standing Committee's Forms Subcommittee. She concluded that these examples show that, consistent with the Rules Enabling Act process, there are often workable solutions within the judiciary, with congressional involvement, to some concerns about the litigation process.

JUDGE DIANE P. WOOD

Judge Wood discussed the triggers for rules committee action, and said triggers include legislative changes; Supreme Court decisions; suggestions from judges, academics, and empirical researchers; and examination of state court practices. She discussed instances in which the rules committees should be skeptical of these triggers. She also introduced the idea of a qualification to the generally accepted norm that the rules are transsubstantive, noting that the committees aim for more than transsubstantivity and seek to make rules that have a broad generality that can be applied in every case in federal court. She concluded that the committees now have the challenge of dealing with problems that may change more quickly than the rulemaking process and that the committees may need another model for that type of problem. She noted that some problems are best addressed outside the rulemaking arena.

REPORT OF THE CM/ECF SUBCOMMITTEE

Professor Capra reported on the work of the CM/ECF Subcommittee, as set out in Judge Michael Chagares's memorandum and attachments of December 4, 2013 (Agenda Item 7). He said there are five main items that the subcommittee has been working on,

and that its work would probably move forward in stages. He added that the reporters to the advisory committees had done outstanding work for the subcommittee.

The first issue the subcommittee was working on was electronic signatures, as explained during the Bankruptcy Rules Committee's report. Professor Capra explained that if the Bankruptcy Rules proposal works, other committees will likely follow with similar proposals, and the CM/ECF Subcommittee will oversee the process. He said that the problem the rule is trying to deal with is not forgery, but using a single signature line and putting it on multiple documents.

Professor Capra said that the second step the subcommittee took was for the reporters to look through their respective rules to see where use of CM/ECF may conflict with existing language. He said addressing all of the items found would be a daunting task. For example, he said, there were dozens of places in the Criminal and Bankruptcy Rules that may not accommodate use of CM/ECF.

The third matter the subcommittee looked at was abrogation of the three-day rule. Professor Capra said that he would take the comments received today on the Civil Rules proposal back to the subcommittee. He added that he thought it was likely that the committees could coordinate a uniform committee note and that the goal would be for the rules to be changed in as uniform a manner as possible. He added that the reporters had been working hard on this issue.

Fourth, Professor Capra said that the subcommittee was looking at the proposal for a civil rule requiring electronic filing. He said he thought this was possibly feasible, but that there are issues about what the exceptions should be. He added that one reason it may be desirable to have a requirement of electronic filing in the federal rules is that the local rules already require it almost universally. On the other hand, he said, the local rules have a lot of exceptions and are not uniform in terms of the exceptions, and that is something that needs to be worked through.

Professor Capra reported that the final issue the subcommittee was considering was whether it would be useful and feasible to have a universal rule that would essentially say that "paper equals electrons." The subcommittee is examining whether, instead of going through all of the rules and changing each rule to accommodate electronic filing and information, there is the possibility of a universal fix. Professor Capra noted that there is a proposed template for such an approach in the agenda materials. The first part of the template would say, "In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information." Professor Capra said that this tracks what the Evidence Rules have done, but that there can be problems with this approach. For example, he said, the Criminal Rules would need carve-outs. The second part of the template would state: "In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be

accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States]." He said that there were still a lot of issues and potential problems to think through, including the need for exceptions, as to whether such an approach would work.

Professor Capra said that the subcommittee was working with CACM because the "CM/ECF Next Gen" was being overseen by that committee and it would clearly have implications for the subcommittee's work. He added that the committee does not yet know what Next Gen will do and there is a concern in the subcommittee that the rules committees should be cautious about getting too far out in advance of a problem that does not yet exist. He said that to try to change the rules in advance of Next Gen, when Next Gen might not be what the committees think it is, could create problems. He said that the subcommittee is therefore proceeding with caution.

A member noted that Next Gen is behind schedule and it might be at least two years away from completion. Professor Capra added that there are CACM members on the subcommittee and CACM staff in the Administrative Office who are helping with the subcommittee's work as well.

NEXT COMMITTEE MEETING

Judge Sutton concluded the meeting by thanking the AO staff for the wonderful job in planning the meeting and coordinating all of the logistics. The committee will hold its next meeting on May 29–30, 2014, in Washington, D.C.

Respectfully submitted,

Jonathan C. Rose
Secretary

Andrea L. Kuperman
Chief Counsel

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Advisory Committee on Evidence Rules

Symposium on the Challenges of Electronic Evidence

University of Maine School of Law

Friday, April 4, 2014

List of Speakers, Topics, and Order of Presentation

I. Opening Remarks

Hon. Sidney A. Fitzwater, Chief Judge, N.D. Tex. (Chair of Evidence Rules Committee)

II. Overview

Hon. Jeffrey S. Sutton, 6th Cir. (Chair of Committee on Rules of Practice and Procedure): Challenges of addressing technological change through rulemaking.

III. Authenticity

1. *Hon. Paul Grimm,* D. Md. (Member of Civil Rules Committee): Proper use of Rules 901, 104(a) and 104(b) in handling challenges to the authenticity of electronic evidence.

2. *Hon. John A. Woodcock,* Chief Judge, D. Me. (Member of Evidence Rules Committee): How judges deal with arguments about the authenticity of digitally-altered images.

3. *Gregory P. Joseph, Esq.,* Joseph Hage Aaronson LLC: Considerations for the Evidence Rules Committee to address if the Committee were to amend Rule 901 to list the factors for a court to consider in ruling on the authenticity of electronic evidence.

4. *John Haried, Esq.*, Department of Justice: Proposing that there should be an analog to Rule 902(11) for authenticating electronic information that is not hearsay under Rule 801 because it is machine-generated.

IV. Hearsay

1. *Professor Jeffrey Bellin*, William and Mary School of Law: Proposing a new exception to the hearsay rule to cover e-hearsay. Professor Bellin's article on the subject can be found at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2232345

2. *Paul Shechtman*, *Esq.,* Zuckerman Spaeder LLP (Member of the Evidence Rules Committee): Commenting on Professor Bellin's presentation.

3. *Professor Deirdre Smith,* University of Maine School of Law: Electronic evidence and the right to confrontation.

4. Open discussion of Judge Posner's suggestion in *United States v. Boyce* to scrap the existing hearsay exceptions in favor of a simplified Rule 807.

V. Adverse Inferences: Is there a need for a new rule of evidence?

1. *Hon. Shira A. Scheindlin,* S.D.N.Y.: How the failure to manage and preserve relevant information leads to spoliation and the need for an evidentiary sanction.

2. *David Shonka, Esq.*, Principal Deputy General Counsel, Federal Trade Commission: Commenting on the use of adverse inferences as a remedy for the loss of relevant information.

VI. Experts

1. *Daniel Gelb*, *Esq.,* Gelb and Gelb: Does *Daubert* apply to challenges to computer-assisted review of electronic information?

VII. Privileges

1. *Andrew Goldsmith, Esq.,* Department of Justice: Use of Rule 502(d) orders in grand jury proceedings.

VIII. General Discussion: How Have Lawyers and Judges Adapted to Electronic Evidence — And How They Have Adapted the *Evidence Rules* to Electronic Evidence.

IX. What Might Be Next?

1. *George Paul,* Esq., Lewis and Roca: Future developments in technology that may affect the presentation of evidence.

2. *Paul Lippe, Esq*., CEO, Legal OnRamp: The court system, technological developments, and systemic change.

X. Closing Remarks

Hon. Sidney A. Fitzwater, Chief Judge, N.D. Tex. (Chair of Evidence Rules Committee)

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TAB 2A

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Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2013

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

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

* * *

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

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

* * *

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

* * *

Committee Note

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

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

The amendment retains the requirement set forth in *Tome v. United States,* 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication or improper influence or motive must have been made before the alleged fabrication or improper influence or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness — such as the charges of inconsistency or faulty memory.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible

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

CHANGES MADE AFTER PUBLICATION AND COMMENTS

The text of the proposed amendment was changed to clarify that the traditional limits on using prior consistent statements to rebut a charge of recent fabrication or improper influence or motive are retained. The Committee Note was modified to accord with the change in text.

SUMMARY OF PUBLIC COMMENTS

Hon. Joan Ericksen, (12-EV-001) opposes the proposed amendment as released for public comment on the ground that it is not needed and may lead to unintended consequences.

The Federal Public Defender (12-EV-002) opposes the proposed amendment as released for public comment on the ground that it is "unnecessary and would actually be counterproductive" because it would allow for admission of more prior consistent statements and would "change the dynamics at the trial."

The Federal Magistrate Judges Association (12-EV-003) "is concerned that, despite the Advisory Committee's stated purpose, the proposed revision significantly undermines the rule against bolstering a witness and opens the door to the admission of self-serving consistent statements as substantive evidence." The FMJA suggests that "the revision specifically state limits to the expansion of what types of rehabilitation evidence are admissible — for example, to rebut a charge of faulty recollection — or that the Rule not be changed at all."

Professor Liesa Richter (12-EV-004) states that "[a]mending

Rule 801(d)(1)(B) to include prior consistent statements used to rehabilitate impeaching attacks other than attacks on motivation is completely consistent with the stated reason for the original hearsay exemption" and "advances the development of clear and rational evidentiary policies that can be administered efficiently and uniformly." Professor Richter argues, however, that the proposal as issued for public comment could be read to undermine the limitation on admitting prior consistent statements established in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication or improper influence or motive must have been made before the alleged fabrication or alleged improper influence or motive arose. The proposed amendment as issued for public comment was revised with the intent to address that concern.

The National Association of Criminal Defense Lawyers (12-EV-005) contends that prior consistent statements should be subject to the same admissibility requirements as those applicable to prior inconsistent statements under Rule 801(d)(1)(A), i.e., they should be admissible as substantive evidence only when made under oath and subject to cross-examination. The NACDL also contends that the words "otherwise rehabilitates" — as used in the proposed amendment as released for public comment — are "fatally ambiguous."

William T. Hangley, Esq. (12-EV-006) objects to the proposed amendment because it would lead to greater admissibility of prior consistent statements, and suggests that more study is required before that result is mandated. He also argues that treating prior consistent statements as substantive is unnecessary because the statement simply replicates testimony that the witness has already given.

TAB 2B

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Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2013

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

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

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

* * *

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

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

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

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

(D) all these conditions are shown by the testimony of the custodian or another qualified

witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

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

* * *

Committee Note

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

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

CHANGES MADE AFTER PUBLICATION AND COMMENTS

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

SUMMARY OF PUBLIC COMMENTS

The Federal Magistrate Judges Association (12-EV-003) endorses the proposed amendment.

The National Association of Criminal Defense Lawyers (12-EV-005) states that the text of the amendment is "well-constructed" but suggests that the Committee Note strays from the language of the text and suggests that the Committee Note be revised to refer to the opponent's burden to prove that the circumstances of preparation "indicate" a lack of trustworthiness.

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Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2013

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

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

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

*** * ***

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

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

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

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

* * *

Committee Note

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

CHANGES MADE AFTER PUBLICATION AND COMMENTS

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

SUMMARY OF PUBLIC COMMENTS

The Federal Magistrate Judges Association (12-EV-003) endorses the proposed amendment.

The National Association of Criminal Defense Lawyers (12-EV-005) states that the text of the amendment is "well-constructed" but suggests that the Committee Note strays from the language of the text and that the Committee Note be revised to refer to the opponent's burden to prove that the circumstances of preparation "indicate" a lack of trustworthiness.

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Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2013

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

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

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

*** * ***

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

(A) it sets out:

(i) the office's activities;

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

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

(B) ~~neither~~ the opponent does not show that the

source of information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

* * *

Committee Note

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

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

CHANGES MADE AFTER PUBLICATION AND COMMENTS

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

SUMMARY OF PUBLIC COMMENTS

The Federal Magistrate Judges Association (12-EV-003) endorses the proposed amendment.

The National Association of Criminal Defense Lawyers (12-EV-005) states that the text of the amendment is "well-

constructed" but suggests that the Committee Note strays from the language of the text and that the Committee Note be revised to refer to the opponent's burden to prove that the circumstances of preparation "indicate" a lack of trustworthiness.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Hearsay Exception for Ancient Documents and its Applicability to ESI
Date: March 1, 2014

In the last few years, a number of people involved in the Rules Committees have suggested that the widespread use of electronically stored information (ESI) merits reconsideration of Rule 803(16), which is the ancient documents exception to the hearsay rule. As discussed below, Rule 803(16) provides that statements in documents that are properly authenticated as more than 20 years old are admissible for their truth – without regard to their actual reliability. The potential problem, as applied to ESI, is that ESI could be stored without much trouble for 20 years, and the sheer volume of it could end up creating an exception to the hearsay rule that would be much broader than the drafters (or the common law) might have anticipated in the days of paper.

This memorandum sets forth the ancient documents rule — both the hearsay exception and the rule of authenticity that ties to it. It discusses the rationale of the rule and whether that rationale might be undermined by the prevalence, volume, and relatively easy storage of ESI. It provides some drafting alternatives for amending or abrogating the ancient documents exception if the Committee decides that the rule must be adjusted in some way to avoid overuse in light of ESI.

I. Background — The Ancient Documents Rule

A. The Rule on Authenticity and the Exception to the Hearsay Rule

The ancient documents "rule" is actually comprised of two separate rules. One is a rule on authenticity, which provides standards for qualifying an old document as genuine. The other is a hearsay exception for all statements contained in an authentic ancient document. These rules are derived from the common law, though one difference from the common law is that the relevant time period has been reduced from 30 years to 20 years.

Rule 901(b)(8) provides as follows:

(b) **Examples.** The following are examples only — not a complete list — of evidence that satisfies the [authenticity] requirement:

* * *

(8) ***Evidence About Ancient Documents or Data Compilations***. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

Rule 803(16) provides as follows:

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

* * *

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

If a document satisfies the authenticity requirements of Rule 901(b)(8) (or some other ground of authentication and is over 20 years old), then *every statement in that document can be admitted for its truth.* That is so because Rule 803(16) simply equates authenticity with an exception to the hearsay rule. The rule does not purport to regulate the reliability of the contents of an ancient document, even though all other hearsay exceptions in Rule 803 are grounded in circumstantial guarantees of reliability. *See, e.g., Threadgill v. Armstrong World Industries, Inc.,* 928 F.2d 1366, 1375 (3rd Cir. 1991) ("Once a document qualifies as an ancient document, it is automatically excepted from the hearsay rule under Fed.R.Evid. 803(16)"; reversing trial court's ruling excluding an ancient document because the content was untrustworthy).[1] This is the only rule of evidence that

[1] A qualification to the rule of broad admissibility in text does arise if the ancient document itself refers to a hearsay statement — e.g., an old diary which says, "The defendant just sent me a letter in which he threatened to kill me." The hearsay exception would cover the fact that the diarist received a letter. But whether the defendant actually made the threat would have to be handled by another exception — in this case that would be a party-opponent statement,

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

It is to say the least a curious assumption that just because an old document is authentic, the statements in it are automatically reliable enough to escape the rule excluding hearsay. None of the guarantees for authenticity set forth in Rule 901(b)(8) do anything to assure that the statements in the authentic document are reliable. *See, e.g., United States v. Kairys,* 782 F.2d 1374, 1379 (7th Cir. 1986) (Rule's requirement that document be free of suspicion "goes not to the content of the document, but rather to whether the document is what it purports to be."). For example, a 20 year-old National Enquirer, kept in an archivist's fancy and secure study, will be found authentic — but should that mean that every single statement in the Enquirer about Michael Jackson should be admissible for its truth?[2]

It should be noted that part of the reason that Rule 803(16) — despite not guaranteeing reliability — has flown under the radar is because it is so rarely invoked. A Westlaw search indicates that ancient documents have been admitted in only 68 reported cases since the Federal Rules of Evidence were enacted.[3] Of course it is not possible to determine how often the exception has been used in unreported cases, but it is fair to state that the rule is, comparatively, a little-invoked exception.

Rule 801(d)(2). In other words, the ancient documents exception does not abrogate the rule on multiple hearsay imposed by Rule 805. *See, e.g., United States v. Hajda,* 135 F.3d 439, 443 (7th Cir. 1998) (ancient documents exception "applies only to the document itself. If the document contains more than one level of hearsay, an appropriate exception must be found for each level. Fed.R.Evid. 805.").

[2] What is odder still is that a 19 year and 364 days old National Enquirer could be authenticated — see Rule 902(6) — but it would not be automatically admissible for the truth of any assertion. The equation of authenticity and hearsay admissibility occurs the second that the periodical becomes 20 years old.

[3] In contrast, state of mind statements have been admitted under Rule 803(3) in around 900 published cases.

B. Rationale for the Ancient Document Rules

1. Authenticity:

The rationale for Rule 901(b)(8) is "the unlikeliness of a still viable fraud after the lapse of time." Advisory Committee Note to Rule 901(b)(8). The standard for authenticity is low, and if a document looks old and not suspicious and is found where it ought to be, the chances of it being a forgery are sufficiently remote that the question of authenticity is one for the jury.

2. Hearsay Exception:

The most complete articulation of the rationale for the ancient documents hearsay exception is found in Mueller and Kirkpatrick §8.58:

> Need is the main justification. The lapse of 20 years since the acts, events or conditions described almost guarantees a shortage of evidence. Witnesses will have died or disappeared. Written statements that might fit other exceptions (business records, past recollection) are typically thrown out or lost or destroyed.[4] And passage of time lowers the marginal value of live testimony over hearsay: Eyewitness accounts of events 20 years in the past are likely to be less reliable than accounts of recent events, and testimonial description of oral statements made long ago (admissions or excited utterances) are less reliable that descriptions of more recent ones.
>
> Naturally statements in ancient documents are affected by risks of misperception, faulty memory, ambiguity, and lack of candor (they are not intrinsically more reliable than oral statements), and a written statement unreliable when made is unreliable forever. Ancient documents do, however, bring fewer risks of misreporting (because the document is in writing), and they bring at least some assurance against negative influences: When authenticated, the document leaves little doubt the statement was made; there is little risk of errors in transmission; because of its age, the document is not likely to have suffered from the forces generating the suit, so there is less reason to fear distortion or lack of candor.[5]

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[4] Reporter's Note: That assertion in text is arguably questionable as applied to ESI. That point will be discussed below.

[5] See also Advisory Committee Note to Rule 803(16) (arguing that "age affords assurance that the writing antedates the present controversy").

The question is whether the rationales for the ancient documents exception — essentially, inaccessibility of other proof and statements antedating a controversy — are sound and, if so, whether they remain operative when it comes to ESI.

II. Do the Rationales for the Ancient Documents Rules Apply to ESI?

A. The Authenticity Rule

Whatever common sense rationale applies to support authenticity of an old hardcopy document would seem to apply equally to ESI. If an email has been sitting in a server for 20 years, there seems to be no special reason to think there is a greater risk of forgery than with respect to a paper document (or any other electronic document); the same would be true with information found in databases maintained by Facebook, Twitter, or in the cloud. Indeed the original Advisory Committee — way back when — foresaw the issue of stored electronic information and made the determination that electronic information should be treated the same as hardcopy for purposes of authenticity under the ancient document rule. Hence the specific inclusion of data compilations. *See* Advisory Committee Note to Rule 901(b)(8) ("The familiar ancient document rule of the common law is extended to include data stored electronically or by other similar means. . . . This expansion is necessary in view of the widespread use of methods of storing data in forms other than conventional written records."). The fact that the Advisory Committee foresaw and accommodated ESI in the authenticity rule arguably counsels caution in trying to rethink or abrogate the rule on authenticity of 20 year-old material, in whatever form. Nor does there appear to be anything about the volume of ESI that would appear to require a change of thinking on the question of authenticity.

B. The Hearsay Exception

It is not as clear that the original Advisory Committee thought much about the risk to the hearsay rule that might be found in the explosion of ESI and its fairly simple retention for a long period of time. Notably, Rule 901(b)(8) specifically mentions data compilations and Rule 803(16) does not.[6] It is possible that the Advisory Committee was not explicitly thinking of the possibility

[6] That discrepancy led Mueller and Kirkpatrick to speculate that Rule 803(16) does not reach ESI: "The authentication provision reaches electronically stored data, and difference in language (the exception refers only to statements 'in a document') suggests difference in coverage. Perhaps the ancient documents exception is less necessary for electronically stored material, which often fits the exception for business or public records." But Mueller and Kirkpatrick ultimately conclude that because the Advisory Committee Note to 803(16) equates authenticity with the hearsay exception, "coverage is probably the same despite difference in

that terabytes upon terabytes of information would become admissible for the truth of the contents simply because that information was stored in a server for 20 years.

III. Arguments in Favor of an Amendment to Rule 803(16)

As stated above, the basic justification for the ancient documents exception is necessity, which comes down to the premise that it is likely that all the reliable evidence (such as business records) has been destroyed so we have to make do with more dubious evidence. An argument can be made that this necessity assumption has been *substantially* undermined by the development of ESI. As we go forward, it can be argued that whatever reliable evidence existed at the time of a 20 year-old event *still exists* — because it is likely to be ESI. Business records from the time, emails from the time, texts, chats — the chances of most or all of that being preserved are certainly higher than the chances of hardcopy and eyewitnesses still being around. There would appear to be no reason to admit *unreliable* ESI on necessity grounds if it is quite likely that there will be *reliable* ESI that is admissible under other hearsay exceptions.[7] *See, e.g., Paramount Pictures Corp. v. International Media Films Inc.,* 2013 WL 3215189 (C.D. Cal.) (records regarding a film, more than 20 years old, were admissible as business records). Thus the "necessity" of proving claims based on older information of whatever provenance seems to have lessened given the possible preservation of bytes upon bytes of *reliable* electronic information — information that was not or could not have been preserved back in the day. If the rule is unamended, then arguably there will be a situation in which there is a mountain of ESI to prove a point, but parties can freely admit unreliable ESI, just because it is old.

But there is another (lesser) justification for the exception that needs to be addressed: that an old statement has some indicium of reliability by the fact that it was made before any litigation motive could have arisen. That justification is not without merit and it would seem to apply to ESI as much as it applies to hardcopy. But there are a number of counterarguments:

First, the fact that a statement was made before one specific litigation arose does not mean it was made without *some* litigation motive. For example, take a case in which a plaintiff is suing a major corporation for employment discrimination. The plaintiff wants to admit 20 year-old text

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words."

In any case it is clear since the restyling that Rule 803(16) covers ESI. That is because Rule 101(b)(6) provides that any reference to any kind of writing— such as a "document" — includes electronically stored information. Whether this made an inadvertent substantive change to Rule 803(16) is an interesting question.

[7] At the very least the threat of rampant use of old and unreliable ESI might lead to an adjustment of the Rule to include something like the necessity language of Rule 807 — requiring that the proffered evidence is more probative than any other evidence reasonably available. One of the drafting alternatives below considers this possibility.

messages from another employee who complains about similar discriminatory activity. It's certainly possible that such messages could pass the Rule 404(b) threshold, as proof of intent. But as to hearsay, the statements may well have been made under the declarant's *own* litigation motive.[8] Given the sheer volume of old ESI that we are likely to encounter, it appears that at least some of it will have been made with a litigation motive of some kind — and yet it would be automatically admissible under an unamended Rule 803(16) simply because it is old. It is important to note that the existing Rule does not require, as a condition of admissibility, that the document must be prepared before a controversy arose. *See, e.g., Langbord v. U.S. Dept. of Treasury,* 2011 WL 2623315, at *3 (E.D.Pa.) ("Requiring courts to ignore the ancient document rule's three requirements and make determinations based on whether a document was prepared with similar litigation in mind would require courts to assess a document's trustworthiness or bias, a task inappropriate when resolving threshold authenticity questions."); *Columbia First Bank, FSB v. U.S.*, 58 Fed.Cl. 333 (Fed.Cl.2003) (there is no requirement in the rule that the document must actually antedate the controversy). It can even be the case that one dispute has been going on so long that documentation prepared in contemplation of that dispute can be admissible under Rule 803(16). *See Osprey Ship Management, Inc. v. Jackson County Port Authority*, 2008 WL 282267 (S.D.Miss.) (affidavit in lengthy dispute admissible as an ancient document).

Second, an absence of litigation motive, even if it exists, is the only reliability-based factor supporting admissibility for hearsay admitted under Rule 803(16). No other hearsay exception relies solely on the absence of litigation motive in establishing the reliability required for admission of hearsay. Hearsay statements are excluded every day even though they are made without a litigation motive — for example, a statement of an unaffiliated bystander to an accident, made the day after the accident, indicating that the defendant-driver was at fault. That statement is inadmissible hearsay even if the declarant is unavailable at trial. There is no reliability-based justification for admitting the same statement simply because the event is 20 years old. The explanation might be necessity, but as stated above, the necessity justification has arguably been undermined by the very fact of ESI. (In the bystander example, there is likely to be some surveillance footage, or a cellphone photo, or a tweet from someone made right at the time of the event, etc.).

Third, the rather thin reed of reliability based on absence of litigation motive could be argued to have been acceptable because of the infrequent use of the ancient documents hearsay exception. But looking forward, it is possible that lawyers will seek to use the exception more frequently — to admit stored ESI for its truth. Establishing admissibility under 803(16) is likely to be easier than, for example, using the business records exception. Rule 803(6) requires foundation testimony or an affidavit from a knowledgeable witness, as well as a showing of regularity, routine, etc. *See, e.g., United States v. Duron-Caldera,* 737 F.3d 988 (5th Cir. 2013) (record not admissible as a business record because not prepared in the regular course of business activity; but admissible under Rule 803(16)). Other exceptions, such as for excited utterances and present sense impressions, contain

[8] From the civil defendant's side, CERCLA-related evidence might well be more than 20 years old and yet made with an eye to some future litigation. Indeed many of the published cases on Rule 803(16) are CERCLA cases.

their own detailed admissibility requirements. In contrast, all that needs to be shown for an ancient document is that it is old and is stored where it ought to be. *See, e.g., Brumley v. Albert E. Brumley & Sons, Inc.,* 727 F.3d 574 (6th Cir. 2013) (while personal knowledge of the declarant is required for admissibility under other exceptions, it is not required for admissibility under the ancient documents exception); *United States v. Kalymon*, 541 F.3d 624, 633 (6th Cir.2008) (factual accuracy of the content is not pertinent when considering whether the ancient document exception applies: "Suspicion does not go to the content of the document, but instead, "to whether the document is what it purports to be."); *United States v. Firishchak*, 468 F.3d 1015 (7th Cir. 2006) (ancient document admissible even though it would not satisfy any reliability-based hearsay exception). For ESI, age will be a snap to show, and it is likely that non-suspicious storage will be easy to show as well. In other words, the argument can be made that while we once could look the other way given the infrequent use of the ancient documents exception, the prospect of more frequent use requires more attention to reliability of old information.

IV. Arguments Against an Amendment to Rule 803(16)

There are a number of arguments against proposing an amendment to Rule 803(16) at this time.

1. No Problem Has Yet Arisen

I looked through all of the reported cases on the ancient documents exception, and none involve ESI. While this of course does not mean that ESI has never been offered under Rule 803(16), it is surely a rough indication that the problem of the use of the ancient documents exception to admit unreliable ESI is not widespread.

Generally, the Advisory Committee does not propose an amendment to the Evidence Rules unless it will solve a real problem. So it might be argued that amending Rule 803(16) due to a projected but not-yet-existing onslaught of old ESI is inappropriate. The counterargument is that technology, and the use of technology at trials, develops very quickly, and trying to keep up with these changes is very difficult in the context of the three-year-minimum rulemaking process. The Committee might conclude that it makes sense to get out ahead of an anticipated problem that is related to technology.[9] The counterargument to that is that a change to Rule 803(16) would not be trying to keep ahead of technology, because the issue addressed is the admission of old ESI, and that technology is by definition 20 years old. Thus delaying the amendment until a real problem is shown would simply risk overuse of the ancient documents exception for a year or two.

[9] This is why the Standing Committee has an cm/ecf Subcommittee that is considering changes to the rules to accommodate NextGen, even though NextGen has not yet been implemented.

2. Data Management Programs

One premise of an amendment to Rule 803(16) is that the necessity-basis of the exception is undermined because old facts can now be proven by reliable, stored ESI. It must be considered, though, that there is a great deal of ESI from 20 or more years ago that *has* been destroyed, either actually or effectively. Data management programs do delete ESI and, especially from 20 years ago, much of the information that was deleted is very hard to retrieve if it can be retrieved at all. Thus it is not obvious that the necessity-basis of the rule will be completely undermined by ESI, at least at this point. It could at least be argued that before an amendment is proposed, some research should be conducted on how much old ESI is out there in an accessible form.

3. Ancient Hardcopy Documents Might Still Be Necessary

Even if old ESI is preserved and accessible, there will still be some cases in which the only evidence available is old hardcopy. For example, cases involving immigration violations for fraudulent entry into the country are often proven by old hardcopy in some archive. *See, e.g., United States v. Demanjuk,* 367 F.3d 623 (6th Cir. 2004) (records of activity during World War II). Old hardcopy has also been found necessary in asbestos cases, CERCLA cases, property disputes, and stolen art cases. *George v. Celotex Corp.*, 914 F.2d 26 (2nd Cir. 1990) (old asbestos report); *Tremont LLC v. Halliburton Energy Services, Inc.,* 696 F.Supp.2d 741 (S.D.Tex. 2010) (old records indicating disposal of waste found admissible in a CERCLA case under Rule 803(16)); *Koepp v. Holland*, 688 F.Supp.2d 65 (N.D.N.Y. 2010) (old deed found admissible as an ancient document in a property dispute); *In re Paysage,* 2014 WL 128132 (E.D.Va.) (old museum records in a case about ownership of a work of art).

In none of the above cases was there ESI (much less reliable ESI) available to prove what the hardcopies were offered to prove. So it can be argued that even if an amendment were necessary to regulate old ESI, any amendment should preserve the exception in cases where necessity can be shown. Put another way, even though the rationale of the ancient documents exception is questionable because necessity trumps reliability, that rationale may still be applicable to certain actions today despite the development of ESI. One of the drafting alternatives below provides for a necessity carve-out.

Of course it is for the Committee to determine whether the development of ESI has created a risk that Rule 803(16) will become an avenue for admitting large amounts of unreliable electronic evidence. The rest of the memo considers drafting alternatives if the Committee thinks this is a topic worth further inquiry.

V. Drafting Alternatives

The drafting alternatives set forth here all relate to Rule 803(16). It would not appear that an amendment to Rule 901(b)(8) is necessary to accommodate the ESI explosion. That rule is already designed to cover ESI and there appears to be nothing about ESI that would call for a different analysis than already provided by Rule 901(b)(8): i.e., if information is old and doesn't look suspicious and is in a likely place, those conditions are enough to satisfy the low bar for authenticity set by Rule 901.

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What follows are some drafting alternatives for Rule 803(16).

A. Deletion

One alternative is simply to delete Rule 803(16). As stated above, it can be argued that the exception provides little but mischief — mischief that will become a real problem once ESI is stored for more than 20 years. The basic problem with the exception is elementary: it confuses authenticity of a document with reliability of its contents. It simply does not follow that because a document is genuine, the statements in the document are reliable. It can be argued that necessity does not justify the use of unreliable evidence, and that any hearsay statement that is old and that *should* be admissible can be offered under the residual exception — you don't need an ancient documents exception to admit old but reliable evidence.

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

Thus, the deletion would look something like this:

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

Committee Note

The ancient documents exception to the rule against hearsay has been abrogated. The

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

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

B. Limit the Exception to Hardcopy

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

If the Committee would wish to limit the ancient documents hearsay exception to hardcopy evidence, the amendment might look like this:

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

Committee Note

The ancient documents exception to the rule against hearsay has been amended to specify that it is not applicable to information that is electronically stored. The ancient

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

The amendment provides an exception to the general definition in Rule 101(b)(6), under which a reference to any kind of writing includes electronically stored information.

C. Add a Necessity Requirement:

Another option is to limit the exception to situations in which the initial justification still obtains — i.e., where it is necessary to introduce the old evidence because there are no alternatives. That amendment might look like this:

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

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

(B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.[10]

Committee Note

Rule 803(16) has been amended to require a specific showing of necessity before hearsay may be admitted under the ancient document exception. *See* Rule 807 (imposing an identical necessity requirement). Unlike the other hearsay exceptions, Rule 803(16) imposes no requirement that the hearsay in a document must be reliable. The basic justification for

[10] Thanks to Joe Kimble for his guidance on how to fit in the new language.

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

Reporter's Comment:

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

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Consideration of a Possible Amendment to Rule 609
Date: March 1, 2014

Over the years, many scholars (and a few judges) have argued that Rule 609(a)(2) should be reconsidered.[1] Rule 609(a)(2) provides that felony convictions *must* be admitted to impeach a witness's character for truthfulness "if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement."[2] The basic critiques of Rule 609(a)(2) are: 1) it is the only rule in all the Federal Rules of Evidence that prohibits the use of judicial balancing and discretion; 2) it raises problems in distinguishing convictions that are automatically admissible from convictions subject to judicial balancing under Rule 609(a)(1); and 3) it unnecessarily discourages criminal defendants from testifying, and is thus in tension with their constitutional right to testify.

This memorandum is intended to provide information to the Committee to assist it in deciding whether an amendment to Rule 609(a)(2) should be proposed. The memorandum is in four

[1] *See, e.g.*, Aviva Orenstein, *Honoring Margaret Berger With a Sensible Idea: Insisting That Judges Employ a Balancing Test Before Admitting the Accused's Convictions Under Federal Rule of Evidence 609(a)(2),* 75 Brook. L.Rev. 1291 (2010); James Beaver and Steven Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment,* 58 Temp. L.Q. 585 (1985); Teree Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform,* 57 Fordham L.Rev. 1 (1988).

[2] Rule 609(a) does not apply if more than 10 years have passed since the witness's conviction or confinement. For such dated convictions, the balancing test of Rule 609(b) governs admissibility. This discussion in this memorandum is limited to recent convictions, i.e., those whose timing is within Rule 609(a).

parts. Part One discusses Rule 609(a) and its history. Part Two discusses the arguments for and against amending Rule 609(a)(2) to provide for some judicial balancing of probative value and prejudicial effect. Part Three sets forth the evidence rules from the States that provide for judicial balancing with respect to convictions involving false statements. Part Four provides drafting alternatives.

I. Rule 609(a) and Its History

Rule 609(a), as restyled, provides as follows:

> **(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
>
> > **(1)** for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
> >
> > > **(A)** must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
> > >
> > > **(B)** must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and
> >
> > **(2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

The crucial distinction is between crimes involving a dishonest act or false statement and those that do not. If the crime involves a dishonest act or false statement, it is automatically admissible to impeach any witness, in any case, regardless of whether it is a felony or a misdemeanor. In contrast, for a crime does not involve a dishonest act or false statement to be admitted, it must first be a felony, and then it must pass through a balancing test under which the trial judge assesses probative value and prejudicial effect. If the witness is a criminal defendant, the balancing test is mildly tilted toward exclusion: probative value must outweigh prejudicial effect for the conviction to be admitted. If the witness is anyone other than a criminal defendant, then the Rule 403 test is applied — meaning that the conviction is presumptively admissible, because the prejudice must substantially outweigh the probative value for the evidence to be excluded.

A. History of Enactment of Rule 609(a)

The history of Rule 609(a) must be evaluated, because the Rule is a product of a legislative compromise, and that might bear on any question of amending it. What follows is a quick account of that history, much of which was taken from Wright and Gold, Federal Practice and Procedure §6131.

The legislative history of Rule 609(a) indicates deep disagreement among the Advisory Committee, the House, and the Senate about the value of prior conviction impeachment. Congress spent more time on Rule 609(a) than on any other evidence rule. While the debate was often couched in narrow terms, the argument in Congress became increasingly broad and ideological, focusing on how to balance the rights of an accused against the rights of society to defend itself from criminals.

Rule 6-09(a) in the Preliminary Draft of the Federal Rules of Evidence would have provided a rule that all convictions for crimes involving dishonesty or false statements, as well as all felony convictions, were automatically admissible. The drafters made no provision within the proposed rule for discretionary exclusion preventing unfair prejudice or unnecessary delay. In proposing this rule, the Advisory Committee was consistent with the common law, under which all felonies and all misdemeanors involving false statements were automatically admissible to impeach all witnesses.

Public comment on the Preliminary Draft focused on the absence of any discretion to exclude, no matter how serious, the threat of prejudice to an accused in a criminal case. Rule 6-09(a) was unfavorably compared to the approach of a then recent D. C. Circuit Court of Appeals decision, *Luck v. United States*, 348 F.2d 763 (D.C.Cir. 1965). In *Luck* the court construed a provision of the District of Columbia Code as permitting discretionary exclusion of convictions offered to impeach an accused. (The D.C. Rule provided that prior convictions "may" be admitted). The Advisory Committee responded to the public criticism by adding a section to Rule 609(a) in the Revised Draft of the Federal Rules of Evidence, providing for the exclusion of conviction evidence when its probative value is substantially outweighed by the danger of unfair prejudice. The drafters also revised their committee note to make clear their reliance on the *Luck* doctrine.

Unfortunately for the drafters, less than a year before promulgation of the Revised Draft, Congress had amended the District of Columbia Code for the purpose of eliminating the *Luck* doctrine. (The language was changed from "may be admitted" to "shall be admitted"). The drafters apparently had been unaware of that amendment. Senator McClellan, a powerful member of the Judiciary Committee, the point man in the Senate, and an outspoken advocate for prosecutorial interests, adamantly objected to Rule 609(a) in the Revised Draft, characterizing it as an intentional effort by the drafters to undermine congressional policy as expressed in its amendment to the District of Columbia Code. This supposed affront to congressional will contributed to Senator McClellan's subsequent legislative attempt to limit the rulemaking power of the Supreme Court, a proposal that threatened the entire project to create a Federal Rules of Evidence.

The drafters reacted to Senator McLellan's ire by returning, in the next draft, to the form of Rule 609(a) employed in the Preliminary Draft — i.e., automatic admissibility of all felonies and

all convictions based on dishonesty or false statement. The Advisory Committee's Note was rewritten to explain that the purpose of this reversal was to make the rule consistent with congressional policy as manifested in the 1970 amendments to the District of Columbia Code. The Supreme Court submitted subdivision (a) to Congress in this form.

Significant discussion of Rule 609(a) took place during hearings held by a subcommittee of the House Judiciary Committee. Most witnesses and correspondents favored a return to the Revised Draft approach by recognizing judicial discretion to exclude any conviction for unfair prejudice. The House subcommittee was at least partially swayed by the tenor of these comments. In the first Committee Print of June 28, 1973, a provision was added to Rule 609(a) giving the courts discretion to exclude convictions for "crimes punishable by death or imprisonment in excess of one year." However, no similar discretion was recognized for crimes "involving dishonesty or false statement." Thus, the subcommittee chose a middle ground between the Revised Draft's grant of discretion to exclude for unfair prejudice in all cases and the Supreme Court Draft's absolute denial of discretion.

The full House Judiciary Committee approved yet another version of subdivision (a), rejecting the subcommittee version because it did not adequately protect an accused from abuse. The Committee's version permitted convictions to be admitted "only if the crime involved dishonesty or false statement." No provision was made for balancing prejudice and probative value for those falsity-based convictions. One member of the Committee complained in a statement in the Committee Report that the balance now had been weighted too heavily in favor of the accused.

The floor debate in the House over Rule 609(a) focused upon the appropriate balance of society's interests in seeing the guilty convicted against the accused's right to a fair trial. An amendment was proposed which substituted the language of the Supreme Court version, eliminating discretion to exclude for unfair prejudice and permitting admission of all felony convictions, as well as any crime involving dishonesty or false statement. That amendment was defeated and the House Judiciary Committee's version of Rule 609 was passed: i.e., only falsity-based convictions would be admissible, but automatically so.

Proceedings in the Senate also reflected the diversity of viewpoints on Rule 609(a). The Senate Judiciary Committee heard from witnesses and correspondents favoring the House version, the Revised Draft, and the Supreme Court Draft. The Committee attempted to compromise by endorsing yet another version of Rule 609(a) which borrowed elements from each of these predecessors. (That version provided for balancing of all convictions, but non-falsity felonies would not be admissible against criminal defendants). Senator McClellan proposed on the Senate floor an amendment reminiscent of the Supreme Court Draft in that it made all felony convictions and all falsity-based convictions of any kind admissible, and eliminated the power to exclude any of those convictions for unfair prejudice. The debate that ensued focused again on the broader ideological question of balancing the right of society to protect itself from crime against the right of an accused to a fair trial. McLellan's amendment was narrowly approved.

This left the Conference Committee with the task of reconciling the two versions of Rule 609(a) which, from all those proposed, defined the scope of admissibility most narrowly and most

broadly. The narrow position was that only falsity-based convictions would be admissible, with no reference to judicial balancing. The broad version was that all felony convictions and all falsity-based convictions would be automatically admissible. The Committee compromised by making crimes involving dishonesty or false statement admissible with no discretion to exclude for unfair prejudice, while also making admissible felony convictions for crimes not involving dishonesty or false statement, but only if probative value outweighed unfair prejudice "to the defendant." Apparently exhausted, both houses acceded and enacted Rule 609(a).

B. 1990 Amendment:

In 1990, Rule 609(a) was amended because the end result of the original Congressional process was nonsensical in one respect: the language "to the defendant" read literally meant that *civil* defendants would be protected from impeachment with non-falsity felonies even though civil plaintiffs would not. *See Green v. Bock Laundry*, 490 U.S. 504 (1989) (rejecting this literal interpretation as being nonsensical, but noting the problem in the drafting of the rule). It could also be construed to protect against impeachment of any witness called by a defendant, because it would be the defendant who suffered prejudice if that witness were impeached with prior convictions.

The 1990 amendment limited the balancing test of "probative value must outweigh the prejudice" to *criminal* defendants who are testifying. But it also, importantly, made clear that Rule 403 applied to non-falsity convictions offered against any witness other than a criminal defendant.[3] The 1990 Committee Note states that "the danger of prejudice from the use of prior convictions is not limited to criminal defendants" and that "it is desirable to protect all litigants from the unfair use of prior convictions." Despite this broad language, however, the Committee did not touch Rule 609(a)(2), which of course provides for automatic admissibility of all falsity-based convictions.

It can be argued that the Advisory Committee actually assumed that Rule 609(a)(2), after the amendment, *had* somehow changed to allow for balancing. The Committee Note, as discussed above, refers to the need for *all* convictions to be excluded if unduly prejudicial. And in referring to Rule 609(a)(2), the Committee Note states that is was retained only "to faciliat[e] retrieval under current computerized research programs, which distinguish between the two subdivisions." But whatever the Committee's intent, the courts both before and after the amendment have held that falsity-based convictions are automatically admissible against all witnesses in all cases. *See, e.g., SEC v. Sargent*, 229 F.3d 68 (1st Cir. 2000) (trial judge excludes prior convictions for lying to the SEC because the witness admitted he lied on the stand; even if the conviction was cumulative, the trial court had no discretion to exclude it under Rule 609(a)(2)); *United States v. Collier*, 527 F.3d 695 (8th Cir. 2008) (credit card fraud conviction, which was predicate felony in a felon-firearm prosecution, was automatically admissible when the defendant testified); *United States v. Lester*, 749 F.2d 1288 (9th Cir. 1984) (under Rule 609(a)(2), "no discretion to exclude exists").

[3] Rule 403 is less protective than the balancing test provide for criminal defendants, because under Rule 403 the conviction is presumptively admissible to impeach and is only excluded if the prejudicial effect substantially outweighs the probative value.

C. 2006 Amendment

In 2006, Rule 609(a)(2) was amended, but not to add a balancing test to the automatic rule of admissibility. Rather, the Rule was amended to deal with the fact that the courts had been having trouble distinguishing between crimes that involve dishonesty and false statement and crimes that do not. Many courts had held that in determining whether a crime involves dishonesty or false statement, the court was required to look behind the conviction itself to determine if the witness had acted in some deceitful or dishonest way to commit the crime. The purpose of the 2006 amendment was to prohibit, or at least severely limit, that practice. The rule as amended provides that the conviction is automatically admissible only if the court can "readily determine that establishing the elements of the crime required proving * * * a dishonest act or false statement." As an example of the limitation imposed by the amendment, the Committee Note states that "evidence that a witness was convicted for a crime of violence, such as murder, is not admissible under Rule 609(a)(2), even if the witness acted deceitfully in the course of committing the crime." The intent of the amendment was to limit automatic admissibility to those crimes which, on their face, require proof of deceit, with one exception: obstruction of justice convictions would be automatically admissible if the indictment alleges deceitful conduct, even though the crime of obstruction of justice might be committed in non-deceitful ways.[4]

Since the amendment, it appears at least in the reported cases that the courts have refrained from going behind the conviction to determine how it was committed, with the exception of obstruction of justice convictions, which are evaluated by the allegations in the indictment. *See, e.g.*, *United States v. Jefferson*, 623 F.3d 227 (5th Cir. 2010) (factfinder had to have found an act of dishonesty or false statement in order for defendant to have been convicted of obstruction of justice, and, therefore, evidence of defendant's prior conviction for obstruction of justice was automatically admissible for impeachment purposes in defendant's subsequent trial; obstruction of justice charges each averred that defendant knowingly and corruptly attempted to persuade another to lie to the authorities). Though at least one court has stated in dictum that the trial court should go behind a *theft* conviction to see how it was committed, if the proponent asks the court to do so. *See United States v. Pruett*, 681 F.3d 232 (5th Cir. 2012). That dictum is not a correct reading of the 2006 amendment.

D. Reporter's Comment on Legislative History

Despite all the back and forth, the development of Rule 609 was subject to the baseline assumption that crimes involving dishonesty or false statement would be automatically admissible against all witnesses in all cases. The fight between the House and the Senate was about the admissibility of non-falsity crimes. It is clear that the intent in both houses was to narrowly define the crimes covered by Rule 609(a)(2). The Conference Report express the intent to confine

[4] The obstruction of justice carve-out was at the insistence of the Department of Justice. The DOJ did not have a good reason for this position, but it was adamant. So to save the amendment, the carve-out was made. I'm not proud of that result.

automatic admissibility to "only those crimes in which the ultimate criminal act was itself an act of deceit." 2006 Amendment Committee Note. But there was never a proposal made to subject this narrow band of crimes to judicial balancing. The 1990 Amendment Committee Note might be read to waffle on the subject, but the fact remains that the amendment added a Rule 403 balancing test to Rule 609(a)(1) but left Rule 609(a)(2) untouched.

Thus the legislative history would appear to cut against any amendment to add a balancing test to falsity-based convictions. But it is unclear what kind of deference should or must be given to a 40-year old decisonmaking process that ended up with a rule that had to be amended because at least in part it made no sense. Obviously it is for the Committee to determine how to weigh the legislative history.

II. Arguments For and Against an Amendment to Rule 609(a)(2)

A. For the Amendment

The strongest argument in favor of an amendment is that, as stated above, Rule 609(a)(2) is a glaring anomaly in the Federal Rules of Evidence. It is the only rule that permits of no judicial balancing. It means, for example, that even if a conviction is cumulative, or utterly prejudicial (because, say, it is for the same conduct of which a criminal defendant was convicted), the judge is powerless to exclude it. Judicial discretion in general, and Rule 403 in particular, is at the heart of the Federal Rules of Evidence. And yet, with respect to the single instance of falsity-based convictions, which constitute evidence imparting obvious prejudicial effect, the judge's hands are tied. It can be argued that something so out-of-kilter with the basic premise of the Federal Rules of Evidence should be struck in favor of allowing some judicial discretion.

Another argument often made by the commentators is that the automatic rule of admissibility operates unfairly to deprive (or at least impinge on) a criminal defendant's right to testify. Instead of facing the slings and arrows of automatic impeachment, a defendant will often decide not to testify. *See, e.g.*, Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Convictions*, 42 Vill. L.Rev. 1, 2 (1997) ("Typically, the defendant may keep the jury from learning of prior convictions only by waiving the right to testify" and "important evidence will be sacrificed by the refusal of the witness to submit to such impeachment."). [5]

A third argument made is that automatic conviction is an extreme rule because criminal defendants come to the stand pre-impeached for obvious bias. *See, e.g., United States v. Gaines*, 457

[5] A recent study by the Innocence Project indicates that a majority of wrongfully convicted defendants chose not to testify, assertedly because they were afraid of being impeached by prior convictions. Those assertions are after-the-fact, however.

F.3d 238, 248 (2nd Cir. 2006) ("Nothing could be more obvious, and less in need of mention to the jury, than the defendant's profound interest in the verdict."). Professor Bellin puts it this way:

> The inherently cumulative nature of impeaching criminal defendants with prior convictions is demonstrated by the common law roots of the modern statutory framework. At common law, a criminal defendant with a prior felony conviction was disqualified from testifying not only as a felon, but also as an interested party --- a separate and independent common law ground for disqualification. It stands to reason, then, that because only one ground for disqualification was considered sufficient to bar a witness from testifying at common law, only one ground for impeachment (felon or disinterested party) should now be necessary to substantially discredit a defendant's testimony.[6]

A fourth argument in favor of the amendment is that the sky will not fall if falsity-based convictions are subject to some kind of balancing. By definition, falsity-based convictions are highly probative of a witness's character for truthfulness. While there certainly are variables, in the run-of-the-mill case, the trial judge is quite likely to find that the probative value of a falsity-based conviction is sufficient to support admissibility despite any cumulative or prejudicial effect.[7] It might be predicted that the only time a falsity-based conviction would be admissible is when it is essentially unnecessary, i.e., where the witness's credibility is not important to the determination, or where the witness has already been thoroughly impeached. Thus, the conclusion could be that allowing for some discretion to exclude will promote trial efficiency with no loss to the search for truth.

A final argument in favor of deleting Rule 609(a)(2) — perhaps the most important one --- is that the distinction made necessary by the Rule (between (a)(1) and (a)(2) crimes) has created costs and problems for courts and litigants. The Federal Rules of Evidence Manual sets forth 60 circuit court cases in which the courts have been tasked with the chore of distinguishing between crimes that are covered by Rule 609(a)(2) and crimes that are covered by Rule 609(a)(1). While it might be argued that most of the work of categorization has already been done — e.g., courts have uniformly held that shoplifting is not a Rule 609(a)(2) crime because it can be committed without lying[8] — there is still some conflict in the courts about certain crimes. *See, e.g., Government of Virgin Islands v. Toto,* 529 F.3d 278 (3rd Cir. 1976) (petty larceny is not a falsity-based offense so

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[6] Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants With Prior Convictions,* 42 U.C. Davis L.Rev. 289, 299 (2008).

[7] Of course, the likelihood of a finding of admissibility is dependent on the balancing test used. If Rule 403 is applicable, a falsity-based conviction is very likely to be admissible, and the likelihood is diminished if the test applied for criminal defendant-witnesses in Rule 609(a)(1) is used.

[8] See, e.g., *Kunz v. DeFelice,* 538 F.3d 667 (7th Cir. 2008) (shoplifting conviction is not covered by Rule 609(a)(2)); *United States v. Dunson,* 142 F.3d 1213 (10th Cir. 1998) (same).

not automatically admissible); *United States v. Carden*, 529 F.3d 443 (5th Cir. 1976) (petty larceny conviction automatically admissible under Rule 609(a)(2); *Cree v. Hatcher*, 969 F.2d 34 (3rd Cir. 1992) (conviction for wilfully failing to file a tax return is not automatically admissible under Rule 609(a)(2)); *Zukowski v. Dunton*, 650 F.2d 30 (4th Cir. 1981) (conviction for wilfully failing to provide information to the IRS was sufficiently reprehensible to be automatically admissible); *United States v. Gellman*, 677 F.2d 65 (11th Cir. 1982) (same result as *Zukowski*). Thus, deleting Rule 609(a) (2) will cure some conflicts in the courts. Moreover, it stands to reason that there are plenty of crimes that have not yet been characterized by the courts. The empty task of such characterization can be avoided if Rule 609(a)(2) is deleted.

Finally, while the 2006 amendment did much to prevent courts from going behind the conviction to determine whether it was committed by way of false acts, that amendment unfortunately still contains wiggle room for a court to try to evaluate the underlying facts of a conviction — a process that is wasteful and has no bearing on the jury's assessment of credibility, as the jury only hears about the conviction itself and not the underlying facts. If Rule 609(a)(2) were deleted, there would be no reason to go behind the conviction, because all convictions would be subject to the same balancing test.

B. Against the Amendment

The basic argument against the amendment is that Rule 609(a)(2) — construed narrowly as it has been by most courts to cover only crimes the elements of which require proof of a false statement — makes sense and is in fact an efficient bright line rule. The argument is that in the vast majority of cases, falsity-based convictions, because they are so probative, will be admissible to impeach a witness under any balancing test that can be conceived, and if that is so, it is worthwhile to have a bright-line rule that avoids a case-by-case judicial balancing that will almost always reach the same result anyway. While any bright-line rule is overinclusive, the cost of occasional inexactitude is outweighed by the benefits of ease of administration.

The second argument against the amendment is that falsity-based convictions were automatically admissible under the common law, as well as under every version of Rule 609(a) that was considered by the Advisory Committee and Congress. Thus there is no support in the history of the Rule for an amendment that would subject such convictions to balancing.

The third argument against the amendment is that even if Rule 609(a)(2) were abrogated, this would not necessarily solve the problem of distinguishing between falsity-based crimes and other crimes. It may be appropriate, for example, to apply a different balancing test to the two sets of crimes. It may be appropriate to allow for admission of misdemeanors that are falsity-based but to exclude other misdemeanors. Thus, the problem of characterization might remain depending on how the rule is amended.

III. State Versions of Rule 609 That Permit Judicial Balancing of All Convictions

A number of states have versions of Rule 609 that provide for judicial balancing of falsity-based convictions.[9] They are set forth below.

Maine Rule of Evidence 609:

> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a specific crime is admissible but only if the crime (1) was punishable by death or imprisonment for one year or more under the law under which the witness was convicted, or (2) involved dishonesty or false statement, regardless of the punishment. In either case admissibility shall depend upon a determination by the court that the probative value of this evidence upon witness credibility outweighs any unfair prejudice to a criminal defendant or to any civil party.

Rhode Island Rule of Evidence 609:

> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record. "Convicted of a crime" includes (1) pleas of guilty, (2) pleas of nolo contendere followed by a sentence (i.e. fine or imprisonment), whether or not suspended and (3) adjudications of guilt.
>
> (b) Discretion. Evidence of a conviction under this rule is not admissible if the court determines that its prejudicial effect substantially outweighs the probative value of the conviction. * * *

[9] Montana goes a step further than that and prohibits impeachment by prior convictions. See Montana Rule of Evidence 609 ("For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.").

South Dakota Laws Ann. §19-14-12:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or the accused and the crime:
>
> > (1) Was punishable by death or imprisonment in excess of one year under the law under which he was convicted; or
> >
> > (2) Involved dishonesty or false statement, regardless of the punishment.

Texas R. Evid. 609

> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.

Wisc. Stat. Ann. 906.09

> (1) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible. The party cross-examining the witness is not concluded by the witness's answer.
>
> (2) Exclusion. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

Reporter's Note: All of these states, except Texas, continue to distinguish between falsity-based crimes and other crimes. This is done to cover falsity-based misdemeanors. Query whether that is worth the characterization problems.

IV. Drafting Alternatives

The drafting alternatives below are based on two assumptions:

1. *The slightly more permissive balancing test for criminal defendants in Rule 609(a)(1) should be retained.* The two balancing tests are familiar to courts and nothing in the case law or commentary indicates a need for providing one balancing test rather than two. The special balancing test for criminal defendants appears justified: it provides a mild protection to criminal defendants in deference to their constitutional right to testify, without providing so much protection that the jury will be unaware of critical aspects of the defendant's credibility. And the Rule 403 test, applied to all other witnesses, needs no introduction and seems very appropriate as applied to impeachment of all other witnesses.[10]

It could be argued that criminal defendants in one respect are *worse off* under the special balancing test than they would be under Rule 403. Rule 403 specifically allows the judge to consider "undue delay, waste of time, or needless presentation of cumulative evidence." The Rule 609(a)(1) test by its terms allows the judge to consider only prejudicial effect to the defendant. So it might be concluded that under Rule 609(a)(1) a trial judge would not be allowed to exclude a conviction of a criminal defendant on the ground that it is cumulative of other convictions. On closer inspection, though, the absence of a specific reference to waste of time or cumulative evidence would not seem to be material due to the way the Rule 609(a)(1) balancing test is calibrated. For example, if the defendant has seven prior convictions for the same crime and seeks to exclude one or two, the argument for exclusion need not be pitched in terms of cumulativeness. Rather, the argument for exclusion can be successfully made by stating that the probative value of cumulative convictions is essentially zero, and therefore the probative value does not outweigh the prejudicial effect. It is true, of course, that the prejudicial effect of a cumulative conviction probably approaches zero as well, but remember that under the Rule 609(a)(1) balancing test the probative value must outweigh the prejudicial effect for the conviction to be admissible. I have not been able to find a reported case in which the absence of an explicit reference to cumulativeness in Rule 609(a)(1) has made a difference or has even been discussed. The absence of any discussion or problem counsels against changing the language of that test. If the Committee believes that an explicit reference to cumulativeness should be added to the Rule 609(a)(1) balancing test, that probably could be done — but that is not to say it would be easy or elegant.

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[10] The Texas version of Rule 609(a) has the virtue of simplicity because it applies a single test to all convictions. But under that rule, the defendant-friendly balancing test is applied to all convictions. The need for greater protection of non-criminal defendant witnesses is not obvious. And considering that the Rule 403 test applies to impeachment with bad *acts* under Rule 608, it is hard to see why a more exclusionary test should apply across the board to impeachment with prior convictions.

The other way to have a uniform test (and thus a simpler rule) would be to apply Rule 403 to all convictions. But the criminal defendant-friendly test seems to give proper deference to the accused's right to testify.

2. *There is no need to provide any kind of different balancing tests for falsity-based convictions.* Assuming a decision has been made to provide some judicial balancing for falsity-based convictions, it is difficult to see why that balancing should be conducted under some test different from those currently applied to Rule 609(a)(1) convictions. Adding a new and different balancing test would be sure to confuse and would make the Rule more difficult to apply than it already is. Moreover, most falsity-based convictions are likely to be admissible under *any* balancing test and so, frankly, the balancing test that is used is not as important as the fact that there is *some* balancing test to provide for judicial discretion in unusual cases.

Given these assumptions, there are really only two drafting alternatives: one that simply does away with Rule 609(a)(2), and the other that retains the designation for convictions involving dishonesty or false statement, in order to cover falsity-based misdemeanors. If the Committee disagrees with the above two assumptions, then different drafting alternatives can be provided for a future meeting.

1. Alternative 1. Deleting Rule 609(a)(2) and the "dishonesty act or false statement" characterization. [11]

(a) In General. ~~The following rules apply~~ This rule applies to attacking a witness's character for truthfulness by evidence of a criminal conviction~~:~~ If,

~~(1) for~~ a crime that, ~~in~~ the convicting jurisdiction, the crime was punishable by death or by imprisonment for more than one year, the evidence:

~~(A)~~**(1)** must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

~~(B)~~ **(2)** must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant~~; and~~ **.**

~~**(2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.~~

Draft Committee Note

Rule 609 has been amended to allow trial courts the limited discretion to exclude prior convictions even if they involve a dishonest act or false statement. Under the previous rule, *crimen falsi* crimes were automatically admissible against all witnesses in all cases — even if they were cumulative or unduly prejudicial. Rule 609(a)(2) was an anomaly; it was the only rule in the Federal Rules of Evidence that barred the trial judge from exercising discretion to exclude evidence where the circumstances so justified. While the rule properly recognized that falsity-based convictions are more probative of a witness's character for truthfulness than others, the Committee determined that this heightened probative value can and will be taken into account by a court through a proper balancing test. The end result is that such convictions will ordinarily be admitted, but the court retains discretion to exclude in cases where, for example, the convictions are cumulative or extremely prejudicial.

The amendment retains the special balancing test for a defendant-witness in a criminal case. The Committee saw no need to apply a different balancing test to falsity-based

[11] Thanks to Joe Kimble for his style suggestions.

convictions, as it would unnecessarily complicate the rule, and falsity-based convictions are likely to be admissible in most cases under any balancing test.

Under the amendment, falsity-based misdemeanors are no longer admissible to impeach a witness's character for truthfulness. The Committee determined that the costs and difficulties of drawing a distinction between those convictions that involve dishonesty or false statement and those that do not (*see* the Committee Notes to the 1990 and 2006 amendments to Rule 609(a)) outweigh the minimal benefit of impeachment with falsity-based misdemeanors. All convictions covered by the rule are now treated under the balancing tests previously set forth by Rule 609(a)(1).

Reporter's comment: **One possible complicating factor under this proposal is that there is a Rule 609(a)(2) that is completely different from the existing Rule 609(a)(2). That might be thought to complicate electronic searches. One possible way around that is to change from numbered subdivisions to bullet points. Joe Kimble thinks that there should be numbered subdivisions.**

There will probably be some pushback from excluding *crimen falsi* misdemeanors. But if they are included, the rule falls right back into the problem of having to distinguish crimes that involve dishonesty or false statement from those that do not. Moreover, as seen below, the amendment gets unduly complex if such misdemeanors are included.

2. Alternative 2: Retaining the "dishonest act or false statement" language in order to cover falsity-based misdemeanors.

~~**(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:~~

~~**(1)** for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:~~

~~**(A)** must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and~~

~~**(B)** must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and~~

~~**(2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.~~

(a) In general. To attack a witness's character for truthfulness, evidence that a witness has been convicted of a crime is admissible:

(1) if, in the convicting jurisdiction, the crime was punishable by death or by imprisonment for more than one year; or

(2) if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

(b) Admitting the evidence when a witness is and is not a defendant in a criminal case. Evidence of the conviction:

(1) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(2) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant.

Committee Note

Rule 609 has been amended to allow trial courts the limited discretion to exclude prior convictions even if they involve a dishonest act or false statement. Under the previous rule, *crimen falsi* crimes were automatically admissible against all witnesses in all cases — even if they were cumulative or unduly prejudicial. Rule 609(a)(2) was an anomaly; it was the only rule in the Federal Rules of Evidence that barred the trial judge from exercising discretion to exclude evidence where the circumstances so justified. While the rule properly recognized that falsity-based convictions are more probative of a witness's character for truthfulness than others, the Committee determined that this heightened probative value can and will be taken into account by a court through a proper balancing test. The end result is that such convictions will ordinarily be admitted, but the court retains discretion to exclude in cases where, for example, the convictions are cumulative or extremely prejudicial.

The Committee saw no need to apply a different balancing test to falsity-based convictions, as it would unnecessarily complicate the rule, and falsity-based convictions are likely to be admissible under virtually any balancing test.

Reporter's Note: **It is obviously difficult to construct a rule that applies two different balancing tests and also tries to distinguish between two kinds of convictions. Joe Kimble worked on this proposal and concluded that the only way to get all the factors laid out is to have two subdivisions, (a) and (b). This would mean, of course, that all the existing subdivisions must be moved down. That kind of disruption may well not be worth the candle. The complication is caused by retaining admissibility of misdemeanors that involve dishonesty or false statement, thus requiring the delineation made by subpart (a).**

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Judge Posner's suggestion that the hearsay exceptions for excited utterances and present sense impressions should be reconsidered; and that all hearsay be evaluated under a simplified Rule 807 for reliability.

Date: March 1, 2014

This memorandum attaches the Seventh Circuit's recent opinion in *United States v. Boyce*. In a rather unremarkable case involving the exceptions for present sense impressions (Rule 803(1)) and excited utterances (Rule 803(2)), Judge Posner in a concurring opinion argued for two fundamental changes to the Federal Rules of Evidence. First, he contended that the exceptions for present sense impressions and excited utterances should be reconsidered because their rationales are weak and unsupported by social science or common sense. Second, he suggested that the Federal Rules hearsay exceptions should be scrapped in favor of a single exception — a "simplified" Rule 807 — that would allow the trial judge to determine whether hearsay is sufficiently reliable to be admissible on a case by case basis.

As of this date the opinion is only two weeks old, Judge Posner's suggestions are in broad strokes, and the Reporter has not had enough time to do a work-up on how these suggestions could be implemented. Thus, the opinion is submitted to the Committee for discussion purposes at this time. Should the Committee be interested in pursuing either or both of Judge Posner's suggestions, the Reporter will prepare a full memorandum for the next meeting. The Reporter's initial comments on Judge Posner's proposals are set forth after the case.

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TAB 5B

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United States Court of Appeals,

Seventh Circuit.
UNITED STATES of America, Plaintiff–Appellee,
v.
Darnell BOYCE, Defendant–Appellant.
No. 13– 1087.

Argued Oct. 3, 2013.
Decided Feb. 13, 2014.

Background: Following denial of defendant's motion to dismiss indictment, 2011 WL 4906826, and grant in part of government's motion in limine, 2011 WL 5078186, defendant was convicted in the United States District Court for the Northern District of Illinois, Robert M. Dow, Jr., J., of being felon in possession of firearm and ammunition and was sentenced to 210 months' imprisonment. Defendant appealed.

Holdings: The Court of Appeals, Williams, Circuit Judge, held that:

(1) defendant had predicate felony for purposes of his conviction for felon in possession of firearm and ammunition, and
(2) District Court did not abuse its discretion by admitting statements from 911 call by mother of defendant's children under excited utterance exception to hearsay rule.

Affirmed.

Posner, Circuit Judge, filed a concurring opinion.

Before POSNER, FLAUM, and WILLIAMS, Circuit Judges.

WILLIAMS, Circuit Judge.

***1** After a foot chase during which an officer said he saw Darnell Boyce throw a gun into a yard, officers recovered the gun from the area and also found ammunition for the gun in Boyce's pocket. A jury convicted Boyce of being a felon in possession of a firearm and ammunition. He maintains that he could lawfully possess a handgun on the premise that his civil rights had been restored. In light of our precedent, we disagree and conclude that a letter to Boyce restoring his civil rights did not do so for all his prior felonies. Boyce also challenges the admission at trial of statements of Sarah Portis, the mother of four of his children, made during a 911 call, including that Boyce had a gun. We find no abuse of discretion in the district court's admission of the statements under the excited utterance exception to the hearsay rule because they were made while under the stress of a

domestic battery and related to it. We affirm the district court's judgment.

I. BACKGROUND

Sarah Portis called 911 at around 7:45 p.m. on March 27, 2010, asking that police come to her residence because her child's father had just hit her and was "going crazy for no reason." The 911 operator asked, "Any weapons involved?" to which Portis responded, "Yes." The operator asked what kind, and Portis said, "A gun." The operator said, "He has a gun?", then "Hello?", and Portis responded, "I, I think so. 'Cause he just, he just." After the operator said, "Come on," Portis responded, "Yes!" twice. The operator again inquired, "Did you see one?" and Portis replied, "Yes!" The operator then cautioned Portis that if she wasn't telling the truth, she could be taken to jail. Portis responded, "I'm positive." After giving a description of what Boyce was wearing, the operator asked where he was at the moment. Portis responded that she "just ran upstairs to [her] neighbor's house" and didn't know whether Boyce had left her house yet.

Within minutes, Officers Robert Cummings and Eugene Solomon responded to the 911 call. After determining Boyce was no longer in the apartment, they interviewed Portis for about five to ten minutes. Officer Solomon described Portis as "appear[ing] emotional as if she just had an argument, perhaps a fight, someone who was just running." The officers then went to their car to complete a case report for domestic battery. While they were sitting in their squad car, the officers saw that Boyce had returned to the outside of Portis's residence and was calling out her name. Officer Solomon asked Boyce to come over, but Boyce ran away instead, and Officer Cummings ran after him. During the chase, Officer Cummings saw Boyce reach toward the midsection of his body, retrieve a nickel-plated handgun, and toss it over a garage into a yard. The officer caught up with Boyce soon afterward and detained him. Officers found a silver .357 Magnum handgun in the area where Officer Cummings saw Boyce throw a gun. Officers also found three .357 bullets in Boyce's right front pants pocket after they arrested him.

***2** Boyce was charged with one count of being a felon in possession of a firearm and one count of being a felon in possession of ammunition, in violation of 18 U.S.C. § 922(g)(1) and § 924(e)(1). While he was in jail awaiting trial, Boyce sent Portis a letter requesting that she recant her statement that he had a gun. He even provided the language he wanted her to use in a letter he wanted her to write to him:

> It seems like my whole life is going down since I called the police and I lied on you. I didn't know that those police was going to actually put a gun on you. Like I said before, I am so sorry for calling them and lying about you had a gun and hit me, but you just misunderstand how I felt when I saw you and the other girl hugging and kissing.... So the only way I thought of paying you back was to call the police and get you locked up once again. I'm so sorry.

Boyce and Portis also spoke by telephone while he was in jail, and Boyce said "our story" to which they would stick was that Portis made the whole thing up because she was mad he had been talking to another woman.

Portis did not testify at trial, but the government played a recording of her 911 call for the jury.

In arguing that Boyce possessed a firearm on March 27, 2010, the government pointed to Officer Cummings's testimony that he saw Portis throw a gun, other officers' testimony recounting the recovery of the gun in the area and ammunition matching the gun in Boyce's pocket, and Portis's statement on the 911 call that Boyce had a gun. A jury found Boyce guilty on both charged counts.
* * *

II. ANALYSIS

* * *

B. 911 Call Properly Admitted

***4** [3] We next turn to Boyce's argument that the government should not have been allowed to introduce Portis's 911 call at trial. Portis did not testify at trial. The jury still heard her voice, though, as the government played the audio recording of her 911 call during the trial. (The jury received a transcript of the call as well.) The district court admitted Portis's 911 call on the basis that it was a present sense impression under Federal Rule of Evidence 803(1) and an excited utterance under Federal Rule of Evidence 803(2). Boyce maintains that the call does not fall within either of these hearsay exceptions. We review the district court's evidentiary rulings for an abuse of discretion. *United States v. Joy*, 192 F.3d 761, 766 (7th Cir.1999).

Rule 803(1), the present sense impression exception, provides that "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it" is not excluded by the rule against hearsay. Rule 803(2) sets forth the exception for an "excited utterance," defined by the rule as "[a] statement relating to a startling event or condition, made while the declarant was under the stress of the excitement that it caused."

The theory underlying the present sense impression exception "is that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." Fed.R.Evid. 803 advisory committee's note. Along similar lines, the idea behind the excited utterance exception is that "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." *Id.* In other words, the statement must have been a spontaneous reaction to the startling event and not the result of reflective thought. 2 McCormick on Evidence § 272 (7th ed.2013).

But that is not to say the spontaneity exceptions in the Federal Rules of Evidence necessarily rest on a sound foundation. We have said before regarding the reasoning behind the present sense impression that "[a]s with much of the folk psychology of evidence, it is difficult to take this rationale entirely seriously, since people are entirely capable of spontaneous lies in emotional circumstances." *See Lust v. Sealy*, 383 F.3d 580, 588 (7th Cir.2004) (noting studies showing that less than one second is needed to fabricate a lie) (citing Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 Fla. St. U.L.Rev. 907, 916 (2001)). As for the excited utterance exception, "The entire basis for the exception may ... be questioned. While psychologists would probably concede that excitement minimizes the reflective self-interest influencing the declarant's statements, they have questioned whether this might be outweighed by the distorting

effect of shock and excitement upon the declarant's observation and judgement." 2 McCormick on Evidence § 272 (7th ed.2013).

***5** Nonetheless, we have recognized that despite these issues, the exceptions are well-established. *See Ferrier v. Duckworth*, 902 F.2d 545, 547–48 (7th Cir.1990); *see also White v. Illinois*, 502 U.S. 346, 356 n. 8, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (describing excited utterance as a "firmly rooted" exception to the general prohibition against hearsay). Boyce, while pointing to some of this criticism, does not ask us to find the exceptions utterly invalid, and so we proceed to consider his arguments that the exceptions do not apply in the circumstances of his case.

To take the Rule 803(1) present sense impression exception first, we have said that to be admissible under this rule, "(1) the statement must describe an event or condition without calculated narration; (2) the speaker must have personally perceived the event or condition described; and (3) the statement must have been made while the speaker was perceiving the event or condition, or immediately thereafter." *United States v. Ruiz*, 249 F.3d 643, 646 (7th Cir.2001). Here, Portis was personally present during the domestic battery she recounted during the 911 call. The questions here are whether Portis's statements were made without calculated narration and whether her 911 call was sufficiently contemporaneous to constitute a present sense impression.

To take the timing issue first, while Portis did not call 911 as Boyce was hitting her, nor would that have been feasible or wise to do, the Advisory Committee's Note to Federal Rule of Evidence 803 "recognizes that in many, if not most, instances precise contemporaneity is not possible and hence a slight lapse is allowable." *See also, e.g., Ruiz*, 249 F.3d at 647 (upholding admission of statements made "shortly after" observations). Portis's statements to the 911 operator that Boyce had "just" hit her and that she had "just" run upstairs to her neighbor's house indicate that she called 911 nearly immediately after her observations. That timing is consistent with other circuits' interpretation of the present sense impression exception. *See, e.g., United States v. Davis*, 577 F.3d 660, 669 (6th Cir.2009) (admitting 911 call where caller reported seeing defendant with a gun as present sense impression and excited utterance in § 922(g)(1) case and stating it did not matter whether statements were made thirty seconds or five minutes after witnessing event); *United States v. Shoup*, 476 F.3d 38, 42 (1st Cir.2007) (finding that statements in 911 call made about one to two minutes after leaving dangerous situation and going into apartment constituted present sense impression and excited utterance).

[4] A statement must also be made without calculated narration to qualify under the present sense impression exception, *United States v. Woods*, 301 F.3d 556, 562 (7th Cir.2002), and Boyce points out that Portis did not mention a gun until questioned by the dispatcher as to whether Boyce had any weapons. One can still make statements without calculated narration even if made in responses to questions. *Cf. United States v. Thomas*, 453 F.3d 838, 844 (7th Cir.2006) (admitting 911 call, including responses to operator questions, as present sense impression). Here, notably, when the operator asked what kind of weapon, Portis told the operator "a gun." The operator did not ask whether Boyce had a gun; it was Portis who first brought up the gun's presence.

***6** [5] But answering questions rather than giving a spontaneous narration could increase the

chances that the statements were made with calculated narration, and, as we discussed, Portis ran to another residence between the battery and her 911 call. We need not definitively decide whether these concerns mean Portis's statements fail to qualify under the present sense impression exception because even if they did, they would still be admissible as an excited utterance. The excited utterance exception "allows for a broader scope of subject matter coverage" than the present sense impression. *United States v. Moore*, 791 F.2d 566, 572 (7th Cir.1986). This is because the Federal Rules of Evidence provide that an excited utterance includes a statement "relating to" a startling event, Fed.R.Evid. 803(2), while the present sense impression exception is limited to "describing or explaining" the event, Fed.R.Evid. 803(1); *see also* *Moore*, 791 F.2d at 572.

[6] For the excited utterance exception to apply, we have said that the proponent must demonstrate that: "(1) a startling event occurred; (2) the declarant makes the statement under the stress of the excitement caused by the startling event; and (3) the declarant's statement relates to the startling event." *Joy*, 192 F.3d at 767. The statement "need not be contemporaneous with the startling event to be admissible under rule 803(2) ... [r]ather, the utterance must be contemporaneous with the excitement engendered by the startling event." *Id.* at 765 (citation and internal quotation marks omitted); *see also* *United States v. Wesela*, 223 F.3d 656, 663 (7th Cir.2000) (stating timing of statement important but not controlling and that what matters is whether statement made "contemporaneously with the excitement resulting from the event, not necessarily with the event itself") (citations omitted).

[7] Here, the startling event of a domestic battery occurred. Portis called 911 and reported that Boyce had just hit her and was "going crazy for no reason" and that he had a gun. Next, Portis made her 911 call while under the stress of the excitement caused by the domestic battery. She made the call right after the battery, telling the operator that she had "just" run upstairs to her neighbor's house. Officer Solomon's testimony that Portis appeared emotional, as though she had just been in an argument or fight, further supports the district court's conclusion that Portis made the call while under the stress or excitement of the startling event.

Boyce principally takes issue with the district's court finding that her statements related to the startling event. In particular, he argues that the gun Portis described in the call was not related to the domestic battery she was reporting. Instead, he says, her reference to a gun in the call referred to a separate, earlier time when Boyce possessed a gun.

We do not find an abuse of discretion in the district court's determination that Boyce's statement in the call that she had seen Boyce with a gun was related to the domestic battery. During her call to 911 requesting help from the police, Portis told the operator that Boyce had a gun and responded "Yes!" several times when the operator asked if she had seen it. Upon further questioning she replied that she was "positive." When the dispatcher asked Portis whether any weapons were involved, the dispatcher was trying to obtain information regarding the battery and the level of danger posed by her assailant. And Portis said a weapon, in particular a gun, was involved. In doing so, Portis provided the dispatcher with information about her assailant and the danger she experienced just minutes before the call. This description of the threat posed by the man who battered her relates to the incident which produced her agitated state.

***7** In addition to stating in the 911 call, and then confirming multiple times, that Boyce had a gun, Boyce stated in response to the government's motion in limine that Portis told the responding officers Boyce had physically assaulted her and that she had witnessed him take a gun from a bedroom dresser before leaving the apartment. Boyce points out that although the probation officer interviewed Portis while preparing the Presentence Report, there is nothing in it that suggests that Portis recounted seeing Boyce with a gun to the probation officer. The district court's decision to allow the account Portis gave in the immediate aftermath of the event, before she had the time to consider the effect it might have on the father of her children (and Boyce's communications to Portis suggest he was trying to influence her), is consistent with the rationale underlying the excited utterance exception. And while corroboration is not required for admissibility, *see* *Ruiz*, 249 F.3d at 647, here Portis's statement that Boyce had a gun was corroborated by Officer Cummings's testimony that he saw Boyce throw a gun and by the testimony of other officers who recovered the gun and found bullets matching the gun in Boyce's pocket.

Even if Boyce is correct that his gun was not at arms' length while he struck her, if a domestic battery victim in Portis's circumstances knows her assailant has access to a gun nearby, the potential for more lethal force to be used against her would be a subject likely to be evoked in the description of her assault. *See* *Moore*, 791 F.2d at 572 (quoting 4 Weinstein Evidence ¶ 803(2) [01] at 803–95 (1985) in explaining excited utterances: "If the subject matter of the statement is such as would likely be evoked by the event, the statement should be admitted."). Under the facts of this case, we find no abuse of discretion in the district court's decision to admit Portis's statements during the 911 call as excited utterances under Rule 803(2).

* * *

POSNER, Circuit Judge, concurring.

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

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

was both those things, but there is profound doubt whether either should be an exception to the rule against the admission of hearsay evidence.

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

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

***9** The rationale for the exception for a "present sense impression" is that if the event described and the statement describing it are near to each other in time, this "negate[s] the likelihood of deliberate or conscious misrepresentation." Advisory Committee Notes to 1972 Proposed Rules. I don't get it, especially when "immediacy" is interpreted to encompass periods as long as 23 minutes, as in *United States v. Blakey*, 607 F.2d 779, 785–86 (7th Cir.1979), 16 minutes in *United States v. Mejia–Velez*, 855 F.Supp. 607, 614 (E.D.N.Y.1994), and 10 minutes in *State v. Odom*, 316 N.C. 306, 341 S.E.2d 332, 335–36 (N.C.1986). Even real immediacy is not a guarantor of truthfulness. It's not true that people can't make up a lie in a short period of time. Most lies in fact are spontaneous. See, e.g., Monica T. Whitty et al., "Not All Lies Are Spontaneous: An Examination of Deception Across Different Modes of Communication," 63 *J. Am. Society of Information Sci. & Technology* 208, 208–09, 214 (2012), where we read that "as with previous research, we found that planned lies were rarer than spontaneous lies." *Id.* at 214, 341 S.E.2d 332. Suppose I run into an acquaintance on the street and he has a new dog with him—a little yappy thing—and he asks me, "Isn't he beautiful"? I answer yes, though I'm a cat person and consider his dog hideous.

I am not alone in deriding the "present sense impression" exception to the hearsay rule. To the majority opinion's quotation from *Lust v. Sealy, Inc.*, 383 F.3d 580, 588 (7th Cir.2004)—"as with much of the folk psychology of evidence, it is difficult to take this rationale [that immediacy negates the likelihood of fabrication] entirely seriously, since people are entirely capable of spontaneous lies in emotional circumstances"—I would add the further statement that " 'old and new studies agree that less than one second is required to fabricate a lie.' " *Id.*, quoting Douglas D. McFarland, "Present Sense Impressions Cannot Live in the Past," 28 *Fla. State U.L.Rev.* 907, 916 (2001); see

also Jeffrey Bellin, "Facebook, Twitter, and the Uncertain Future of Present Sense Impressions," 160 *U. Pa. L. Rev* . 331, 362–66 (2012); I. Daniel Stewart, Jr., "Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence," 1970 *Utah L.Rev.* 1, 27–29. Wigmore made the point emphatically 110 years ago. 3 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 1757, p. 2268 (1904) ("to admit hearsay testimony simply because it was uttered at the time something else was going on is to introduce an arbitrary and unreasoned test, and to remove all limits of principle").

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

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

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

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

I don't want to leave the impression that in questioning the present sense and excited utterance exceptions to the hearsay rule I want to reduce the amount of hearsay evidence admissible in federal trials. What I would like to see is Rule 807 ("Residual Exception") swallow much of Rules 801 through 806 and thus many of the exclusions from evidence, exceptions to the exclusions, and notes

of the Advisory Committee. The "hearsay rule" is too complex, as well as being archaic. Trials would go better with a simpler rule, the core of which would be the proposition (essentially a simplification of Rule 807) that hearsay evidence should be admissible when it is reliable, when the jury can understand its strengths and limitations, and when it will materially enhance the likelihood of a correct outcome.

C.A.7 (Ill.),2014.

Reporter's Initial Comments:

As to Judge Posner's first suggestion — to scrap Rules 803(1) and 803(2) — he is right that the scientific data (and common experience) indicates that people can lie immediately and that they can lie even though (or because) they are excited. Thus the rationales for these exceptions are pretty weak. Whether that is enough to justify deleting exceptions that are the subject of extensive case law over more than 40 years (including two recent Supreme Court cases) is a difficult question. The Committee might be wise to seek data from judges and litigants before taking such a drastic step — perhaps a mini-conference and/or a Federal Judicial Center survey would be warranted.

As to the second suggestion, it bears noting that Judge Posner's suggestion was in fact the very first proposal on hearsay exceptions from the original Advisory Committee. An early draft proposed a single hearsay exception — hearsay would be admissible if the trial judge found the hearsay statement to be reliable under the circumstances. That proposal was roundly opposed by lawyers and judges. Judges wanted the structure of categorical rules — they didn't want to have to reinvent the reliability wheel every time someone raised a hearsay objection. Lawyers thought that leaving hearsay to a case-by-case judicial determination would result in judicial activism, as well as substantial uncertainty — as admissibility would depend on who the judge was and what the judge ate for breakfast. Lawyers expressed the concern that a circumstances-dependent single hearsay exception would raise the specter of unpredictable outcomes, and consequently difficulties in settling cases. After all this pushback, the Advisory Committee drafted the categorical exceptions, adding the residual exception to allow some play in the joints. And it is notable that a number of states refused to adopt even the limited residual exception, for fear the exception would be used by activist judges to swallow the hearsay rule.

It is for the Committee to determine whether the criticisms of the Advisory Committee's original draft retain currency today. It is undoubtedly true that the hearsay rule and its exceptions are inordinately complex. Perhaps the Advisory Committee could think about a project to simplify the rule and the exceptions, if that goal is possible. But it doesn't necessarily follow that the whole system should be scrapped in favor of a case-by-case determination of reliability — at least in the absence of some empirical study.

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

Memorandum To: CM/ECF Subcommittee
From: Daniel Capra, Reporter
Re: Amendment of Evidence Rules to accommodate CM/ECF
Date: July 1, 2013

This memorandum discusses the Evidence Rules that might be affected by CM/ECF, and provides comments and suggestions on whether any amendment to the Evidence Rules is necessary or advisable.

The list of possibly affected rules is small, for two reasons:

1) CM/ECF, including Next Gen, does not appear to be intended to impact the introduction of evidence at trial. Therefore any rule governing admissibility or inadmissibility of evidence is unlikely to require an amendment. I checked with CACM staffers and they could not think of anything in CM/ECF that was directly designed to have an evidentiary impact, other than electronic signatures — and the Evidence Rules Committee has already determined that a rule permitting the use of electronic signatures requires no change to the Federal Rules of Evidence. The CACM staffers did caution that there are thousands of changes that will be implemented in the Next Gen CM/ECF system, and some of them may have evidentiary implications, but they couldn't think of anything specific. So while there may be issues down the line when Next Gen is implemented, it seems inadvisable to try to pre-think some evidentiary implication that is not apparent at this point.

2) As to admission of electronic evidence, the Restyling accommodates its use throughout the Evidence Rules by way of definition. FRE 101(b)(6) provides that "a reference to any kind of written material or any other medium includes electronically stored information." Thus there should be no concern, for example, that a reference in the hearsay exceptions to "periodicals" (see FRE 803(18)) or "publications" (see FRE 803 (17)), or "records" (see Rule 803(6)) would fail to accommodate electronic versions.

With these two very important provisos in mind, what is set forth below are the Evidence Rules that might somehow be affected by CM/ECF. The list is, by intent, overly inclusive.

1. Rules with references to matters "on the record" or "for the record"

a. Rule 103. Rulings on Evidence

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, ***on the record***:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively ***on the record*** — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

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b. Rule 410 (b): Pleas, Plea Discussions, and Related Statements

(b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4):

* * *

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, ***on the record***, and with counsel present.

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c. Rule 612(b): Writing Used to Refresh Memory

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be ***preserved for the record.***

_____

Comment on references to "the record": The references to "on the record" and "for the record" are not about admitting evidence but are rather about making a record, and accordingly there could be some CM/ECF effect as to the mode of judicial recordkeeping.[1] But there is nothing to indicate that a simple reference to "the record" would not cover records that are prepared and kept pursuant to CM/ECF. For example, the rules do not say, or even imply, that the record must be in hardcopy or kept in a certain way. Moreover, to the extent the references to "on the record" might be thought to refer to a written record, any issue of technological advancement would seem to be covered by the aforementioned Rule 101(b)(6) — *any* reference to written material includes electronically stored information. So it would not seem that an amendment to any of the above rules is necessary.

It should be noted that an amendment to Rule 410(b)(2) would be particularly inadvisable, because the reference to "on the record" in that Rule covers state as well as Federal proceedings.

[1] Of course, rules governing evidentiary admission of records and writings abound — see, e.g., Rules 803(6) (business records), 803(8) (public records). But these references are not discussed here because they have all been updated to accommodate electronic information by the definitional provision in Rule 101(6).

2. Rules Requiring Notice

a. Rule 404(b)(2)

(2) Permitted Uses; Notice in a Criminal Case.

This evidence may be admissible for another purpose, such as proving motive, 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 or 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.

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c. Rules 413(b) and 414(b) (identical):

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

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d. Rule 415(b):

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

e. Rule 609(b): Impeachment with old convictions

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

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

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

f. Rule 807(b): Residual exception to the hearsay rule

(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.

Comment on notice provisions: A notice provision is not about the presentation of evidence but rather about providing notice, and NextGen will have an effect on how notice is provided to parties in an action. But this does not mean that all of these rules need to be amended. The rules generally say nothing about the *manner* of notice; they only require notice to be provided. It is apparent that these Evidence Rules defer to other rules and procedures outside the FRE to determine the mechanics of how notice is to be provided. This makes sense, as the FRE is generally about admissibility, and not about how to file, plead, etc.

The possible exception is Rule 609(b), which refers to *written* notice. It is true that this is a specification of the manner of notice and thus needs to accommodate the technological changes wrought by CM/ECF. Yet there is a strong argument that the accommodation has already been made in Rule 101(b)(6). Rule 609(b) refers to a writing, and under Rule 101(b)(6), "a reference to any kind of written material . . . includes electronically stored information." The definition is not limited

to terminology about admissibility of evidence. The Rule refers to any reference to written material anywhere in the Evidence Rules. Thus it is questionable whether it is necessary to amend Rule 609(b) to accommodate CM/ECF. It should be noted, though, that if an amendment is advisable, it is an easy one to make: simply delete the word "written."

3. References to Court Orders

a. Rule 502(d): Court order protecting against waiver of privilege

(d) Controlling Effect of a *Court Order*. A federal court may ***order*** that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.

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b. Rule 612(b) and (c): Writing Used to Refresh Memory

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and ***order*** that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record. [2]

(c) Failure to Produce or Deliver the Writing. If a writing is not produced or is not delivered as ordered, the court ***may issue any appropriate order***. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

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c. Rule 615: Sequestration of witnesses

Rule 615. Excluding Witnesses

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. * * *

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[2] The reference to the preparation of a "record" in Rule 612(a) is discussed above in section 1.

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d. Rule 705: Disclosure of expert's basis

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

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e. Rule 706: Court-appointed experts

Rule 706. Court-Appointed Expert Witnesses

(a) Appointment Process. On a party's motion or on its own, ***the court may order*** the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

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f. Rule 1006: Summaries

Rule 1006. Summaries to Prove Content

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And ***the court may order*** the proponent to produce them in court.

Comment on References to Court Orders: Entry of court orders is surely affected by CM/ECF, but that would not appear to necessitate an amendment to every — or any — Evidence Rule that

refers to a court order. The Evidence Rules references are concerned with the court making an order, but not with the mechanics of entry of an order. Nothing in the Evidence Rules mandates entry of an order that would be inconsistent with a change in technology. (And if it did that reference would be updated in any event by the previously discussed definition in Rule 101(b)(6)).

4. References to Judgments

a. Hearsay exception for judgments of conviction.

(22) ***Judgment*** **of a Previous Conviction**. Evidence of a ***final judgment*** of conviction if:

(A) the ***judgment*** was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

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b. Hearsay exception for certain judgments

(23) ***Judgments*** **Involving Personal, Family, or General History, or a Boundary.** A ***judgment*** that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the ***judgment***; and

(B) could be proved by evidence of reputation.

Comment on rules referring to judgments: Entry of a judgment is affected by CM/ECF. But the above rules are not concerned with entry of a judgment. They are concerned with *admissibility* of a judgment however it might be entered. As to the form of the judgment for admissibility, the FRE, as previously discussed, already embraces evidence in electronic form. Thus there would appear to be no need to amend these provisions.

5. References to Motions, Filing, Service

b. Rule 412(c)

(c) Procedure to Determine Admissibility

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

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

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

(C) ***serve the motion*** on all parties;

(D) notify the victim or, when appropriate, the victim's guardian or representative.[3]

* * *

Rule 706: Court-appointed experts

Rule 706. Court-Appointed Expert Witnesses

(a) Appointment Process. ***On a party's motion or on its own***, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so ***in writing and have a copy filed with the clerk*** or may do so orally at a conference in which the parties have an opportunity to participate.

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[3] Note that Rule 412(c)(1)(D) requires the party seeking to introduce sexual conduct evidence to *notify* the victim or representative. But even if all of the other notice provisions need to be changed to accommodate CM/ECF, this provision should not be changed. The notification referred to must be flexible because the victim will not always be a party.

Comment on Rules Referring to Motions, Filing and Service:

Electronic case filing and case management affects the mechanics of making a motion, filing, and service — as opposed to the introduction of evidence. But the mere references to motions, filings and/or service in the above rules would not seem to raise any conflict with CM/ECF. The *manner* of filing and service is generally not specified — there is no implication or suggestion that service must be in person or by mail, or that a motion must be filed in hardcopy — and so, as it was before CM/ECF, the mechanics for complying with the Rule's requirements are generally left to provisions outside the Rules of Evidence.

There is one proviso — the reference in Rule 706(b), which provides that the court may inform the expert of her duties in writing and have a copy filed with the clerk, does deal with the manner of entry as opposed to the admissibility of evidence. The use of the term "writing" is likely not problematic because of the aforementioned definitional Rule 101(b)(6). But the use of the term "copy filed with the clerk" does seem outmoded in light of CM/ECF. The problem, if any, is not earth-shaking — Rule 706 is a little-used rule and the procedure provided is optional in any event. But it might be something that the Evidence Rules Committee would wish to consider as part of a technology package to be submitted with the other Advisory Committees.

6. References to Physical Presence in court for testimony

Rule 804. Exceptions to the Rule Against Hearsay - When the Declarant Is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

* * *

(4) ***cannot be present*** or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's ***attendance***, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's ***attendance or testimony***, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

Comment on references to physical presence: Clearly it is possible under CM/ECF for a witness to testify at trial without being physically present. Of course this has been the case for a long time. On first glance, it would appear that Rule 804(a) appears to define availability in terms of physical presence and so might end up admitting some hearsay on the grounds of unavailability even though the declarant could actually be able to testify remotely. The question, then, is whether the definition of unavailability should refer to inability to produce the witness not only physically but also remotely.

That question is already answered in the Rule insofar as absence is the asserted ground of unavailability. Rule 804(a)(5)(B) says a witness is not unavailable if his attendance *or testimony* can be produced. Thus, a witness who is available to testify remotely is *not* absent, for purposes of admitting the unavailability-based hearsay exceptions in Rules 804(b)(2)-(4). Procurement of physical attendance *is* required before prior testimony under Rule 804(b)(1) is admitted — see Rule 804(a)(5)(A) — but that is because the proponent in those circumstances is seeking to offer out-of-court *testimony* and it wouldn't make any sense to preclude that testimony if the alternative was only

another piece of out-of-court testimony.[4]

What about if a witness — who has made a hearsay statement that would be admissible under Rule 804(b) — is in the hospital, and would be able to testify remotely but cannot be moved to physically testify at the trial? That witness apparently would not be unavailable under Rule 804(a)(4) because he "cannot be present *or* testify at the trial." That is, the term "testify at the trial", fairly read, includes the possibility of remote testimony — a reading that is supported by the fact that testimony "at the trial" is an expressed alternative to physical presence. Thus there appears to be no need to amend Rule 804(a)(4) to accommodate the possibility of remote testimony.

All this discussion of remote testimony has been in the context of whether a hearsay declarant is unavailable when it is possible for the declarant to testify remotely. The broader question is whether the remote testimony should be freely admitted as a substitute for testimony made physically in court. That is a controversial question and it is not directly addressed by the Evidence Rules. Rule 801(c) defines hearsay as a statement made "other than while testifying at the trial or hearing." A witness who is testifying remotely in real-time during a trial is testifying "at" the trial. Thus, Rule 801 does not automatically exclude real-time trial testimony simply because it is coming from a remote location (as opposed to a canned videotaped deposition, which is not testimony made at trial). Courts have cited Rule 611(a) — allowing the trial court discretion in controlling the mode of examining witnesses — and Fed. R. Civ. P. 43(a) as authority for allowing remote testimony as a substitute for physical presence of the witness at trial, at least in cases where good cause is shown. *See, e.g., Parkhurst v. Belt*, 567 F.3d 995 (8th Cir. 2009) (no error in permitting child-witness to testify by closed circuit).

Nonetheless, studies indicate that live testimony has a stronger impact than testimony that is presented from a remote location. *See Traylor v. Husqvarna Motor,* 988 F.2d 729 (7th Cir. 1993) (reviewing studies). And in criminal cases there are of course Confrontation Clause concerns in using remote testimony as a substitute for live in-court testimony. *See generally Maryland v. Craig,* 497 U.S. 836 (1990) (requiring a specific showing of witness trauma before closed-circuit testimony was permitted). The most that can be said is that the question of evidentiary use of remote testimony in lieu of live in-court testimony is a complex one that would require significant study — probably by a joint effort of Evidence, Criminal, Civil and Bankruptcy.

[4] As to Rule 804(b)(6), the forfeiture exception, it is conditioned on an inability to procure physical presence, but the chance that an intimidated (or dead) witness is willing to testify remotely but not in person seems a slim one — though perhaps the scenario is plausible enough that the Evidence Rule Committee should take the following question under advisement: whether to move the reference about Rule 804(b)(6) from Rule 804(a)(5)(A) to Rule 804(a)(5)(B).

Conclusion

My initial review indicates that there is very little in the Evidence Rules that requires an amendment to accommodate changes wrought by CM/ECF. But further review will certainly be required as Next Gen rolls out. It should also be noted that the Evidence Rules Committee is holding a symposium in October about the effect of technology on the Federal Rules of Evidence, and it may well be that the participants in that symposium will find other Evidence Rules that warrant amendment to accommodate technology.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Federal Case Law Development After *Crawford v. Washington*
Date: March 1, 2014

The Committee has directed the Reporter to keep it apprised of case law developments after *Crawford v. Washington*. This memo is intended to fulfill that function. The memo describes the Supreme Court and federal circuit case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. It has been modified to have a separate, opening section *Williams v. Illinois*, which throws the Supreme Court's Confrontation Clause jurisprudence in disarray.

The memo is in four parts:

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

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

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

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

I. *Williams v. Illinois*

In *Williams v. Illinois,* 132 S.Ct. 2221 (2012), the Court brought substantial uncertainty to how courts are supposed to regulate hearsay offered against an accused under the Confrontation Clause. The case involved an expert who used testimonial hearsay as part of the basis for her opinion; but the splintered opinions in *Williams* create confusion not only for how and whether experts may use testimonial hearsay, but more broadly about how some of the hearsay exceptions square with the confrontation clause bar on testimonial hearsay.

The facts are as follows: Williams was tried for rape in a bench trial. When the victim was brought to the hospital, doctors took a blood sample and vaginal swabs for a sexual-assault kit. The police eventually sent these samples to a private laboratory, Cellmark, for DNA testing. Cellmark prepared a DNA profile and sent it back to the police. At the time the Cellmark report was prepared, the rapist was still at-large (that fact turns out to be important). Then Lambatos, a forensic specialist for the State Police, conducted a computer search to see if the Cellmark profile matched any profiles in the state DNA database. The computer showed a match with Williams's profile, which had been produced by the state lab from a sample of Williams's blood that had been taken in an unrelated arrest. At trial, there was in-court testimony that a swab was taken from the victim and that there was semen on it. There was in court testimony that after the semen test, the sample was stored in the lab. There was in-court testimony that the defendant's DNA profile was prepared from a blood sample after a previous arrest. There was in-court testimony that the defendant's DNA profile was added into the DNA database. And finally, there was in-court testimony from the expert that the profiles of the semen swab and the blood sample matched.

Two things that were not shown by in-court testimony were 1) that the swab sample went from the police to Cellmark, and 2) that they were sent back from Cellmark along with the profile, to the police. But the defendant did not challenge these two facts as they were proven by shipping manifests that were admitted as business records. (This is important because the court as early as *Crawford* found that business records are not testimonial because they are prepared for a non-litigative purpose. Indeed if they are prepared for a litigation purpose they are not admissible as business records, per *Palmer v. Hoffman*.)

So what exactly was the confrontation question in *Williams*? It was that no witness from Cellmark was called to testify to the preparation of the profile from the sample taken from the victim. Instead the state offered Lambatos as an expert witness in forensic biology and DNA analysis. She testified about the general process of DNA testing, and how profiles are matched based on a unique genetic code. She further testified that Cellmark was an accredited crime lab. Finally she testified that, based on her own comparison of the two DNA profiles, there was a match. The expert relied on Cellmark's assertion, in its report, that the sample tested is the one that the police sent it, and not another sample. The Cellmark report was neither admitted into evidence nor shown to the factfinder, i.e., the judge. Lambatos did not quote or read from the report. But she did testify on cross-examination that she relied on the DNA profile produced by Cellmark to reach her conclusion of a match — specifically that she relied on Cellmark's assertion that the profile it made was based on the vaginal swab from the victim that police sent to the lab.

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

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

The Alito Opinion:

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

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

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

The Kagan Opinion:

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

1) As to the Rule 703-based analysis, Justice Kagan stated that it was a "subterfuge" to say that it was only the expert's opinion (and not the underlying report) that was admitted against Williams. She reasoned that where the expert relies on a report, the expert's opinion is useful only if the report itself is true. Therefore, according to Justice Kagan, the argument that the Cellmark report was not admitted for its truth rests on an artificial distinction that cannot satisfy the right to confrontation. While she recognized that Rule 703 rests on the very distinction she rejected, her response was that an Evidence Rule cannot define an accused's right to confrontation.

2) As to Justice Alito's "targeting the individual" test of testimoniality, Justice Kagan declared that it was not supported by the Court's prior cases defining testimoniality in terms of primary motive. Her test of "primary motive" is whether the statement was prepared primarily for the purpose of *any* criminal prosecution, which the Cellmark report clearly was. [1]

The Thomas Opinion:

Justice Thomas was the tiebreaker. He essentially agreed completely with Justice Kagan's critique of Justice Alito's two grounds for affirming the conviction, i.e., that the Rule 703 analysis was an artifice and that the "primary motive" test is not limited to statements that target a particular individual. But Justice Thomas concurred in the judgment because he had his own reason for affirming the conviction. In his view, the use of the Cellmark report for its truth did not offend the Confrontation Clause because that report was not sufficiently "formalized." He tried to explain that the Cellmark report

> lacks the solemnity of an affidavit of deposition, for it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained. . . . And, although the report was introduced at the request of law enforcement, it was not the product of any sort of formalized

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[1] Justice Breyer wrote a concurring opinion. He argued that rejecting the Rule 703 analysis would end up requiring the government to call every person who had anything to do with a forensic test — a result he found untenable. He also re-raised many of the arguments of the dissenters in *Melendez-Diaz.* Finally, he set forth several possible approaches to permitting/limiting experts' reliance on lab reports, some of which he found "more compatible with *Crawford* than others" and some of which "seem more easily considered by a rules committee" than the Court.

The problem of course with consideration of these alternatives by a rules committee is that if the Confrontation Clause bars these approaches, the rules committee is just wasting its time. And given the uncertainty of *Williams*, it is fair to state that none of the approaches listed by Justice Breyer are clearly constitutional.

dialogue resembling custodial interrogation.

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

Fallout from Williams:

It must be noted that *eight* members of the Court rejected Justice Thomas's view that testimoniality is defined by whether a statement is sufficiently formal as to constitute an affidavit or certification. As Justice Kagan stated, "Justice Thomas's approach grants constitutional significance to minutia." Yet if a court is counting Justices, it appears that it will often be necessary for the government to comply with the rather amorphous standards for "informality" established by Justice Thomas. Thus, if the government offers hearsay that would be testimonial under the Kagan view of "primary motive" but not under the Alito view, then the government may have to satisfy the Thomas requirement that the hearsay is not tantamount to a formal affidavit. Similarly, if the government proffers an expert who relies on testimonial hearsay, but the declarant does not testify, then the government would appear to have to establish that the hearsay is not tantamount to a formal affidavit — this is because five members of the court rejected the argument that the confrontation clause is satisfied so long as the testimonial hearsay is used only as the basis of the expert's opinion. (Moreover, there is some confusion raised in Justice Alito's opinion about whether the distinction set forth in Rule 703 — between hearsay that is admitted and hearsay that is used only as the basis for an expert opinion — will work as well in a jury trial as it does in a trial before the judge, who can more easily understand such a nuance.)

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

It should be noted that much of the post-*Crawford* landscape is unaltered by *Williams*. For example, take a case in which a victim has just been shot. He makes a statement to a neighbor "I've just been shot by Bill. Call an ambulance." Surely that statement — admissible against the accused as an excited utterance — satisfies the Confrontation Clause on the same grounds after *Williams* as it did before. Such a statement is not testimonial because even under the Kagan view, it was not made with the primary motive that it would be used in a criminal prosecution. And *a fortiori* it satisfied the less restrictive Alito view. Thus Justice Thomas's "formality" test is not controlling, but even if it were, such a statement is not tantamount to an affidavit and so Justice Thomas would find no constitutional problem with its admission. See *Michigan v. Bryant*, 131 S.Ct. 1143, 1167 (2011) (Thomas, J., concurring) (excited utterance of shooting victim "bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.").

Similarly, there is extensive case law allowing admission of testimonial statements on the ground that they are not offered for their truth — for example a statement is offered to show the background of a police investigation, or offered to show that the statement is in fact false. That case law appears unaffected by *Williams.* As will be discussed further below, while both Justice Thomas and Justice Kagan reject the not-for-truth analysis in the context of expert reliance on hearsay, they both distinguish that use from admitting a statement for a *legitimate* not-for-truth purpose. Moreover, both approve of the language in *Crawford* that the Confrontation Clause "does not bar the use of testimonial statements offered for purposes other than establishing the truth of the matter asserted." And they both approve of the result in *Tennessee v. Street*, 471 U.S. 409 (1985), in which the Court held that the Confrontation Clause was not violated when an accomplice confession was admitted only to show that it was different from the defendant's own confession. For the Kagan-Thomas camp, the question will be whether the testimonial statement is offered for a purpose as to which its probative value is not dependent on the statement being true — and that is the test that is essentially applied by the lower courts in determining whether statements ostensibly offered for a not-for-truth purpose are consistent with the Confrontation Clause.

II. Post-*Williams* Cases in the Lower Courts, Federal and State

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

Those courts that don't just ignore the Thomas formality requirements either recognize them in passing or simply evade *Williams* entirely by relying on harmless error, no plain error, etc. Relatively few cases really go through all the opinions in *Williams* as a basis for coming to a conclusion on the admissibility of an expert's testimony.

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

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

1. Rule 703 Analysis:

A. Federal Court Decisions

Limiting *Williams* to its precise circumstances: : *United States v. James,* 712 F.3d 79 (2nd Cir. 2013): The court held that a routine autopsy report was not testimonial — the analysis is set forth later in this outline under the "Records" section. As to *Williams,* the court declined to use either of the rationales espoused by Justice Alito on the ground that they had been rejected by five members of the Court. The court found that in fact there was no lesson at all to be derived from *Williams,* as there was no rationale on which five members of the Court could agree. Thus, the Court found that *Williams* controlled only in cases exactly like it.

Finding that *Williams* raises doubt about the circuit's pre-*Williams* reliance on Rule 703, at least in jury trials where the test was targeted: *United States v. Turner,* 709 F.3d 1187 (7th Cir. 2013): This case is discussed in detail under "Experts" *infra*. The court found it doubtful that an expert could rely on the fact that the analyst had followed proper procedure and had reached a particular conclusion, at least where the trial is before a jury and the test was targeted to a particular individual. ***But see United States v. Maxwell,*** 724 F.3d 724 (7th Cir. 2013) (finding no problem under *Williams* where the expert relied on a technician's data in reaching her own conclusion and never mentioned what conclusions the technician had reached about the substance.).

Finding no plain error with a combination of the Rule 703 analysis and the Thomas formality analysis: *United States v. Pablo,* 625 F.3d 1285 (10th Cir. 2010), **on remand for reconsideration under Williams, 696 F.3d 1280 (10th Cir. 2012)**: an expert relied on a lab test, which was not admitted into evidence. The court evaluated the impact of *Williams* as follows, applying the plain error standard:

> [I]t 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.

Adoption of the Rule 703 not-for-truth analysis: *Boone v. Sullivan,* 2012 WL 6970843 (C.D. Cal.): The court found no confrontation violation where a supervisor was allowed to testify to a DNA test after having made an independent review, and another expert was permitted to rely on an analysts having lifted a fingerprint, where the expert conducted his own comparison. The court stated: "Recently, the Supreme Court has acknowledged that '[u]nder settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true' and that this form of testimony 'does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted.'" (quoting from the Alito opinion in *Williams*). ***See also Brown v. Small,* 2012 WL 7170434 (C.D. Cal.):** No confrontation violation where an expert testified on the basis of an autopsy report, quoting from Alito opinion: "the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth. Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.").

Adoption of the Rule 703 not-for-truth analysis: *United States v. Kantengwa,* 2012 WL 4591891 (D. Mass.): Moving for a new trial on convictions for lying on visa and asylum applications, the defendant argued that the trial court had erred in allowing a historian to testify to an account of the Rwandan genocide. The defendant claimed that the historian relied on the research of others in violation of the Confrontation Clause. But the court cited *Williams* and stated that expert testimony does not violate the Confrontation Clause when the expert provides his own opinion even

if he relies on testimonial hearsay.

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

Adoption of the Rule 703 not-for-truth analysis: *Evans v. King*, 2012 WL 4128682 (D.Minn.): The court relied solely on the Alito/Rule 703 analysis to reject a claim that the Confrontation Clause was violated by an expert's reliance on a testimonial report. "Evans appears to claim that because [the expert] did not conduct the gunshot residue test personally, admission of his testimony violated Evans's right to confrontation. This argument has no merit. Neither United States Supreme Court precedent nor the state and federal rules of evidence require that an expert personally conduct the study or test about which he or she testifies. *Williams v. Illinois.* [quote from Alito opinion]."

Adoption of the Rule 703 not-for-truth analysis: *Jake v. McDonald*, 2012 WL 3862455 (E.D.Cal.): There was no confrontation violation where a sexual assault examination report was used as the basis for expert testimony. Quoting from the Alito opinion, the court states:

> the Supreme Court has acknowledged that "Under settled evidence law, an expert may express an opinion that is based on facts that the experts assumes, but does not know, to be true" and that this form of testimony "does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted."

The Court also noted in a footnote that the sexual assault report was not formalized in the nature of a certificate.

Reliance on research of others does not violate the Confrontation Clause, relying on the plurality's Rule 703 analysis: *Harper v. United States*, 2013 WL 2318149 (E.D. Wisc.): In a 2255 review of a felon-firearm conviction, the petitioner contended that the Confrontation Clause was violated when a DNA expert referred to general research that had been conducted by other analysts. The expert tested evidence recovered from the petitioner's truck — gun, shell casings, and plastic bag — but could not detect any human DNA, which was not unusual in her experience with such items. She further testified that while she did not keep statistics an intern did a compilation, finding that about 85% of the time they could not do anything with guns, and one of the lab's other analysts concluded that it was not really worth testing shell casings. The court noted that defense counsel was able to cross-examine the expert regarding the tests she performed in this case and the bases for her opinions, including her personal experience in testing similar items. Relying on the Rule 703 analysis in *Williams*, the court concluded that "Her references to studies and compilations completed by others based on evidence seized in previous cases, which confirmed McDonough's own experience, did not violate petitioner's Confrontation Clause rights."

B. State Supreme Court Decisions

Adoption of the Rule 703 not-for-truth analysis: *State v. Joseph*, 230 Ariz. 296, 283 P.3d 27 (Ariz. 2012): The court found no confrontation violation when an expert relied on a doctor's report about the cause of death. It stated as follows:

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

Rejection of the Rule 703 not-for-truth analysis: *Martin v. State,* 2013 WL 427287 (Del.): A blood test showed that the defendant was driving under the influence of PCP. The analyst was not called to testify. Instead, the Chief Forensic Toxicologist, who managed the lab, testified. She explained that the laboratory conducted an initial and confirmatory screening on Martin's blood sample. She conducted an independent review of the test but testified that she did not observe the analyst's work and relied on the analyst to follow the standard operating procedure that she had developed and approves as laboratory manager. The witness detailed how the analyst would have performed a confirmatory screening via gas chromatograph mass spectrometry. The court held that the testimony violated the defendant's right to confrontation. The court noted that "the precise holding of *Williams* is less than clear (and not only to us)." The court distinguished *Williams* as involving a bench trial and stated that the state introduced the "substance" of the analyst's findings during the supervisor's testimony, even though the lab report was not formally admitted into evidence.

Prior case law permitting testimony by supervisor of testing not affected by *Williams: Leger v. State,* 291 Ga. 584, 732 S.E.2d 53 (2012): The supervisor of testing testified to a DNA match. She was presented with the data, interpreted the data, and wrote the report. No certified DNA report was admitted into evidence. The court adhered to its prior case law which held that "the Confrontation Clause does not require the analyst who actually completed the forensic testing used against a defendant to testify at trial." In a footnote discussing *Williams*, the court noted the split

votes and stated that "it may not be possible to definitively state the Court's prevailing view on this issue" but concluded that *Williams* did not affect the prior case law in the state providing that an expert can rely on forensic testing by others so long as he forms his own opinion.

Adoption of the Rule 703 not-for-truth analysis: *State v. Jenkins,* 102 So.3d 1063 (Miss. 2012): The court held that admission of a lab report did not violate the defendant's right to confrontation because the testifying witness was the laboratory supervisor, who reviewed the analyst's report for accuracy, and the witness was able to explain the types of tests that were performed and the analysis that was conducted. The witness had "intimate knowledge" about the report and "reached his own conclusion that the subject tested was cocaine." The court found that *Williams* "has no bearing on the case at hand because we do not dispute that the forensic report at issue is testimonial." ***See also Galloway v. State,* 2013 WL 2436653 (Miss.):** ("Distinguishable from *Bullcoming*, the record here illustrates that Dubourg, as the technical reviewer assigned to the case, was familiar with each step of the complex testing process conducted by Golden, and Dubourg performed her own analysis of the data. Dubourg personally analyzed the data generated by each test conducted by Golden and signed the report. Given Dubourg's knowledge about the underlying testing process and the report itself, any questions regarding the accuracy of the report due to possible contamination of the DNA samples could have been asked of Dubourg.").

Confrontation Clause violated where report is admitted into evidence: *Connors v. State,* 92 So.3d 676 (Miss. 2012) (Admission of forensic reports — a toxicology report and a ballistics report — violated the right to confrontation; the court notes that the case is not affected by *Williams*, which it clearly is not; under any view, admission of the report itself, without an expert testifying, violates *Melendez-Diaz.*).

Rejecting the Rule 703 analysis where the report is formalized: *Davidson v. State,* 2013 WL 1458654 (Nev.): The court held that a DNA report was testimonial where the analyst formally swore to the results. The government argued that the report was properly admitted under the Alito Rule 703 analysis in *Williams* but the court responded that "the analyses and conclusions of the plurality were repudiated by a five-justice majority." The critical point for the court was that the analyst "declared under the penalty of perjury that the conclusions in his report were true and correct."

Adoption of the Rule 703 not-for-truth analysis: *State v. Ortiz-Zape*, 743 S.E.2d 156 (N.C. 2013). The court relied on the plurality opinion in *Williams* to hold that "admission of an expert's independent opinion based on otherwise inadmissible facts or data 'of a type reasonably relied upon by experts in the particular field' does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert." It reasoned that "when an expert gives an opinion, the opinion is the substantive evidence and the expert is the witness whom the defendant has the right to confront." The court also stated that "an expert may render an independent opinion based on otherwise inadmissible facts or data." The report in *Ortiz-Zape* was not itself admitted into evidence. ***See also State v. Brewington,* 743 S.E.2d 626 (N.C. 2013)** ("Here, Agent

Gregory's lab notes were not admitted into evidence. Instead, as in *Ortiz-Zape*, Agent Schell presented an independent opinion formed as a result of her own analysis, not mere surrogate testimony. Defendant was able to conduct a vigorous and searching cross-examination that exposed the basis of, and any weaknesses in, Agent Schell's opinion. Accordingly, we conclude that defendant's Confrontation Clause rights were not violated."). ***Compare State v. Craven,* 744 S.E.2d 458 (2013)** (Confrontation Clause violated where expert did not conduct an independent analysis but merely parroted the testimonial lab report.).

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

> Quartaro was the preeminent testifying witness. He testified as to his own conclusions; he did not act as a conduit of the opinions of, or parrot the data produced by, other analysts. Cf. *United States v. Ramos–Gonzalez,* 664 F.3d 1, 5 (1st Cir.2011) ("Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth Amendment infraction is minimal. * * * Where an expert acts merely as a well-credentialed conduit for testimonial hearsay, however, the cases hold that her testimony violates a criminal defendant's right to confrontation."). * * * [T]he fact that Quartaro used data produced from the work of other analysts to form his final, independent conclusions did not bestow upon defendant the constitutional right to confront each and every one of those subordinate analysts. * * * Accordingly, we hold that in this case, where defendant had ample opportunity to confront Quartaro—the witness who undertook the critical stage of the DNA analysis, supervised over and had personal knowledge of the protocols and process of all stages involved in the DNA testing, reviewed the notes and data produced by all previous analysts, and testified to the controls employed by the testing lab to safeguard against the possibility of testing errors—the Confrontation Clause was satisfied.

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

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

C. Selected State Lower Court Decisions

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

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

***Accord, People v. Magana*, 2012 WL 3039756 (Cal.App. 4 Dist.)** (citing *Williams* for the proposition that " the Confrontation Clause has no application to out-of-court statements that are not offered to prove the truth of the matter asserted, including expert testimony where [the] witness expresses an opinion based on facts made known to [the] expert.")**; *People v. Martinez,* 2012 WL 3983766 (Cal.App. 4 Dist.)** ("it is permissible for an expert witness to base his opinion on out-of-court statements that would otherwise be inadmissible under the hearsay rule" because the statements are not being admitted for their substantive truth, but rather as foundational evidence for the expert's opinions, and therefore their admission does not violate the confrontation clause. (*Williams v. Illinois* (2012)"); ***People v. Hamilton*, 2012 WL 3089371 (Cal. 4th App.)** ("The United States Supreme Court recently confirmed that "modern rules of evidence continue to permit experts to express opinions based on facts about which they lack personal knowledge." *Williams v. Illinois*. An expert's testimony concerning a report prepared by a third party does not violate the Confrontation Clause when the report was not admitted into evidence.").

Adoption of the Rule 703 not-for-truth analysis: *McMullen v. State,* 2012 WL 2688713 (Ga.App.)): The defendant argued that an expert's report on blood should have been excluded because he relied in part on a testimonial lab report. The court rejected the argument, relying solely on the Alito/Rule 703/not-for-truth analysis:

> [T]he trial court did not err in allowing the testimony of the expert witness even though he did not actually perform the testing procedure himself. It is well established that an expert may base his opinion on data collected by others and that his or her lack of personal knowledge does not mandate the exclusion of the opinion but, rather, presents a jury question as to the weight which should be assigned the opinion. Moreover, because the expert personally viewed and analyzed the data which formed the basis of the expert opinion about which he testified, he was not acting as a mere "surrogate," but rather had a substantial personal connection to the scientific test at issue. It follows then, that the expert witness's testimony did not violate McMullen's Sixth Amendment confrontation right. *Williams.* ***Accord Crosby v. State*, 735 S.E.2d 588 (Ga. App. 2012).**

Adherence to the Rule 703 not-for-truth analysis: *People v. Negron,* 2012 WL 478181 (Ill. App.): In a burglary prosecution, the government offered an expert who used a DNA report to

conclude that the defendant was the burglar. The expert testified that she performed the technical review of the documentation of the documentation that was generated during the analysis and also reviewed the final data of the samples. But neither the report nor the underlying documentation was admitted into evidence. The court found no error, relying on *People v. Williams* — the decision reviewed by the Supreme Court in *Williams.* The defendant argued that the Supreme Court had rejected the Illinois Supreme Court's analysis in *Williams*, but the court did not agree. It relied exclusively on Justice Alito's analysis that the Confrontation Clause is not violated when an expert relies on testimonial hearsay and that hearsay is not itself offered for its truth. The court stated:

> We find the United States Supreme Court's holding in *Williams* dispositive of this issue. The DNA comparison report related by Pineda was offered to explain the assumptions of her opinion that the DNA found inside the Uriarte home matched defendant's DNA and not for the truth of the matter asserted.

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

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

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

> [D]efendant argues that his Sixth Amendment confrontation rights were violated because Word testified instead of Clifton. However, in a recent decision, *Williams v. Illinois*, 132 S.Ct. 2221 (2012), the Supreme Court of the United States confirmed that the Confrontation Clause is not violated where a DNA expert testifies to her own independent conclusions, based on information from a DNA testing laboratory. In other words, the Court's decision

> confirmed the continuing viability of Rule 703 of the Federal Rules of Evidence and N.J.R.E. 703, both of which permit an expert witness to testify to the expert's own independent conclusions, even if the expert relied on inadmissible hearsay documents in reaching those conclusions. Consequently, we find no error, plain or otherwise, in the admission of Word's testimony.

Accord *State v. Bussey*, 2012 WL 3628772 (N.J. Super. A.D.) (no error in admitting expert's testimony based on lab results "because Maxwell had independently evaluated and supervised all aspects of the test.").

Adoption of the Rule 703 not-for-truth analysis: *People v. Rogers*, 958 N.Y.S.2d 835 (4th Dept. 2013): The court rejected the defendant's argument that expert testimony at his trial violated his right to confrontation: "Those experts relied on an autopsy report and DNA paternity report, respectively, but the actual reports were not admitted into evidence. 'Out-of-court statements that are related by an expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.'" [quoting from the Alito opinion in *Williams*]. ***See also People v. Rios*, 2013 WL 149864 (N.Y. 1st Dept.)** ("A fair reading of the analyst's testimony establishes that she made her own independent comparison between defendant's DNA profile and the DNA recovered from semen stains on the victim's underwear. * * * [T]he reports of the nontestifying analysts never reached the jury. The witness testified about the other analysts's tests only to explain the basis for her own opinion, which was the only statement offered for the truth of the matter asserted.").

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

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

Applying the Rule 703 analysis but only if the report is not admitted for any purpose at trial: State v. McLeod, 66 A.3d 1221 (N.H. 2103): In allowing forensic experts to testify on the basis of a lab report, the court refused to adopt the Alito position that the report itself could be admitted for a not-for-truth purpose. The court Justice-counted and found that five Justices had rejected that not-for-truth premise in *Williams.* But this did not end the inquiry, because in this case the experts were prepared to state their independent opinions, without any direct reference in their testimony to the lab report. Such a process was not foreclosed by *Williams.* The court explained as follows:

> That is the question before us here: to what extent may the State's experts rely upon Walker's [the analyst's] un-admitted testimonial statements in rendering their own opinions as to the cause and origin of the fire? Although the plurality in *Williams* stated that it was confronting this question, it did not, in fact, do so. Rather, in *Williams*, the substance of the report prepared by the non-testifying scientist *was* admitted into evidence during the direct examination of the testifying expert. The plurality concluded that admission of the evidence did not constitute a Con-frontation Clause violation for two independent reasons: the evidence was not introduced for its truth; and the primary purpose of the report was not to accuse a particular individual or to create evidence for use at trial. Thus, Williams is not helpful on this issue.
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> * * *
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> We agree with the proposition that the Confrontation Clause is not violated when an expert testifies regarding his or her independent judgment, even if that judgment is based upon inadmissible testimonial hearsay. We conclude that this approach strikes the proper balance between a defendant's confrontation rights and the valuable role expert testimony plays in a criminal trial. Thus, here, we must determine whether the State's experts have applied their "own training and experience" to Walker's statements or have acted merely as "transmitter[s] for testimonial hearsay." . . . Here, we conclude that the State's experts have each applied their independent judgment to Walker's statements and that they are not acting as mere "transmitters" of testimonial hearsay.

Thus the court made a distinction between an expert's relying on a testimonial report on direct examination, as in *Williams*, and the expert simply drawing independent conclusions on direct, leaving the defendant to raise issues about reliance on the lab report on cross-examination. Citing Rule 703, the court stated: "Our holding-disallowing 'basis evidence' in the form of testimonial statements of an unavailable witness on direct examination of a State's expert, but allowing a defendant to explore those statements on cross-examination-is based upon well-established legal principles." Finally, the court addressed the defendant's complaint that his situation was not improved by shifting the discussion about the expert's reliance on testimonial statements to cross-examination:

> The defendant argues that allowing the experts to testify on direct examination regarding their opinions without testifying as to Walker's statements puts him in the untenable position of choosing between his right to cross-examine the experts and his right to confront Walker. We disagree. If offered on direct examination, the testimonial statements could only be understood as being offered for their truth. See *Williams*, 132 S.Ct. at 2268- 69 (Kagan, J., dissenting). On cross-examination, elicitation of Walker's statements would be for the purpose of impeaching the experts' opinions. Cf. *United States v. Hudson*, 970 F.2d 948, 956 (1st Cir.1992) ("Impeachment evidence ... is admitted not for the truth of the matter asserted but solely for the fact that the witness' trial testimony is less believable."). Because, on cross-examination, Walker's statements would not be offered for their truth, the Confrontation Clause is not violated.

Adoption of the Rule 703 not-for-truth analysis: *State v. Jamerson,* 2012 WL 5333412 (Tex. App.): The court held that the admission of a lab report did not violate the defendant's right to confrontation where the testimony was provided by the technical reviewer who "was familiar with each step of the complex testing process and performed her own analysis of the data to compare with [the analyst's] to confirm that [the analyst's] contention was correct." The court cited *Williams* for the proposition that "under the right circumstances, a trial court does not violate the Confrontation Clause by admitting a DNA report into evidence based on the testimony of an independent DNA expert with no connection to the testing laboratory or knowledge of its procedures and who did not take part in the testing or the formulation of the report."

Confrontation Clause violation where the lab report is introduced into evidence: *Hall v. State*, 2012 WL 3174130 (Tex.App.-Dallas): The court held that the state could not avoid a confrontation violation by arguing that an expert relied on a testimonial lab report, when the testimonial lab report was actually admitted into evidence. The court distinguished *Williams* as a case in which the lab report was never entered into evidence. The court also distinguished *Williams* as a case where the report was prepared before the defendant was arrested, and so it was not testimonial. In contrast, the lab report in this case was specifically targeted toward the defendant, who had been arrested.

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

Adoption of the Rule 703 not-for-truth analysis: *State v. Doerflinger,* 2012 WL 4055338 (Wash. App.): In an assault case, the court found that a radiologist's report about a nasal fracture was not testimonial because it was made while the victim was being treated, and not solely for purposes of litigation. Moreover, the report was only used by an expert, and the court cited *Williams* as support in the following passage:

> In *Williams v. Illinois*, the Court held that out-of-court statements testified to by an expert solely for the purpose of explaining the assumptions upon which the expert opinion rests fall outside the scope of the confrontation clause. * * * The Court further noted that the report was produced before a suspect was even identified, and was not sought for the purpose of obtaining evidence to be used against the defendant, but for the purpose of finding a rapist who was on the loose.

2. Primary Motive Analysis:

A. Federal Court Decisions

Distinguishing the Alito Primary Motive Analysis: *United States v. Cameron,* 699 F.3d 621 (1st Cir. 2012): This is a complex decision with a lot of analysis, not all related to the Alito

primary motive test. The entire case discussion is included under the headnote, "Cases on Records after *Melendez-Diaz" infra.*

Court rejects the "targeted individual" test: *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 found that it was testimonial and reversed. The court found that the government had not shown that the affidavit was prepared outside the context of a criminal investigation, and therefore the affidavit was testimonial under the primary motive test. The government relied on the Alito opinion in *Williams*, under which the affidavit would not be testimonial, because it clearly was not targeted toward the defendant, as he was only a child when it was prepared. But the court rejected the targeted individual test. It noted first that five members of the court in *Williams* had rejected the test. It also stated that the targeted individual limitation could not be found in any of the *Crawford* line of cases before *Williams*: noting, for example, that in *Crawford* the Court defined testimonial statements as those one would expect to be used "at *a* later trial." Finally, the court stated that the targeted individual test was inconsistent with the terms of the Confrontation Clause, which provide a right of the accused to be confronted with the "*witnesses against him."* In this case, the grandmother, by way of affidavit, was a witness against the defendant.

> ***Reporter's Note:*** The Court's construction of the Confrontation Clause could come out the other way. The references to "witnesses against him" could be interpreted as something personal, i.e., at the time the statement was made, it was being directed at the defendant. The *Duron-Caldera* court reads "witnesses" as of the time the statement is being introduced. But at that time, the witness is not there. All the "witnessing" is done at the time the statement is made; and if the witness is not targeting the individual, 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.

Primary motive test not met where statements were made to an undercover informant to set up a drug transaction: *Brown v. Epps,* 686 F.3d 281 (5th Cir. 2012): This case is discussed more fully under "informal statements" in Part Three, infra. The court held that statements "unknowingly made to an undercover officer, confidential informant, or cooperating witness are not testimonial in nature because the statements are not made under circumstances which would lead

an objective witness to reasonably believe that the statements would be available for later use at trial."
The case was decided after *Williams*, but the court did not rely on it, because statements setting up a drug deal with a confidential informant are definitely not testimonial under either of the "primary motive" tests posited in *Williams.*

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

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

B. State Supreme Court Decisions

Factual observations in autopsy reports are not testimonial because the primary purpose was not to prepare them for trial: *People v. Dungo*, 55 Cal.4th 608, 286 P.3d 442 (2012): At the defendant's murder trial, a forensic pathologist testifying for the prosecution described to the jury objective facts about the condition of the victim's body as recorded in the autopsy report and accompanying photographs. The court noted that the expert did not testify to the conclusions reached in the autopsy report, only to objective facts: the hemorrhages in the victim's eyes and neck organs, the purple color of her face, the absence of any natural disease causing death, the fact that she had bitten her tongue shortly before death, and the absence of any fracture of the hyoid bone. Those observations in the autopsy report were not testimonial. The court explained as follows:

> The preparation of an autopsy report is governed by California's Government Code section 27491, which requires a county coroner to "inquire into and determine the circumstances, manner, and cause" of certain types of death. Some of these deaths (such as deaths from alcoholism, "sudden infant death syndrome," and "contagious disease") result from causes unrelated to criminal activities, while other deaths (such as deaths resulting from "criminal abortion," deaths by "known or suspected homicide," and "deaths associated with a known or alleged rape") result from the commission of a crime. With respect to all of the statutorily specified categories of death, however, the scope of the coroner's statutory duty to investigate is the same, regardless of whether the death resulted from criminal activity.
>
> The usefulness of autopsy reports, including the one at issue here, is not limited to criminal investigation and prosecution; such reports serve many other equally important purposes. For example, the decedent's relatives may use an autopsy report in determining whether to file an action for wrongful death. And an insurance company may use an autopsy report in determining whether a particular death is covered by one of its policies. Also, in certain cases an autopsy report may satisfy the public's interest in knowing the cause of death, particularly when (as here) the death was reported in the local media. In addition, an autopsy report may provide answers to grieving family members.
>
> In short, criminal investigation was not the primary purpose for the autopsy report's description of the condition of Pina's body; it was only one of several purposes. The presence of a detective at the autopsy and the statutory requirement that suspicious findings be reported to law enforcement do not change that conclusion. The autopsy continued to serve several purposes, only one of which was criminal investigation. The autopsy report itself was simply an official explanation of an unusual death, and such official records are ordinarily not testimonial.

Avoiding the conflict over the primary motive test by finding a report to be insufficiently formalized: *People v. Lopez,* 54 Cal.4th 569, 286 P.3d 469 (Cal.2012): The court held that admission of a lab report indicating alcohol in the defendant's blood did not violate the right to confrontation. It found it unnecessary to determine the primary motivation for preparing the report, because the Justices in *Williams* could not agree on the proper test to apply. It also noted that unlike *Williams,* some of the information in the report was admitted for its truth and so the Alito Rule 703 not-for-truth analysis was inapplicable. Nonetheless the court found the report properly admitted because "the critical portions of that report were not made with the requisite degree of formality or solemnity to be considered testimonial" and that other parts of the report were simply machine-generated printouts and so not hearsay. On formality, the court explained as follows:

> The notation in question does not meet the high court's requirement that to be testimonial the out-of-court statement must have been made with formality or solemnity. Although here laboratory analyst Peña's initials appear on the same line that shows defendant's name and laboratory assistant Constantino's initials appear at the top of the page to indicate that he entered the notation that defendant's blood sample was given laboratory No. 070–7737, neither Constantino nor Peña signed, certified, or swore to the truth of the

> contents of page one of the report. The chart shows only numbers, abbreviations, and one-word entries under specified headings. Thus, the notation on the chart linking defendant's name to blood sample 070–7737 is nothing more than an informal record of data for internal purposes, as is indicated by the small printed statement near the top of the chart: "for lab use only." Such a notation, in our view, is not prepared with the formality required by the high court for testimonial statements.

Parsing *Williams* and concluding that Alito's targeting test is not controlling if the report is formalized: *Young v. United States,* 2013 WL 1349179 (D.C.C.A.): The case involved a DNA report in which the testifying expert made the comparison but had no personal knowledge of how the profiles were prepared or how the statistical analysis was made. The Court parsed *Williams* and found that it couldn't find a controlling rule under the *Marks* test, i.e., when the court is split, you apply the narrowest holding on which a majority can agree. That test wouldn't work because five Justices could not agree on any rationale. But the court culled the following rule out of *Williams:*

> It therefore is logically coherent and faithful to the Justices' expressed views to understand *Williams* as establishing — at a minimum — a sufficient, if not a necessary, criterion: a statement is testimonial at least when it passes the basic evidentiary purpose test plus either the plurality's targeted accusation requirement or Justice Thomas's formality criterion. Otherwise put, if *Williams* does have precedential value as the government contends, an out-of-court statement is testimonial under that precedent if its primary purpose is evidentiary and it is either a targeted accusation or sufficiently formal in character.

In this case, the testing was done while the defendant was a target so the court found it testimonial.

The court also rejected the government's argument that the lab report was not offered for its truth but only for the basis of evaluating the testifying expert's opinion. It noted that the trial court gave no limiting instruction to that effect, and so the report must have been offered for its truth. Finally, the court addressed the "multiple analyst" problem:

> We do not hold that every analyst and technician who performed any aspect of the multi-stage process used to isolate, amplify, identify, and analyze DNA evidence must testify at a defendant's trial absent a waiver. This is an issue of great practical importance that the Supreme Court left open in *Williams*. It is not an easy issue under current Sixth Amendment doctrine. Perhaps, as has been proposed in one treatise, a practical compromise ultimately will be reached pursuant to which the Confrontation Clause will be deemed satisfied so long as the testifying expert was personally and significantly involved in all the critical stages of the DNA testing process, even if others "played a supporting role." Perhaps, as also has been suggested, the prosecution may be allowed to call a substitute expert to testify when the original expert who performed the testing is no longer available (through no fault of the government), retesting is not an option, and the original test was "documented with sufficient detail for another expert to understand, interpret, and evaluate the results."

In this case, however, we need not address such possible solutions to the practical difficulties of implementing *Crawford* in connection with forensic evidence. The government has not argued that practical considerations made it necessary to present its DNA test results through Craig as opposed to witnesses with personal knowledge of the critical testing, and Craig clearly lacked personal and significant involvement in critical parts of the process.

Autopsy reports are not testimonial under either of the primary motive tests in *Williams: People v. Leach,* 980 N.E.2d 570 (Ill. 2012): The court concluded that "whichever definition of primary purpose is applied, the autopsy report in the present case was not testimonial because it was (1) not prepared for the primary purpose of accusing a targeted individual or (2) for the primary purpose of providing evidence in a criminal case." The defendant argued that the report was testimonial because the doctor was performing an autopsy at the police's request in the middle of a criminal investigation into a violent death where a suspect had been arrested for homicide. But the court disagreed, noting the following:

1. The medical examiner's office is not a law enforcement agency and even if the doctor knew or suspected that his report in this case would likely be used in a future criminal trial, his function was not "the production of evidence for use at trial." Even when the police suspect foul play and the medical examiner's office is aware of this suspicion, "an autopsy might reveal that the deceased died of natural causes and, thus, exonerate a suspect."

2. Although the police discovered the body and arranged for transport, there was no evidence that the autopsy was done "at the specific request of the police."

3. While it is true that an autopsy report might eventually be used in litigation of some sort, "these reports are not usually prepared for the sole purpose of litigation. A finding of accidental death may eventually lead to claims of product liability, medical malpractice, or other tort. A finding of suicide may become evidence in a lawsuit over proceeds of a life insurance policy. Similarly, a finding of homicide may be used in a subsequent prosecution of the accused killer. But the primary purpose of preparing an autopsy report is not to accuse 'a targeted individual of engaging in criminal conduct' (*Williams*) or to provide evidence in a criminal trial. An autopsy report is prepared in the normal course of operation of the medical examiner's office, to determine the cause and manner of death, which, if determined to be homicide, could result in charges being brought."

4. "[T]he autopsy report was not certified or sworn in anticipation of its being used as evidence; it was merely signed by the doctor who performed the autopsy. Thus, the autopsy report would not be deemed testimonial by Justice Thomas, because it lacks the formality and solemnity of an affidavit, deposition, or prior sworn testimony."

5. Nothing in the report directly linked defendant to the crime. "Only when the autopsy findings are viewed in light of defendant's own statement to the police is he linked

to the crime. In short, the autopsy sought to determine how the victim died, not who was responsible, and, thus, Dr. Choi was not defendant's accuser."

6. Because a prosecution for murder may be brought years or even decades after the autopsy was performed and the report prepared, "these reports should be deemed testimonial only in the unusual case in which the police play a direct role (perhaps by arranging for the exhumation of a body to reopen a "cold case") and the purpose of the autopsy is clearly to provide evidence for use in a prosecution. The potential for a lengthy delay between the crime and its prosecution could severely impede the cause of justice if routine autopsies were deemed testimonial merely because the cause of death is determined to be homicide."

Primary motive test not met where report is prepared before a crime occurs: *People v. Nunley,* 491 Mich. 686, 821 N.W.2d 642 (2012): The defendants were charged with driving with a suspended license, an element of which was that the state sent them notice that their license was suspended. The trial court admitted certificates of mailing a license suspension. The defendants argued that the certificates of mailing were testimonial, but the court disagreed, because the primary motivation for the certificate was not for use in a criminal prosecution.

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

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

We note that our analysis is consistent with the reasoning of both the lead opinion and the dissenting opinion from the United States Supreme Court's recent plurality decision in *Williams.* Consistently with the reasoning of the lead opinion, the primary purpose of the certificate of mailing was not to accuse a targeted individual of engaging in criminal conduct. Instead, because the certificate is necessarily generated before the commission of any crime, there is no one to accuse of criminal conduct. Further, consistently with the reasoning of the dissenting opinion, the primary purpose of the certificate of mailing was not to produce evidence for a later criminal prosecution. * * * [T]he circumstances here would not lead an objective witness to reasonably believe that the certificate of mailing would be available for use at a later trial because no crime had been committed at the time the certificate was generated and no investigatory procedure had begun.

Autopsy report is testimonial under Kagan-Thomas views in *Williams*: *State v. Navarette,* 294 P.3d 435 (N.M. 2013): The court counted the votes in *Williams* and held that testimony about an autopsy report violated the Confrontation Clause even though the report was not admitted into evidence. The autopsy report was prepared without a suspect in mind, and it was used as the basis for an expert's conclusions. But the court held that the report was prepared with the primary motivation of use in a criminal case (under the Kagan-Thomas view) and that the Rule 703 analysis would not work (again under the Kagan-Thomas view). The court noted that the autopsy report was performed as part of a homicide investigation, with two police officers in attendance.

Routine records regarding calibration of breathalyzers are not testimonial under the Alito primary motive test: *People v. Pealer,* 20 N.Y.3d 447, 962 N.Y.S.2d 592 (2013): The court found that records of routine calibration of breathalyzer machines were not testimonial. The court pointed out, among other things, that these records were not prepared to target a particular individual, and cited in support Justice Alito's opinion on the "target" test of primary motive in *Williams.* The court also reasoned as follows:

> It may reasonably be inferred that the primary motivation for examining the breathalyzer was to advise the Penn Yan police department that its machine was adequately calibrated and operating properly. The testing of the machine was performed by employees of the Division of Criminal Justice Services, an executive agency that is independent of law enforcement agencies, whose task was to ensure the reliability of such machines — not to secure evidence for use in any particular criminal proceeding. The fact that the scientific test results and the observations of the technicians might be relevant to future prosecutions of unknown defendants was, at most, an ancillary consideration when they inspected and calibrated the machine.
>
> Relatedly, it is also significant that, as with an autopsy report or a graphical DNA report * * * the breathalyzer testing certificates do not directly inculpate defendant or prove an essential element of the charges against him. All three records simply reflected objective facts that were observed at the time of their recording in order to establish that the breathalyzer would produce accurate results, rather than to prove some past event. At their core, these documents should be viewed as business records which, as a class, are generally deemed nontestimonial.

Certificate of service is not testimonial under either version of the primary motive test: *State v. Copeland,* 2013 WL 3864325 (Ore.): The defendant was convicted of violating a restraining order. He argued that the certificate of service — indicating he got notice of the restraining order — was testimonial so admitting it at trial violated his right to confrontation. The court noted that the Supreme Court in *Williams* was in dispute about whether the primary motivation test required a statement to be targeted to a particular individual. But it found the dispute irrelevant to evaluating the certificate of service in this case:

> We need not dwell on those disagreements further, however, because, as we will explain, under any iteration of the applicable test, we conclude that the primary purpose of the return of service in this case was administrative, not prosecutorial. . . . [T]he primary purpose for which the certificate of service in this case was created was to serve the administrative functions of the court system, ensuring that defendant, the respondent in the restraining order proceeding, received the notice to which he is statutorily and constitutionally entitled, establishing a time and manner of notice for purposes of determining when the order expires or is subject to renewal, and assuring the petitioner that the subject of the order knew of its existence. It was foreseeable that the certificate might be used in a later criminal prosecution to furnish proof that defendant had notice that the order had been entered against him. However, the more immediate and predominant purpose of service was to ensure that defendant could — and would — comply with the order — that is, avoid a violation, consistently with the primary goal of the FAPA process, which is "abuse prevention," not punishment.

Autopsy report is testimonial, rejecting Alito's "targeted individual" primary motive test: *State v. Kennedy*, 735 S.E.2d 905 (W.Va. 2012): The court viewed *Williams* "with caution" and held that it could not fairly be read to supplant the primary motive test previously endorsed by the Court. The court found an autopsy report to be testimonial because use in judicial proceedings was one of its statutorily defined purposes. The court also noted that an expert's reliance on the autopsy report violated the confrontation clause "to the extent he merely reiterated the contents of the autopsy report." In contrast, where the expert relied on independently formed opinions, the Confrontation Clause was not violated.

C. Selected State Lower Court Decisions

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

> The Declaration was created and filed with the court to serve administrative purposes as required by statute and would have been created regardless whether Shivers later violated the Order. Shivers was not being investigated for violating the Order at the time the Declaration was created and filed, and neither law enforcement nor the prosecution requested its creation. A reasonable person taking into account all surrounding circumstances would conclude the Declaration primarily served a contemporaneous administrative purpose rather than a prosecutorial one. *Bryant*, 131 S.Ct. at 1155. Although the possibility existed the Declaration could be used in a later prosecution if Shivers violated the Order, the

Declaration remains nontestimonial because its purpose at the time of creation was not prosecutorial.

The court notes the fight over the primary motivation test in *Williams* but states as follows:

> The dissenting justices did not disavow the primary purpose test but criticized the plurality's description of it as including an inquiry whether the speaker intended to target a particular person. We need not wade into the choppy waters left in the wake of *Williams'* discussion of the primary purpose test; applying any iteration of the test, we conclude the primary purpose of the Declaration was administrative rather than prosecutorial.

Finding the target test in question after *Williams*; but ruling that under any view, certificates that breathalyzers are in working order do not fit the primary motivation test *Jones v. State,* 982 N.E.2d 417 (Ind. App. 2013): The court held that admitting a certificate that a breathalyzer was in working order did not violate the defendant's right to confrontation, because their primary purpose was not for use in a criminal prosecution. The court stated: "although certificates of inspection are kept on file by the court clerk and may be duplicated for use in court, their primary purpose is to ensure that certain breath test equipment is in good operating condition in compliance with Ind.Code § 9-30-6-5." In the course of its discussion, the court distanced itself from previous authority that had relied on the rationale that the certificates were not prepared with a specific suspect in mind. That factor — the targeting factor — was found by the court to be in question due to the Thomas and Kagan opinions for five Justices in *Williams.*

3. Avoiding Williams

Avoiding *Williams* by finding no plain error: *United States v. Garvey,* 688 F.3d 881 (7th Cir. 2012): The defendant argued that his right to confrontation was violated when an expert relied on a testimonial lab test to conclude that he was found with narcotics. The court noted that it had previously found such a process to be constitutional under a Rule 703 not-for-truth analysis, but that in *Williams* the Supreme Court had left "significant confusion" about whether such a procedure comported with the Confrontation Clause. The court avoided the issue because "even if Garvey can establish plain error, he cannot demonstrate that the error affected his substantial rights."

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

have to rely on *Williams* because the State did not rely on a testimonial lab report to establish any fact:

> We need not parse in any great detail the philosophical underpinnings of the various opinions in *Williams* because although they disagreed as to their rationale, five justices agreed at the core that the outside laboratory's report was not testimonial. This conclusion governs this case, and we do not have to delve beyond this core to analyze whether, as Justice Alito's lead opinion concludes in part, that the outside laboratory's report was not relied on for its truth (with which five justices disagreed), or whether, as Justice Alito seems to indicate, the analysis might have been more far-ranging if Williams's trial had been to a jury rather than to a judge, although he also notes that he does "not suggest that the Confrontation Clause applies differently depending on the identity of the factfinder. Instead, our point is that the identity of the factfinder makes a big difference in evaluating the likelihood that the factfinder mistakenly based its decision on inadmissible evidence." This discourse on possible foundational gradations does not apply here because, as we have seen, the State laid more than a sufficient foundation for the jury to conclude that the semen recovered from Kristina S. and Chantee O. was sent to Orchid Cellmark, and that Orchid Cellmark's profiles were consistent with approved DNA-analysis standards. * * * [U]nlike the situation to which Justices Alito and Kagan referred to in *Williams*, the jury here did not have to rely on Witucki's testimony for it to conclude beyond a reasonable doubt that the semen samples sent to Orchid Cellmark were those recovered from Kristina S. and Chantee.

4. Facts Identical to Williams:

Lab report essentially identical to that in Williams: *State v. Bolden,* 2012 WL 5275488 (La.): The court stated that it would read *Williams* "no more broadly than the particular circumstances that led the convergence of the votes of five Justices to uphold the judgment of the Illinois appellate courts affirming the defendant's conviction and that are substantically similar to those in the present case." The court summarized as follows:

> No error under the Confrontation Clause occurs when a DNA expert testifies that in his or her opinion the DNA profile developed from a sample taken from defendant matches the DNA profile developed by other, non-testifying technicians from biological samples taken from the victim of a sexual assault if: the tests on the victim's samples were conducted before the defendant was identified as an assailant or suspect; the tests are conducted by an accredited laboratory; and the report of the test results itself is not introduced as a certified declaration of fact by the accredited laboratory.

***See also United States v. Gutierrez,* 2012 WL 5348698 (C.D. Cal.)** (State courts did not unreasonably apply federal law when lab report was made under the same conditions as approved by the result in *Williams*: the report was offered only as the basis of an expert's opinion, it was not a formalized statement, and it was produced before any suspect was identified).

***Williams* controls because the report is substantively identical to that approved in *Williams*: *Commonwealth v. Tassone,* 2013 WL 310229 (Mass. App.):** The court held that expert testimony about a lab report did not violate the defendant's right to confrontation. The court found that the case was controlled by *Williams* because 1) "the expert in this case did not testify to the truth of the underlying analyses any more than the expert in *Williams"* and so it would satisfy the *Williams* plurality; and 2) the report was no more formal than the report found to be non-testimonial by Justice Thomas in *Williams*. The defendant argued that the Cellmark report in this case was in fact more formal than that in *Williams,* but the court disagreed:

> In each case the report was signed by two people who are described as having "reviewed" the analysis. To be sure, in the instant case one of them is called "analyst," the other "technical reviewer." By contrast, in the *Williams* case the two "reviewers" were identified as two directors of the laboratory. Nonetheless, where the certificate states only that these two people reviewed the analysis and not that either of them performed it, we see no material difference with respect to the testimonial nature of the report here as that concept was articulated by Justice Thomas in *Williams.*

III. Cases Defining "Testimonial" Hearsay, Arranged By Subject Matter

"Admissions" — Hearsay Statements by the Defendant

Defendant's own hearsay statement was not testimonial: *United States v. Lopez,* 380 F.3d 538 (1st Cir. 2004): The defendant blurted out an incriminating statement to police officers after they found drugs in his residence. The court held that this statement was not testimonial under *Crawford.* The court declared that "for reasons similar to our conclusion that appellant's statements were not the product of custodial interrogation, the statements were also not testimonial." That is, the statement was spontaneous and not in response to police interrogation.

Note: The *Lopez* court had an easier way to dispose of the case. Both before and after *Crawford,* an accused has no right to confront *himself*. If the solution to confrontation is cross-examination, as the Court in *Crawford* states, then it is silly to argue that a defendant has the right to have his own statements excluded because he had no opportunity to cross-examine himself. *See United States v. Hansen,* 434 F.3d 92 (1st Cir. 2006) (admission of defendant's own statements does not violate *Crawford*); *United States v. Orm Hieng,* 679 F.3d 1131 (9th Cir. 2012): "the Sixth Amendment simply has no application [to the defendant's own hearsay

statements] because a defendant cannot complain that he was denied the opportunity to confront himself."

Defendant's own statements, reporting statements of another defendant, are not testimonial under the circumstances: *United States v. Gibson,* 409 F.3d 325 (6th Cir. 2005): In a case involving fraud and false statements arising from a mining operation, the trial court admitted testimony from a witness that Gibson told him that another defendant was planning on doing something that would violate regulations applicable to mining. The court recognized that the testimony encompassed double hearsay, but held that each level of hearsay was admissible as a statement by a party-opponent. Gibson also argued that the testimony violated *Crawford.* But the court held that Gibson's statement and the underlying statement of the other defendant were both casual remarks made to an acquaintance, and therefore were not testimonial.

Bruton — Testimonial Statements of Co-Defendants

Bruton* line of cases not applicable unless accomplice's hearsay statement is testimonial: *United States v. Figueroa-Cartagena, 612 F.3d 69 (1st Cir. 2010): The defendant's codefendant had made hearsay statements in a private conversation that was taped by the government. The statements directly implicated both the codefendant and the defendant. At trial the codefendant's statements were admitted against him, and the defendant argued that the *Bruton* line of cases required severance. But the court found no *Bruton* error, because the hearsay statements were not testimonial in the first place. The statements were from a private conversation so the speaker was not primarily motivated to have the statements used in a criminal prosecution. The court stated that the "*Bruton/Richardson* framework presupposes that the aggrieved co-defendant has a Sixth Amendment right to confront the declarant in the first place."

Bruton* line of cases not altered by *Crawford*: *United States v. Lung Fong Chen, 393 F.3d 139, 150 (2d Cir. 2004)**:** The court held that a confession of a co-defendant, when offered only against the co-defendant, is regulated by *Bruton,* not *Crawford*: so that the question of a Confrontation violation is dependent on whether the confession is powerfully incriminating against the non-confessing defendant. If the confession does not directly implicate the defendant, then there will be no violation if the judge gives an effective limiting instruction to the jury. *Crawford* does not apply because if the instruction is effective, the co-defendant is not a witness "against" the defendant within the meaning of the Confrontation Clause.

Bruton* protection limited to testimonial statements: *United States v. Berrios, 676 F.3d 118 (3rd Cir. 2012): "[B]ecause *Bruton* is no more than a byproduct of the Confrontation Clause, the Court's holding in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements. Any protection provided by *Bruton* is therefore only afforded to the same extent as the Confrontation Clause, which requires that the challenged statement qualify as testimonial. To the extent we have held otherwise, we no longer follow those holdings." ***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").

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

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

In this case, the court found no error in admitting the confession against the codefendant who made it. As to the other defendants, the court found that the reference to them in the confession was vague, and therefore a limiting instruction was sufficient to assure that the confession would not be used against them. Thus, the *Bruton* problem was resolved by a limiting instruction.

Bruton* and its progeny survive *Crawford* — co-defendant's testimonial statements were not admitted "against" the defendant in light of limiting instruction: *United States v. Harper, 527 F.3d 396 (5th Cir. 2008): Harper's co-defendant made a confession, but it did not directly implicate Harper. At trial the confession was admitted against the co-defendant and the jury was instructed not to use it against Harper. The court recognized that the confession was testimonial, but held that it did not violate Harper's right to confrontation because the co-defendant was not a witness "against" him. The court relied on the post-*Bruton* case of *Richardson v. Marsh,* and held that the limiting instruction was sufficient to protect Harper's right to confrontation because the co-defendant's confession did not directly implicate Harper and so was not as "powerfully incriminating" as the confession in *Bruton.* The court concluded that because "the Supreme Court has so far taken a 'pragmatic' approach to resolving whether jury instructions preclude a Sixth

Amendment violation in various categories of cases, and because *Richardson* has not been expressly overruled, we will apply *Richardson* and its pragmatic approach, as well as the teachings in *Bruton.*"

Statement admitted against co-defendant only does not implicate *Crawford: Mason v. Yarborough,* 447 F.3d 693 (9th Cir. 2006): A non-testifying codefendant confessed during police interrogation. At the trial of both defendants, the government introduced only the fact that the codefendant confessed, not the content of the statement. The court first found that there was no *Bruton* violation, because the defendant's name was never mentioned — *Bruton* does not prohibit the admission of hearsay statements of a non-testifying codefendant if the statements implicate the defendant only by inference and the jury is instructed that the evidence is not admissible against the defendant. For similar reasons, the court found no *Crawford* violation, because the codefendant was not a "witness against" the defendant. "Because Fenton's words were never admitted into evidence, he could not 'bear testimony' against Mason."

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).

Co-Conspirator Statements

Co-conspirator statement not testimonial: *United States v. Felton,* 417 F.3d 97 (1st Cir. 2005): The court held that a statement by the defendant's coconspirator, made during the course and in furtherance of the conspiracy, was not testimonial under *Crawford.* **Accord *United States v. Sanchez-Berrios,*** 424 F.3d 65 (1st Cir. 2005) (noting that *Crawford* "explicitly recognized that statements made in furtherance of a conspiracy by their nature are not testimonial."). ***See also United States v. Turner,*** 501 F.3d 59 (1st Cir. 2007) (conspirator's statement made during a private conversation were not testimonial);***United States v. Ciresi,*** 697 F.3d 19 (1st Cir. 2012) (statements admissible as coconspirator hearsay under Rule 801(d)(2)(E) are "by their nature" not testimonial because they are "made for a purpose other than use in a prosecution.") .

Surreptitiously recorded statements of coconspirators are not testimonial: *United States v. Hendricks,* 395 F.3d 173 (3rd Cir. 2005): The court found that surreptitiously recorded statements of an ongoing criminal conspiracy were not testimonial within the meaning of *Crawford* because

they were informal statements among coconspirators. **Accord *United States v. Bobb,*** 471 F.3d 491 (3rd Cir. 2006) (noting that the holding in *Hendricks* was not limited to cases in which the declarant was a confidential informant).

Statement admissible as coconspirator hearsay is not testimonial: *United States v. Robinson*, 367 F.3d 278 (5th Cir. 2004): The court affirmed a drug trafficker's murder convictions and death sentence. It held that coconspirator statements are not "testimonial" under *Crawford* as they are made under informal circumstances and not for the purpose of creating evidence. ***Accord United States v. Delgado,*** 401 F.3d 290 (5th Cir. 2005); ***United States v. Olguin,*** 643 F.3d 384 (5th Cir. 2011); ***United States v. Alaniz,*** 726 F.3d 586 (5th Cir. 2013). ***See also United States v. King,*** 541 F.3d 1143 (5th Cir. 2008) ("Because the statements at issue here were made by co-conspirators in the furtherance of a conspiracy, they do not fall within the ambit of *Crawford's* protection"). Note that the court in *King* rejected the defendant's argument that the co-conspirator statements were testimonial because they were "presented by the government for their testimonial value." Accepting that argument would mean that all hearsay is testimonial. The court observed that "*Crawford's* emphasis clearly is on whether the statement was 'testimonial' at the time it was made."

Statement by an anonymous coconspirator is not testimonial: *United States v. Martinez,* 430 F.3d 317 (6th Cir. 2005). The court held that a letter written by an anonymous coconspirator during the course and in furtherance of a conspiracy was not testimonial under *Crawford* because they were not made with the intent that they would be used in a criminal investigation or prosecution. ***See also United States v. Mooneyham,*** 473 F.3d 280 (6th Cir. 2007) (statements made by coconspirator in furtherance of the conspiracy are not testimonial because the one making them "has no awareness or expectation that his or her statements may later be used at a trial"; the fact that the statements were made to a law enforcement officer was irrelevant because the officer was undercover and the declarant did not know he was speaking to a police officer); ***United States v. Stover,*** 474 F.3d 904 (6th Cir. 2007) (holding that under *Crawford* and *Davis*, "co-conspirators' statements made in pendency and furtherance of a conspiracy are not testimonial" and therefore that the defendant's right to confrontation was not violated when a statement was properly admitted under Rule 801(d)(2)(E)); ***United States v. Damra,*** 621 F.3d 474 (6th Cir. 2010) (statements made by a coconspirator "by their nature are not testimonial") ***United States v. Tragas,*** 727 F.3d 610 (6th Cir. 2013) ("As coconspirator statements were made in furtherance of the conspiracy, they were categorically non-testimonial.").

Coconspirator statements made to an undercover informant are not testimonial: *United States v. Hargrove,* 508 F.3d 445 (7th Cir. 2007): The defendant, a police officer, was charged with taking part in a conspiracy to rob drug dealers. One of his coconspirators had a discussion with a potential member of the conspiracy (in fact an undercover informant) about future robberies. The defendant argued that the coconspirator's statements were testimonial, but the court disagreed. It held that "*Crawford* did not affect the admissibility of coconspirator statements." The court

specifically rejected the defendant's argument that *Crawford* somehow undermined *Bourjaily*, noting that in both *Crawford* and *Davis*, "the Supreme Court specifically cited *Bourjaily* — which as here involved a coconspirator's statement made to a government informant — to illustrate a category of nontestimonial statements that falls outside the requirements of the Confrontation Clause."

Statements by a coconspirator during the course and in furtherance of the conspiracy are not testimonial: *United States v. Lee,* 374 F.3d 637 (8th Cir. 2004): The court held that statements admissible under the coconspirator exemption from the hearsay rule are by definition not testimonial. As those statements must be made during the course and in furtherance of the conspiracy, they are not the kind of formalized, litigation-oriented statements that the Court found testimonial in *Crawford.* The court reached the same result on co-conspirator hearsay in ***United States v. Reyes,*** 362 F.3d 536 (8th Cir. 2004); ***United States v. Singh,*** 494 F.3d 653 (8th Cir. 2007); and ***United States v. Hyles,*** 521 F.3d 946 (8th Cir. 2008) (noting that the statements were not elicited in response to a government investigation and were casual remarks to co-conspirators)**.**

Statements in furtherance of a conspiracy are not testimonial: *United States v. Allen,* 425 F.3d 1231 (9th Cir. 2005): The court held that "co-conspirator statements are not testimonial and therefore beyond the compass of *Crawford's* holding." ***See also United States v. Larson,*** 460 F.3d 1200 (9th Cir. 2006) (statement from one conspirator to another identifying the defendants as the source of some drugs was made in furtherance of the conspiracy; conspiratorial statements were not testimonial as there was no expectation that the statements would later be used at trial); ***United States v. Grasso,*** 724 F.3d 1077 (9th Cir. 2013) ("co-conspirator statements in furtherance of a conspiracy are not testimonial").

Statements admissible under the co-conspirator exemption are not testimonial: *United States v. Townley,* 472 F.3d 1267 (10th Cir. 2007): The court rejected the defendant's argument that hearsay is testimonial under *Crawford* whenever "confrontation would have been required at common law as it existed in 1791." It specifically noted that *Crawford* did not alter the rule from *Bourjaily* that a hearsay statement admitted under Federal Rule 801(d)(2)(E) does not violate the Confrontation Clause. ***Accord United States v. Ramirez,*** 479 F.3d 1229 (10th Cir. 2007) (statements admissible under Rule 801(d)(2)(E) are not testimonial under *Crawford*); ***United States v. Patterson,*** 713 F.3d 1237 (10th Cir. 2013) (same).

Statements made during the course and in furtherance of the conspiracy are not testimonial: *United States v. Underwood,* 446 F.3d 1340 (11th Cir. 2006): In a drug case, the defendant argued that the admission of an intercepted conversation between his brother Darryl and an undercover informant violated *Crawford*. But the court found no error and affirmed. The court

noted that the statements "clearly were not made under circumstances which would have led [Daryl] reasonably to believe that his statement would be available for use at a later trial. Had Darryl known that Hopps was a confidential informant, it is clear that he never would have spoken to her in the first place." The court concluded as follows:

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

See also United States v. Lopez, 649 F.3d 1222 (11th Cir. 2011): co-conspirator's statement, bragging that he and the defendant had drugs to sell after a robbery, was admissible under Rule 801(d)(2)(E) and was not testimonial, because it was merely "bragging to a friend" and not a formal statement intended for trial.

Cross-Examination

Cross-examination of prior testimony was adequate even though defense counsel was found ineffective on other grounds: *Rolan v. Coleman,* 680 F.3d 311 (3rd Cir. 2012): The habeas petitioner argued that his right to confrontation was violated when he was retried and testimony from the original trial was admitted against him. The prior testimony was obviously testimonial under *Crawford.* The question was whether the witness — who was unavailable for the second trial — was adequately cross-examined at the first trial. The defendant argued that cross-examination could not have been adequate because the court had already found defense counsel to be inadequate at that trial (by failing to investigate a self-defense theory and failing to call two witnesses). The court, however, found the cross-examination to be adequate. The court noted that the state court had found the cross-examination to be adequate — that court found "baseless" the defendant's argument that counsel had failed to explore the witness's immunity agreement. Because the witness had made statements before that agreement was entered into that were consistent with his in-court testimony, counsel could reasonably conclude that exploring the immunity agreement would do more harm than good. The court of appeals concluded that "[t]here is no Supreme Court precedent to suggest that Goldstein's cross-examination was inadequate, and the record does not support such a conclusion. Consequently, the Superior Court's finding was not contrary to, or an unreasonable application of, *Crawford.*"

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

Accomplice's jailhouse statement admissible as a declaration against interest and accordingly was not testimonial: *United States v. Pelletier,* 666 F.3d 1 (1st Cir. 2011): The defendant's accomplice made hearsay statements to a jailhouse buddy, indicating among other things that he had smuggled marijuana for the defendant. The court found that the statements were properly admitted as declarations against interest. The court noted specifically that the fact that the accomplice made the statements "to fellow inmate Hafford, rather than in an attempt to curry favor with police, cuts in favor of admissibility." For similar reasons, the hearsay was not testimonial under *Crawford.* The court stated that the statements were made "not under formal circumstances, but rather to a fellow inmate with a shared history, under circumstances that did not portend their use at trial against Pelletier."

Statement admissible as a declaration against penal interest, after *Williamson,* is not testimonial: *United States v. Saget,* 377 F.3d 223 (2nd Cir. 2004) (Sotomayor, J.): The defendant's accomplice spoke to an undercover officer, trying to enlist him in the defendant's criminal scheme. The accomplice's statements were admitted at trial as declarations against penal interest under Rule 804(b)(3), as they tended to implicate the accomplice in a conspiracy. After *Williamson v. United States,* hearsay statements made by an accomplice to a law enforcement officer while in custody are not admissible under Rule 804(b)(3) when they implicate the defendant, because the accomplice may be currying favor with law enforcement. But in the instant case, the accomplice's statement was not barred by *Williamson,* because it was made to an undercover officer—the accomplice didn't know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant. For similar reasons, the statement was not testimonial under *Crawford*—it was not the kind of formalized statement to law enforcement, prepared for trial, such as a "witness" would provide. ***See also United States v. Williams***, 506 F.3d 151 (2d Cir. 2007): Statement of accomplice implicating himself and defendant in a murder was admissible under Rule 804(b)(3) where it was made to a friend in informal circumstances; for the same reason the statement was not testimonial. The defendant's argument about insufficient indicia of reliability was misplaced because the Confrontation Clause no longer imposes a reliability requirement. ***Accord United States v. Wexler,*** 522 F.3d 194 (2nd Cir. 2008) (inculpatory statement made to friends admissible under Rule 804(b)(3) and not testimonial).

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

non-testimonial, because neither of the declarants "held the objective of incriminating any of the defendants at trial when their prison yard conversation was recorded; there is no indication that they were aware of being overheard; and there is no indication that their conversation consisted of anything but casual remarks to an acquaintance." A defendant also lodged a hearsay objection, but the court found that the statements were admissible as declarations against interest. The declarants unequivocally incriminated themselves in acts of carjacking and murder, as well as shooting a security guard, and they mentioned the defendant "only to complain that he crashed the getaway car."

Accomplice statement made to a friend, admitting complicity in a crime, was admissible as a declaration against interest and was not testimonial: *United States v. Jordan,* 509 F.3d 191 (4th Cir. 2007): The defendant was convicted of murder while engaged in a drug-trafficking offense. He contended that the admission of a statement of an accomplice was error under the Confrontation Clause and the hearsay rule. The accomplice confessed her part in the crime in a statement to her roommate. The court found no error in the admission of the accomplice's statement. It was not testimonial because it was made to a friend, not to law enforcement. The court stated: "To our knowledge, no court has extended *Crawford* to statements made by a declarant to friends or associates." The court also found the accomplice's statement properly admitted as a declaration against interest. The court elaborated as follows:

> Here, although Brown's statements to Adams inculpated Jordan, they also subject *her* to criminal liability for a drug conspiracy and, be extension, for Tabon's murder. Brown made the statements to a friend in an effort to relieve herself of guilt, not to law enforcement in an effort to minimize culpability or criminal exposure.

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

or investigators is relevant to the determination of whether a statement is 'testimonial' only if it is first the case that a person in the position of the declarant reasonably would have expected that his statements would be used prosecutorially."

> **Note: This case was decided before *Michigan v. Bryant, infra,* but it consistent with the holding in *Bryant* that the primary motive test considers the motivation of all the parties to a communication.**

Accomplice's confessions to law enforcement agents were testimonial: *United States v. Harper,* 514 F.3d 456 (5th Cir. 2008): The court held that confessions made by the codefendant to law enforcement were testimonial, even though the codefendant did not mention the defendant as being involved in the crime. The statements were introduced to show that the codefendant owned some of the firearms and narcotics at issue in the case, and these facts implicated the defendant as well. The court did not consider whether the confessions were admissible under a hearsay exception — but they would not have been admissible as a declaration against interest, because *Williamson* bars confessions of cohorts made to law enforcement.

Accomplice's statements to a friend, implicating both the accomplice and the defendant in the crime, are not testimonial: *Ramirez v. Dretke,* 398 F.3d 691 (5th Cir. 2005): The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The accomplice made statements both before and after the murder that directly implicated both himself and the defendant. These statements were made to the accomplice's roommate. The court found that these statements were not testimonial under *Crawford*: "There is nothing in *Crawford* to suggest that 'testimonial evidence' includes spontaneous out-of-court statements made outside any arguably judicial or investigatorial context."

Declaration against penal interest, made to a friend, is not testimonial: *United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005): The defendant was charged with bank robbery. One of the defendant's accomplices (Clarke), was speaking to a friend (Wright) some time after the robbery. Wright told Clarke that he looked "stressed out." Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The court found no error in admitting Clarke's hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark's interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the court found that Clarke's statement was not testimonial under *Crawford:*

> Clarke made the statements to his friend by happenstance; Wright was not a police officer or a government informant seeking to elicit statements to further a prosecution against

> Clarke or Franklin. To the contrary, Wright was privy to Clarke's statements only as his friend and confidant.

The court distinguished other cases in which an informant's statement to police officers was found testimonial, on the ground that those other cases involved accomplice statements knowingly made to police officers, so that "the informant's statements were akin to statements elicited during police interrogation, i.e., the informant could reasonably anticipate that the statements would be used to prosecute the defendant."

See also United States v. Gibson, 409 F.3d 325 (6th Cir. 2005) (describing statements as nontestimonial where "the statements were not made to the police or in the course of an official investigation, nor in an attempt to curry favor or shift the blame."); ***United States v. Johnson,*** 440 F.3d 832 (6th Cir. 2006) (statements by accomplice to an undercover informant he thought to be a cohort were properly admitted against the defendant; the statements were not testimonial because the declarant didn't know he was speaking to law enforcement, and so a person in his position "would not have anticipated that his statements would be used in a criminal investigation or prosecution of Johnson.").

Statement admissible as a declaration against penal interest is not testimonial: *United States v. Johnson,* 581 F.3d 320 (6th Cir. 2009): The court held that the tape-recorded confession of a coconspirator describing the details of an armed robbery, including his and the defendant's roles, was properly admitted as a declaration against penal interest. The court found that the statements tended to disserve the declarant's interest because "they admitted his participation in an unsolved murder and bank robbery." And the statements were trustworthy because they were made to a person the declarant thought to be his friend, at a time when the declarant did not know he was being recorded "and therefore could not have made his statement in order to obtain a benefit from law enforcement." Moreover, the hearsay was not testimonial, because the declarant did not know he was being recorded or that the statement would be used in a criminal proceeding against the defendant.

Accomplice confession to law enforcement is testimonial, even if redacted: *United States v. Jones,* 371 F.3d 363 (7th Cir. 2004): An accomplice's statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, could be admissible as a declaration against interest (a question it did not decide), its admission would violate the Confrontation Clause after *Crawford*. The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And because the defendant never had a chance to cross-examine the accomplice, "under *Crawford*, no part of Rock's confession should have been allowed into evidence."

Declaration against interest made to an accomplice who was secretly recording the conversation for law enforcement was not testimonial: *United States v. Watson,* 525 F.3d 583 (7th Cir. 2008): After a bank robbery, one of the perpetrators was arrested and agreed to cooperate with the FBI. She surreptitiously recorded a conversation with Anthony, in which Anthony implicated himself and Watson in the robbery. The court found that Anthony's statement was against his own interest, and rejected Watson's contention that it was testimonial. The court noted that Anthony could not have anticipated that the statement would be used at a trial, because he did not know that the FBI was secretly recording the conversation. It concluded: "A statement unwittingly made to a confidential informant and recorded by the government is not testimonial for Confrontation Clause purposes."

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

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

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

Declaration against interest is not testimonial: *United States v. U.S. Infrastructure, Inc.,*

576 F.3d 1195 (11th Cir. 2009): The declarant, McNair, made a hearsay statement that he was accepting bribes from one of the defendants. The statement was made in private to a friend. The court found that the statement was properly admitted as a declaration against McNair's penal interest, as it showed that he accepted bribes from an identified person. The court also held that the hearsay was not testimonial, because it was "part of a private conversation" and no law enforcement personnel were involved.

Excited Utterances, 911 Calls, Etc.

911 calls and statements to responding officers may be testimonial, but only if the primary purpose is to establish or prove past events in a criminal prosecution: *Davis v. Washington* and *Hammon v. Indiana,* 547 U.S. 813 (2006): In companion cases, the Court decided whether reports of crime by victims of domestic abuse were testimonial under *Crawford*. In *Davis,* the victim's statements were made to a 911 operator while and shortly after the victim was being assaulted by the defendant. In *Hammon,* the statements were made to police, who were conducting an interview of the victim after being called to the scene. The Court held that the statements in *Davis* were not testimonial, but came to the opposite result with respect to the statements in *Hammon*. The Court set the dividing line for such statements as follows:

> Without attempting to produce an exhaustive classification of all conceivable statements – or even all conceivable statements in response to police interrogation – as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Court defined testimoniality by whether the *primary motivation* in making the statements was for use in a criminal prosecution.

Pragmatic application of the emergency and primary purpose standards: *Michigan v. Bryant,* 131 S.Ct. 1143 (2011): The Court held that the statement of a shooting victim to police, identifying the defendant as the shooter — and admitted as an excited utterance under a state rule of evidence — was not testimonial under *Davis* and *Crawford.* The Court applied the test for testimoniality established by *Davis*— whether the primary motive for making the statement was to have it used in a criminal prosecution — and found that in this case such primary motive did not exist. The Court noted that *Davis* focused on whether statements were made to respond to an

emergency, as distinct from an investigation into past events. But it stated that the lower court had construed that distinction too narrowly to bar, as testimonial, essentially all statements of past events. The Court made the following observations about how to determine testimoniality when statements are made to responding police officers:

> 1. The primary purpose inquiry is objective. The relevant inquiry into the parties' statements and actions is not the subjective or actual purpose of the particular parties, but the purpose that reasonable participants would have had, as ascertained from the parties' statements and actions and the circumstances in which the encounter occurred.
>
> 2. As *Davis* notes, the existence of an "ongoing emergency" at the time of the encounter is among the most important circumstances informing the interrogation's "primary purpose." An emergency focuses the participants not on proving past events potentially relevant to later criminal prosecution, but on ending a threatening situation. But there is no categorical distinction between present and past fact. Rather, the question of whether an emergency exists and is ongoing is a highly context-dependent inquiry. An assessment of whether an emergency threatening the police and public is ongoing cannot narrowly focus on whether the threat to the first victim has been neutralized, because the threat to the first responders and public may continue.
>
> 3. An emergency's duration and scope may depend in part on the type of weapon involved; in *Davis* and *Hammon* the assailants used their fists, which limited the scope of the emergency — unlike in this case where the perpetrator used a gun, and so questioning could permissibly be broader.
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> 4. A victim's medical condition is important to the primary purpose inquiry to the extent that it sheds light on the victim's ability to have any purpose at all in responding to police questions and on the likelihood that any such purpose would be a testimonial one. It also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.
>
> 5. Whether an ongoing emergency exists is simply one factor informing the ultimate inquiry regarding an interrogation's "primary purpose." Another is the encounter's informality. Formality suggests the absence of an emergency, but informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.
>
> 6. The statements and actions of *both* the declarant and interrogators provide objective evidence of the interrogation's primary purpose. Looking to the contents of both the questions and the answers ameliorates problems that could arise from looking solely to one participant, because both interrogators and declarants may have mixed motives.

Applying all these considerations to the facts, the Court found that the circumstances of the encounter as well as the statements and actions of the shooting victim and the police objectively indicated that the interrogation's "primary purpose" was "to enable police assistance to meet an

ongoing emergency." The circumstances of the interrogation involved an armed shooter, whose motive for and location after the shooting were unknown and who had mortally wounded the victim within a few blocks and a few minutes of the location where the police found him. Unlike the emergencies in *Davis* and *Hammon*, the circumstances presented in *Bryant* indicated a potential threat to the police and the *public*, even if not the victim. And because this case involved a gun, the physical separation that was sufficient to end the emergency in *Hammon* was not necessarily sufficient to end the threat.

The Court concluded that the statements and actions of the police and victim objectively indicated that the primary purpose of their discussion was not to generate statements for trial. When the victim responded to police questions about the crime, he was lying in a gas station parking lot bleeding from a mortal gunshot wound, and his answers were punctuated with questions about when emergency medical services would arrive. Thus, the Court could not say that a person in his situation would have had a "primary purpose" "to establish or prove past events potentially relevant to later criminal prosecution." For their part, the police responded to a call that a man had been shot. They did not know why, where, or when the shooting had occurred; the shooter's location; or anything else about the crime. They asked exactly the type of questions necessary to enable them "to meet an ongoing emergency" — essentially, who shot the victim and where did the act occur. Nothing in the victim's responses indicated to the police that there was no emergency or that the emergency had ended. The informality suggested that their primary purpose was to address what they considered to be an ongoing emergency — apprehending a suspect with a gun — and the circumstances lacked the formality that would have alerted the victim to or focused him on the possible future prosecutorial use of his statements.

Justice Sotomayor wrote the majority opinion for five Justices. Justice Thomas concurred in the judgment, adhering to his longstanding view that testimoniality is determined by whether the statement is the kind of formalized accusation that was objectionable under common law — he found no such formalization in this case. Justices Scalia and Ginsburg wrote dissenting opinions. Justice Kagan did not participate.

911 call reporting drunk person with an unloaded gun was not testimonial: *United States v. Cadieux,* 500 F.3d 37 (1st Cir. 2007): In a felon-firearm prosecution, the trial court admitted a tape of a 911 call, made by the daughter of the defendant's girlfriend, reporting that the defendant was drunk and walking around with an unloaded shotgun. The court held that the 911 call was not testimonial. It relied on the following factors: 1) the daughter spoke about events "in real time, as she witnessed them transpire"; 2) she specifically requested police assistance; 3) the dispatcher's questions were tailored to identify "the location of the emergency, its nature, and the perpetrator"; and 4) the daughter was "hysterical as she speaks to the dispatcher, in an environment that is neither tranquil nor, as far as the dispatcher could reasonably tell, safe." The defendant argued that the call was testimonial because the daughter was aware that her statements to the police could be used in a prosecution. But the court found that after *Davis,* awareness of possible use in a prosecution is not

enough for a statement to be testimonial. A statement is testimonial only if the "primary motivation" for making it is for use in a criminal prosecution.

911 call was not testimonial under the circumstances: *United States v. Brito,* 427 F.3d 53 (1st Cir. 2005): The court affirmed a conviction of firearm possession by an illegal alien. It held that statements made in a 911 call, indicating that the defendant was carrying and had fired a gun, were properly admitted as excited utterances, and that the admission of the 911 statements did not violate the defendant's right to confrontation. The court declared that the relevant question is whether the statement was made with an eye toward "legal ramifications." The court noted that under this test, statements to police made while the declarant or others are still in personal danger are ordinarily not testimonial, because the declarant in these circumstances "usually speaks out of urgency and a desire to obtain a prompt response." In this case the 911 call was properly admitted because the caller stated that she had "just" heard gunshots and seen a man with a gun, that the man had pointed the gun at her, and that the man was still in her line of sight. Thus the declarant was in "imminent personal peril" when the call was made and therefore it was not testimonial. The court also found that the 911 operator's questioning of the caller did not make the answers testimonial, because "it would blink reality to place under the rubric of interrogation the single off-handed question asked by the dispatcher — a question that only momentarily interrupted an otherwise continuous stream of consciousness."

911 call — including statements about the defendant's felony status—was not testimonial: *United States v. Proctor,* 505 F.3d 366 (5th Cir. 2007): In a firearms prosecution, the court admitted a 911 call from the defendant's brother (Yogi), in which the brother stated that the defendant had stolen a gun and shot it into the ground twice. Included in the call were statements about the defendant's felony status and that he was probably on cocaine. The court held that the entire call was nontestimonial. It applied the "primary purpose" test and evaluated the call in the following passage:

> Yogi's call to 911 was made immediately after Proctor grabbed the gun and fired it twice. During the course of the call, he recounts what just happened, gives a description of his brother, indicates his brother's previous criminal history, and the fact that his brother may be under the influence of drugs. All of these statements enabled the police to deal appropriately with the situation that was unfolding. The statements about Proctor's possession of a gun indicated Yogi's understanding that Proctor was armed and possibly dangerous. The information about Proctor's criminal history and possible drug use necessary for the police to respond appropriately to the emergency, as it allowed the police to determine whether they would be encountering a violent felon. Proctor argues that the emergency had already passed, because he had run away with the weapon at the time of the 911 call and, therefore, the 911 conversation was testimonial. It is hard to reconcile this argument with the facts. During the 911 call, Yogi reported that he witnessed his brother, a

> felon possibly high on cocaine, run off with a loaded weapon into a nightclub. This was an ongoing emergency — not one that had passed. Proctor's retreat into the nightclub provided no assurances that he would not momentarily return to confront Yogi * * *. Further, Yogi could have reasonably feared that the people inside the nightclub were in danger. Overall, a reasonable viewing of the 911 call is that Yogi and the 911 operator were dealing with an ongoing emergency involving a dangerous felon, and that the 911 operator's questions were related to the resolution of that emergency.

See also United States v. Mouzone, 687 F.3d 207 (5th Cir. 2012) (911 calls found non-testimonial as "each caller simply reported his observation of events as they unfolded"; the 911 operators were not attempting to "establish or prove past events"; and "the transcripts simply reflect an effort to meet the needs of the ongoing emergency").

911 call, and statements made by the victim after police arrived, are excited utterances and not testimonial: *United States v. Arnold,* 486 F.3d 177 (6th Cir. 2007) (en banc): In a felon-firearm prosecution, the court admitted three sets of hearsay statements made by the daughter of the defendant's girlfriend, after an argument between the daughter (Tamica) and the defendant. The first set were statements made in a 911 call, in which Tamica stated that Arnold pulled a pistol on her and is "fixing to shoot me." The call was made after Tamica got in her car and went around the corner from her house. The second set of statements occurred when the police arrived within minutes; Tamica was hysterical, and without prompting said that Arnold had pulled a gun and was trying to kill her. The police asked what the gun looked like and she said "a black handgun." At the time of this second set of statements, Arnold had left the scene. The third set of statements was made when Arnold returned to the scene in a car a few minutes later. Tamica identified Arnold by name and stated "that's the guy that pulled the gun on me." A search of the vehicle turned up a black handgun underneath Arnold's seat.

The court first found that all three sets of statements were properly admitted as excited utterances. For each set of statements, Tamica was clearly upset, she was concerned about her safety, and the statements were made shortly after or right at the time of the two startling events (the gun threat for the first two sets of statements and Arnold's return for the third set of statements).

The court then concluded that none of Tamica's statements fell within the definition of "testimonial" as developed by the Court in *Davis*. Essentially the court found that the statements were not testimonial for the very reason that they were excited utterances — Tamica was upset, she was responding to an emergency and concerned about her safety, and her statements were largely spontaneous and not the product of an extensive interrogation.

911 call is non-testimonial*: United States v. Thomas,* 453 F.3d 838 (7th Cir. 2006): The court held that statements made in a 911 call were non-testimonial under the analysis provided by the Supreme Court in *Davis/Hammon*. The anonymous caller reported a shooting, and the perpetrator was still at large. The court analyzed the statements as follows:

> [T]he caller here described an emergency as it happened. First, she directed the operator's attention to Brown's condition, stating "[t]here's a dude that just got shot . . .", and ". . . the guy who shot him is still out there." Later in the call, she reiterated her concern that ". . . [t]here is somebody shot outside, somebody needs to be sent over here, and there's somebody runnin' around with a gun, somewhere." Any reasonable listener would know from this exchange that the operator and caller were dealing with an ongoing emergency, the resolution of which was paramount in the operator's interrogation. This fact is evidenced by the operator's repeatedly questioning the caller to determine who had the gun and where Brown lay injured. Further, the caller ended the conversation immediately upon the arrival of the police, indicating a level of interrogation that was significantly less formal than the testimonial statement in *Crawford*. Because the tape-recording of the call is nontestimonial, it does not implicate Thomas's right to confrontation.

See also United States v. Dodds, 569 F.3d 336 (7th Cir. 2009) (unidentified person's identification of a person with a gun was not testimonial: "In this case, the police were responding to a 911 call reporting shots fired and had an urgent need to identify the person with the gun and to stop the shooting. The witness's description of the man with a gun was given in that context, and we believe it falls within the scope of *Davis*.").

911 calls and statements made to officers responding to the calls were not testimonial: *United States v. Brun,* 416 F.3d 703 (8th Cir. 2005): The defendant was charged with assault with a deadly weapon. The police received two 911 calls from the defendant's home. One was from the defendant's 12-year-old nephew, indicating that the defendant and his girlfriend were arguing, and requesting assistance. The other call came 20 minutes later, from the defendant's girlfriend, indicating that the defendant was drunk and had a rifle, which he had fired in the house and then left. When officers responded to the calls, they found the girlfriend in the kitchen crying; she told the responding officers that the defendant had been drunk, and shot his rifle in the bathroom while she was in it. All three statements (the two 911 calls and the girlfriend's statement to the police) were admitted as excited utterances, and the defendant was convicted. The court affirmed. The court had little problem in finding that all three statements were properly admitted as excited utterances, and addressed whether the admission of the statements violated the defendant's right to confrontation after *Crawford.* The court first found that the nephew's 911 call was not "testimonial" within the meaning of *Crawford*, as it was not the kind of statement that was equivalent to courtroom testimony. It had "no doubt that the statements of an adolescent boy who has called 911 while witnessing an argument between his aunt and her partner escalate to an assault would be emotional and spontaneous rather than deliberate and calculated." The court used similar reasoning to find that the girlfriend's 911 call was not testimonial. The court also found that the girlfriend's statement to the police was not testimonial. It reasoned that the girlfriend's conversation with the officers "was unstructured, and not the product of police interrogation."

> **Note: The court's decision in *Brun* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon* and then *Bryant,* but the analysis appears consistent with that of the Supreme Court. It is true that in *Hammon***

the Court found statements by the victim to responding police officers to be testimonial, but that was largely because the police officers engaged in a structured interview about past criminal activity; in *Brun* the victim spoke spontaneously in response to an emergency. And the Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they were directed more toward dealing with an emergency than toward investigating or prosecuting a crime. The *Brun* decision is especially consistent with the pragmatic approach to finding an emergency (and to the observation that emergency is only one factor in the primary motive test) that the Court found in *Michigan v. Bryant.*

Excited utterance not testimonial under the circumstances, even though made to law enforcement: *Leavitt v. Arave*, 371 F.3d 663 (9th Cir. 2004): In a murder case, the government introduced the fact that the victim had called the police the night before her murder and stated that she had seen a prowler who she thought was the defendant. The court found that the victim's statement was admissible as an excited utterance, as the victim was clearly upset and made the statement just after an attempted break-in. The court held that the statement was not testimonial under *Crawford*. The court explained as follows:

> Although the question is close, we do not believe that Elg's statements are of the kind with which *Crawford* was concerned, namely, testimonial statements. * * * Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which the Confrontation Clause was directed: the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.

Note: The court's decision in *Leavitt* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. The Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they are directed toward dealing with an emergency rather than prosecuting a crime. It is especially consistent with the pragmatic approach to applying the primary motive test established in *Michigan v. Bryant.*

Expert Witnesses

Confusion over expert witnesses testifying on the basis of testimonial hearsay: *Williams v. Illinois*, 132 S.Ct. 2221 (2012): This case is fully set forth in Part One. To summarize, the confusion is over whether an expert can, consistently with the Confrontation Clause, rely on

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

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

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

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

> Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth Amendment infraction is minimal. Where an expert acts merely as a well-credentialed conduit for testimonial hearsay, however, the cases hold that her testimony violates a criminal defendant's right to confrontation. See, e.g., *United States v. Ayala*, 601 F.3d 256, 275 (4th Cir.2010) ("[Where] the expert is, in essence, ... merely acting as a transmitter for

testimonial hearsay," there is likely a Crawford violation); *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir.2009) (same); *United States v. Lombardozzi*, 491 F.3d 61, 72 (2d Cir.2007) ("[T]he admission of [the expert's] testimony was error ... if he communicated out-of-court testimonial statements ... directly to the jury in the guise of an expert opinion."). In this case, we need not wade too deeply into the thicket, because the testimony at issue here does not reside in the middle ground.

The government is hard-pressed to paint Morales's testimony as anything other than a recitation of Borrero's report. On direct examination, the prosecutor asked Morales to "say what are the results of the test," and he did exactly that, responding "[b]oth bricks were positive for cocaine." This colloquy leaves little room for interpretation. Morales was never asked, and consequently he did not provide, his independent expert opinion as to the nature of the substance in question. Instead, he simply parroted the conclusion of Borrero's report. Morales's testimony amounted to no more than the prohibited transmission of testimonial hearsay. While the interplay between the use of expert testimony and the Confrontation Clause will undoubtedly require further explication, the government cannot meet its Sixth Amendment obligations by relying on Rule 703 in the manner that it was employed here.

Note: Whatever *Williams* may mean, the court's analysis in *Ramon-Gonzalez* surely remains valid. Five members of the *Williams* Court rejected the proposition that an expert can rely *at all* on testimonial hearsay even if the expert testifies to his own opinion. And even Justice Alito cautions that an expert may not testify if he does nothing more than parrot the testimonial hearsay.

Confrontation Clause not violated where testifying expert conducts his own testing that replicates a testimonial report: *United States v. Soto*, 720 F.3d 51 (1st Cir. 2013): In a prosecution for identity theft and related offenses, a technician did a review of the defendant's laptop and came to conclusions that inculpated the defendant. At trial, a different expert testified that he did the same test and it came out exactly the same as the test done by the absent technician. The defendant argued that this was surrogate testimony that violated *Bullcoming.* But the court disagreed:

Agent Pickett did not testify as a surrogate witness for Agent Murphy. * * * Unlike in *Bullcoming*, Agent Murphy's forensic report was not introduced into evidence through Agent Pickett. Agent Pickett testified about a conclusion he drew from his own independent examination of the hard drive. The government did not need to get Agent Murphy's report into evidence through Agent Pickett. We do not interpret *Bullcoming* to mean that the agent who testifies against the defendant cannot know about another agent's prior examination or that agent's results when he conducts his examination. The government may ask an agent to replicate a forensic examination if the agent who did the initial examination is unable to testify at trial, so long as the agent who testifies conducts an independent examination and testifies to his own results.

The court reviewed the votes in *Bullcoming* and found that "it appears that six justices would find no Sixth Amendment violation when a second analyst retests evidence and testifies at trial about her conclusions about her independent examination."This count resulted from the fact that Justice Ginsburg, joined by Justice Scalia, stated that the Confrontation problem in *Bullcoming* could have been avoided if the testifying expert had simply retested the substance and testified on the basis of the retest.

The *Soto* court did express concern, however, that the testifying expert did more than simply replicate the results of the prior test: he also testified that the tests came to identical results:

> Soto's argument that Agent Murphy's report bolstered Agent Pickett's testimony hits closer to the mark. At trial, Agent Pickett testified that the incriminating documents in Exhibit 20 were found on a laptop that was seized from Soto's car. Although Agent Pickett had independent knowledge of that fact, he testified that "everything that was in John Murphy's report was exactly the way he said it was," and that Exhibit 20 "was contained in the same folder that John Murphy had said that he had found it in." * * * These two out-of-court statements attributed to Agent Murphy were arguably testimonial and offered for their truth. Agent Pickett testified about the substance of Agent Murphy's report which Agent Murphy prepared for use in Soto's trial. * * * Agent Pickett's testimony about Agent Murphy's prior examination of the hard drive bolstered Agent Pickett's independent conclusion that the Exhibit 20 documents were found on Soto's hard drive.

But the court found no plain error, in large part because the bolstering was cumulative.

Expert's reliance on out-of-court accusations does not violate *Crawford*, unless the accusations are directly presented to the jury*: United States v. Lombardozzi,* 491 F.3d 61 (2nd Cir. 2007): The court stated that *Crawford* is inapplicable if testimonial statements are not used for their truth, and that "it is permissible for an expert witness to form an opinion by applying her expertise because, in that limited instance, the evidence is not being presented for the truth of the matter asserted." The court concluded that the expert's testimony would violate the Confrontation Clause "only if he communicated out-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion." The court found any error in introducing the hearsay statements directly to be harmless. ***See also United States v. Mejia,*** 545 F.3d 179 (2nd Cir. 2008) (violation of Confrontation Clause where expert directly relates statements made by drug dealers during an interrogation).

> **Note: These opinions from the 2nd Circuit precede *Williams* and are questionable if you count the votes in *Williams.* But these cases are quite consistent with the Alito opinion in *Williams* and as stated above, most lower courts appear to be treating the Alito opinion as controlling on an expert's reliance on testimonial hearsay.**

Expert reliance on printout from machine does not violate *Crawford*: *United States v. Summers,* 666 F.3d 192 (4th Cir. 2011): The defendant objected to the admission of DNA testing performed on a jacket that linked him to drug trafficking. The court first considered whether the Confrontation Clause was violated by the government's failure to call the FBI lab employees who signed the internal log documenting custody of the jacket. The court found no error in admitting the log, because chain-of-custody evidence had been introduced by the defense and therefore the defendant had opened the door to rebuttal. The court next considered whether the Confrontation Clause was violated by testimony of an expert who relied on DNA testing results by lab analysts who were not produced at trial. The court again found no error. It emphasized that the expert did his own testing, and his reliance on the report was limited to a "pure instrument read-out." The court stated that "[t]he numerical identifiers of the DNA allele here, insofar as they are nothing more than raw data produced by a machine" should be treated the same as gas chromatograph data, which the courts have held to be non-testimonial. ***See also United States v. Shanton,*** , 2013 WL 781939 (4th Cir.) (Unpublished) (finding that the result concerning the admissibility of the expert testimony in *Summers* was unaffected by *Williams*: "[W]e believe five justices would affirm: Justice Thomas on the ground that the statements at issue were not testimonial and Justice Alito, along with the three justices who joined his plurality opinion, on the ground that the statements were not admitted for the truth of the matter asserted.").

Expert reliance on confidential informants in interpreting coded conversation does not violate *Crawford: United States v. Johnson,* 587 F.3d 625 (4th Cir. 2009): The court found no error in admitting expert testimony that decoded terms used by the defendants and coconspirators during recorded telephone conversations. The defendant argued that the experts relied on hearsay statements by cooperators to help them reach a conclusion about the meaning of particular conversations. The defendant asserted that the experts were therefore relying on testimonial hearsay. The court stated that experts are allowed to consider inadmissible hearsay as long as it is of a type reasonably relied on by other experts — as it was in this case. It stated that "[w]ere we to push *Crawford* as far as [the defendant] proposes, we would disqualify broad swaths of expert testimony, depriving juries of valuable assistance in a great many cases." The court recognized that it is "appropriate to recognize the risk that a particular expert might become nothing more than a transmitter of testimonial hearsay." But in this case, the experts never made reference to their interviews, and the jury heard no testimonial hearsay. "Instead, each expert presented his independent judgment and specialized understanding to the jury." Because the experts "did not become mere conduits" for the testimonial hearsay, their consideration of that hearsay "poses no *Crawford* problem." ***Accord United States v. Ayala,*** 601 F.3d 256 (4th Cir. 2010) (no violation of the Confrontation Clause where the experts "did not act as mere transmitters and in fact did not repeat statements of particular declarants to the jury."). ***Accord United States v Palacios,*** 677 F.3d 234 (4th Cir. 2012): Expert testimony on operation of a criminal enterprise, based in part on interviews with members, did not violate the Confrontation Clause because the expert "did not specifically reference" any of the testimonial interviews during his testimony, and simply relied on them as well as other information to give his own opinion.

Note: These opinions from the 4th Circuit precede *Williams* and are questionable if you count the votes in *Williams.* (You would have to go back to determine whether the statements relied upon are sufficiently "formalized" to constitute testimony under the Thomas view.) But these cases are quite consistent with the Alito opinion in *Williams* and as stated above, most lower courts at this early stage appear to be treating the Alito opinion as controlling on an expert's reliance on testimonial hearsay.

Expert reliance on printout from machine and another expert's lab notes does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone." Moreover, the expert's reliance on another expert's lab notes did not violate *Crawford* because the court concluded that an expert is permitted to rely on hearsay (including testimonial hearsay) in reaching his conclusion. The court noted that the defendant could "insist that the data underlying an expert's testimony be admitted, see Fed.R.Evid. 705, but by offering the evidence themselves defendants would waive any objection under the Confrontation Clause." The court observed that the notes of the chemist, evaluating the data from the machine, were testimonial and should not have been independently admitted, but it found no plain error in the admission of these notes.

Note: The court makes two holdings in *Moon.* The first is that expert reliance on a machine output does not violate *Crawford* because the machine is not a witness. That holding appears unaffected by *Williams* — at least it can be said that *Williams* says nothing about whether machine output is testimony. The second holding, that an expert's reliance on lab notes he did not prepare, is at the heart of *Williams.* It would appear that such a practice would be permissible even after *Williams* because 1) four Justices in *Williams* adopt the Rule 703 not-for-truth analysis (and most courts so far are saying it is controlling without more); and 2) in any case, lab "notes" are not certificates or affidavits so they do not appear to be the kind of formalized statement that Justice Thomas finds to be testimonial.

Expert reliance on drug test conducted by another does not violate *Melendez-Diaz* — though on remand from *Williams* the court assumes that the Confrontation Clause is violated and finds harmless error*: United States v. Turner,* 591 F.3d 928 (7th Cir. 2010), on remand from Supreme Court, 709 F.3d 1187 (7th Cir. 2013) : At the defendant's drug trial, the government called a chemist to testify about the tests conducted on the substance seized from the defendant — the tests indicating that it was cocaine. The defendant objected that the witness did not conduct the tests and was relying on testimonial statements from other chemists, in violation of *Crawford.* The court found no error, emphasizing that no statements of the official who actually tested the substance were

admitted at trial, and that the witness unequivocally established that his opinions about the test reports were his own.

Note: The Supreme Court vacated the decision in *Turner* and remanded for reconsideration in light of *Williams.* On remand, the court declared that while a rule from *Williams* was difficult to divine, it at a minimum "casts doubt on using expert testimony in place of testimony from an analyst who actually examined and tested evidence bearing on a defendant's guilt, insofar as the expert is asked about matters which lie solely within the testing analyst's knowledge." But the court noted that even after *Williams*, much of what the expert testified to was permissible because it was based on personal knowledge:

> We note that the bulk of Block's testimony was permissible. Block testified as both a fact and an expert witness. In his capacity as a supervisor at the state crime laboratory, he described the procedures and safeguards that employees of the laboratory observe in handling substances submitted for analysis. He also noted that he reviewed Hanson's work in this case pursuant to the laboratory's standard peer review procedure. As an expert forensic chemist, he went on to explain for the jury how suspect substances are tested using gas chromatography, mass spectrometry, and infrared spectroscopy to yield data from which the nature of the substance may be determined. He then opined, based on his experience and expertise, that the data Hanson had produced in testing the substances that Turner distributed to the undercover officer-introduced at trial as Government Exhibits 1, 2, and 3-indicated that the substances contained cocaine base. * * *
>
> As we explained in our prior decision, an expert who gives testimony about the nature of a suspected controlled substance may rely on information gathered and produced by an analyst who does not himself testify. Pursuant to Federal Rule of Evidence 703, the information on which the expert bases his opinion need not itself be admissible into evidence in order for the expert to testify. Thus, the government could establish through Block's expert testimony what the data produced by Hanson's testing revealed concerning the nature of the substances that Turner distributed, without having to introduce either Hanson's documentation of her analysis or testimony from Hanson herself. And because the government did not introduce Hanson's report, notes, or test results into evidence, Turner was not deprived of his rights under the Sixth Amendment's Confrontation Clause simply because Block relied on the data contained in those documents in forming his opinion.
>
> Nothing in the Supreme Court's *Williams* decision undermines this aspect of our decision. On the contrary, Justice Alito's plurality opinion in *Williams* expressly endorses the notion that an appropriately credentialed individual may give expert testimony as to the significance of data produced by another analyst. Nothing in either Justice Thomas's concurrence or in Justice Kagan's dissent takes issue with this aspect of the plurality's reasoning. Moreover, as we have indicated, Block in part

> testified in his capacity as Hanson's supervisor, describing both the procedures and safeguards that employees of the state laboratory are expected to follow and the steps that he took to peer review Hanson's work in this case. Block's testimony on these points, which were within his personal knowledge, posed no Confrontation Clause problem.

The court saw two Confrontation problems in the expert's testimony: 1) his statement that Hanson followed standard procedures in testing the substances that Turner distributed to the undercover officer, and 2) his testimony that he reached the same conclusion about the nature of the substances that the analyst did. The court held that on those two points, "Block necessarily was relying on out-of-court statements contained in Hanson's notes and report. These portions of Block's testimony strengthened the government's case; and, conversely, their exclusion would have diminished the quantity and quality of evidence showing that the substances Turner distributed comprised cocaine base in the form of crack cocaine." And while the case was much like *Williams,* the court found two distinguishing factors: 1) it was tried to a jury, thus raising a question of whether Justice Alito's not-for-truth analysis was fully applicable; and 2) the test was conducted with a suspect in mind, as Turner had been arrested with the substances to be tested in his possession. The defendant also argued that the report was "certified" and so was formal under the Thomas view. But the court noted that the analysts did not formally certify the results — the certification was made by the Attorney General to the effect that the report was a correct copy of the *report.* But the court implied that it was sufficiently formal in any case, because it was "both official and signed, it constituted a formal record of the result of the laboratory tests that Hanson had performed, and it was clearly designed to memorialize that result for purposes of the pending legal proceeding against Turner, who was named in the report."

Ultimately the court found it unnecessary to decide whether the defendant's Confrontation rights were violated because the error, if any, in the use of the analyst's report was harmless.

Distinguishing *Turner* and Finding No Confrontation Issue Where Expert Simply Relies on a Technician's Data: *United States v. Maxwell,* 724 F.3d 724 (2013): An expert testified to a substance by relying on a technician's report, but the expert never testified that she so relied. The tech's report was never mentioned. She did not vouch for the procedures used by the technician report, as had the expert in *Turner*. Nor did the expert testify that she had reached the same conclusion as the tech, as in *Turner.* Instead she simply testified about how evidence in the lab is typically tested, that she had reviewed the data generated for the material, and that she reached an independent conclusion that the substance was cocaine after reviewing that data. Because the tech's report was not introduced or referred to in any way. The court found this case easier than *Turner, supra,* and 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."

Avoiding the confusion wrought by *Williams*: *United States v. Garvey,* 688 F.3d 881 (7th Cir. 2012): The court recognized that the facts of the case mirrored the facts of *Turner,* immediately above: an expert testified that substances were narcotics, relying on a testimonial lab test, but the test itself was not admitted into evidence. The court noted that the Supreme Court in *Williams* had left "significant confusion" about whether such a procedure comported with the Confrontation Clause. The court avoided the issue because "even if Garvey can establish plain error, he cannot demonstrate that the error affected his substantial rights."

No confrontation violation where expert did not testify that he relied on a testimonial report: *United States v. Maxwell,* 2013 WL 3766519 (7th Cir.): In a narcotics prosecution, the analyst from the Wisconsin State Crime Laboratory who originally tested the substance seized from Maxwell retired before trial, so the government offered the testimony of his co-worker instead. The coworker did not personally analyze the substance herself, but concluded that it contained crack cocaine after reviewing the data generated by the original analyst. The court found no plain error in permitting this testimony, explaining that there could be no Confrontation problem, even after *Bullcoming* and *Williams*, where there is no testimony that the expert relied on the report:

> What makes this case different (and relatively more straightforward) from those we have dealt with in the past is that Gee did not read from Nied's report while testifying (as in *Garvey*), she did not vouch for whether Nied followed standard testing procedures or state that she reached the same conclusion as Nied about the nature of the substance (as in *Turner*), and the government did not introduce Nied's report itself or any readings taken from the instruments he used (as in *Moon*). Maxwell argues that Nied's forensic analysis is testimonial, but Gee never said she relied on Nied's report or his interpretation of the data in reaching her own conclusion. Instead, Gee simply testified (1) about how evidence in the crime lab is typically tested when determining whether it contains a controlled substance, (2) that she had reviewed the data generated for the material in this case, and (3) that she reached an independent conclusion that the substance contained cocaine base after reviewing that data.

Expert's reliance on report of another law enforcement agency did not violate the right to confrontation: *United States v. Huether,* 673 F.3d 789 (8th Cir. 2012): In a trial on charges of sexual exploitation of minors, an expert testified in part on the basis of a report by the National Center for Missing and Exploited Children. In this *pre-Williams* case, the court found no confrontation violation because the NCMEC report was not introduced into evidence and the expert drew his own conclusion and was not a conduit for the hearsay.

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

Expert's reliance on notes prepared by lab technicians did not violate the Confrontation Clause: *United States v. Pablo,* 625 F.3d 1285 (10th Cir. 2010), ***on remand for reconsideration under Williams,* 696 F.3d 1280 (10th Cir. 2012)**: The defendant was tried for rape and other charges. Two lab analysts conducted tests on the rape kit and concluded that the DNA found at the scene matched the defendant. The defendant complained that the lab results were introduced through the testimony of a forensic expert and the lab analysts were not produced for cross-examination. In the original appeal the court found no plain error, reasoning that the notes of the lab analysts were not admitted into evidence and were never offered for their truth. To the extent they were discussed before the jury, it was only to describe the basis of the expert's opinion — which the court found to be permissible under Rule 703. The court observed that "[t]he extent to which an expert witness may disclose to a jury otherwise inadmissible testimonial hearsay without implicating a defendant's confrontation rights * * * is a matter of degree." According to the court, if an expert "simply parrots another individual's testimonial hearsay, rather than conveying her own independent judgment that only incidentally discloses testimonial hearsay to assist the jury in evaluating her opinion, then the expert is, in effect, disclosing the testimonial hearsay for its substantive truth and she becomes little more than a backdoor conduit for otherwise inadmissible testimonial hearsay." In this case the court, applying the plain error standard, found insufficient indication that the expert had operated solely as a conduit for testimonial hearsay.

***Pablo* was vacated for reconsideration in light of *Williams*. On remand, the court once again affirmed the conviction.** The Court stated that "we need not decide the precise mandates and limits of *Williams*, to the extent they exist." The Court noted that five members of the *Williams* Court "might find" that the expert's reliance on the lab test was for its truth. But "we cannot say the district court plainly erred in admitting Ms. Snider's testimony, as it is not plain that a majority of the Supreme Court would have found reversible error with the challenged admission." The court explained as follows in a parsing of *Williams:*

> On the contrary, it appears that five Justices would affirm the district court in this case, albeit with different Justices relying on different rationales as they did in Williams. The four-Justice plurality in *Williams* likely would determine that Ms. Snider's testimony was not offered for the truth of the matter asserted in Ms. Dick's report, but rather was offered for the separate purpose of evaluating Ms. Snider's credibility as an expert witness per Fed.R.Evid. 703; and therefore that the admission of her testimony did not offend the Confrontation Clause. Meanwhile, although Justice Thomas likely would conclude that the testimony was being offered for the truth of the matter asserted, he likely would further determine that the testimony was nevertheless constitutionally admissible because the appellate record does not show that the report was certified, sworn to, or otherwise imbued with the requisite "solemnity" required for the statements therein to be considered " ' testimonial' for purposes of the Confrontation Clause." Since Ms. Dick's report is not a part of the appellate record, we naturally cannot say that it plainly would meet Justice Thomas's solemnity test. In sum, it is not clear or obvious under current law that the district court erred in admitting Ms. Snider's testimony, so reversal is unwarranted on this basis.

The *Pablo* court on remand concluded that " the manner in which, and degree to which, an expert may merely rely upon, and reference during her in-court expert testimony, the out-of-court testimonial conclusions in a lab report made by another person not called as a witness is a nuanced legal issue without clearly established bright line parameters, particularly in light of the discordant 4–1–4 divide of opinions in *Williams*."

Forfeiture

Constitutional standard for forfeiture — like Rule 804(b)(6) — requires a showing that the defendant acted wrongfully with the intent to keep the witness from testifying: *Giles v. California,* 554 U.S. 353 (2008): The Court held that a defendant does not forfeit his constitutional right to confront testimonial hearsay unless the government shows that the defendant engaged in wrongdoing *designed to keep the witness from testifying at trial.* Giles was charged with the murder of his former girlfriend. A short time before the murder, Giles had assaulted the victim, and she made statements to the police implicating Giles in that assault. The victim's hearsay statements were admitted against the defendant on the ground that he had forfeited his right to rely on the Confrontation Clause, by murdering the victim. The government made no showing that Giles murdered the victim with the intent to keep her from testifying. The Court found an intent-to-procure requirement in the common law, and therefore, under the historical analysis mandated by *Crawford,* there is necessarily an intent-to-procure requirement for forfeiture of confrontation rights. Also, at one point in the opinion, the Court in dictum stated that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial — presumably because the primary motivation for making such statements is for something other than use at trial.

Murder of witness by co-conspirators as a sanction to protect the conspiracy against testimony constitutes forfeiture of both hearsay and Confrontation Clause objections: *United States v. Martinez,* 476 F.3d 961 (D.C. Cir. 2007): Affirming drug and conspiracy convictions, the court found no error in the admission of hearsay statements made to the DEA by an informant involved with the defendant's drug conspiracy. The trial court found by a preponderance of the evidence that the informant was murdered by members of the defendant's conspiracy, in part to procure his unavailability as a witness. The court of appeals affirmed this finding — rejecting the defendant's argument that forfeiture could not be found because his co-conspirators would have murdered the informant anyway, due to his role in the loss of a drug shipment. The court stated that it is "surely reasonable to conclude that anyone who murders an informant does so intending *both* to exact revenge *and* to prevent the informant from disclosing further information and testifying." It concluded that the defendant's argument would have the "perverse consequence" of allowing criminals to avoid forfeiture if they could articulate more than one bad motivation for disposing of a witness. Finally, the court held that forfeiture under Rule 804(b)(6) by definition constituted forfeiture of the Confrontation Clause objection. It stated that *Crawford* and *Davis* "foreclose" the

possibility that the admission of evidence under Rule 804(b)(6) could nonetheless violate the Confrontation Clause.

Fact that defendant had multiple reasons for killing a witness does not preclude a finding of forfeiture: *United States v. Jackson,* 706 F.3d 262 (4th Cir. 2013): The defendant argued that the constitutional right to confrontation can be forfeited only when a defendant was motivated exclusively by a desire to silence a witness. (In this case the defendant argued that while he murdered a witness to silence him, he had additional reasons, including preventing the witness from harming the defendant's drug operation and as retaliation for robbing one of the defendant's friends.) The court rejected the argument, finding nothing in *Giles* to support it. To the contrary, the Court in *Giles* reasoned that the common law forfeiture rule was designed to prevent the defendant from profiting from his own wrong. Moreover, under a multiple-motive exception to forfeiture, defendants might be tempted to murder witnesses and then cook up another motive for the murder after the fact.

Forfeiture can be found on the basis of *Pinkerton* liability: *United States v. Dinkins,* 691 F.3d 358 (4th Cir. 2012): The court found that the defendant had forfeited his right of confrontation when a witness was killed by a coconspirator as an act to further the conspiracy by silencing the witness. The court concluded that in light of *Pinkerton* liability, "the Constitution does not guarantee an accused person against the legitimate consequence of his own wrongful acts."

Retaliatory murder of witnesses who testified against the accused in a prior case is not a forfeiture in the trial for murdering the witnesses: *United States v. Henderson,* 626 F.3d 626 (6th Cir. 2010): The defendant was convicted of bank robbery after two people (including his accomplice) testified against him. Shortly after the defendant was released from prison, the two witnesses were found murdered. At the trial for killing the two witnesses, the government offered statements made by the victims to police officers during the investigation of the bank robbery. These statements concerned their cooperation and threats made by the defendant. The trial judge admitted the statements after finding by a preponderance of the evidence that the defendant killed the witnesses. That decision, grounded in forfeiture, was made before *Giles* was decided. On appeal, the court found error under *Giles* because "Bass and Washington could not have been killed, in 1996 and 1998, respectively, to prevent them from testifying against [the defendant] in the bank robbery prosecution in 1981." Thus there was no showing of intent to keep the witnesses from testifying, as *Giles* requires for a finding of forfeiture. The court found the errors to be harmless.

Grand Jury, Plea Allocutions, Etc.

Grand jury testimony and plea allocution statement are both testimonial: *United States v. Bruno,* 383 F.3d 65 (2nd Cir. 2004): The court held that a plea allocution statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant. It noted that the Court in *Crawford* had taken exception to previous cases decided by the

Circuit that had admitted such statements as sufficiently reliable under *Roberts*. Those prior cases have been overruled by *Crawford.* The court also noted that the admission of grand jury testimony was error as it was clearly testimonial after *Crawford*. **See *also United States v. Becker,*** 502 F.3d 122 (2nd Cir. 2007) (plea allocution is testimonial even though redacted to take out direct reference to the defendant: "any argument regarding the purposes for which the jury might or might not have actually considered the allocutions necessarily goes to whether such error was harmless, not whether it existed at all"); ***United States v. Snype,*** 441 F.3d 119 (2nd Cir. 2006) (plea allocution of the defendant's accomplice was testimonial even though all direct references to the defendant were redacted); ***United States v. Gotti,*** 459 F.3d 296 (2nd Cir. 2006) (redacted guilty pleas of accomplices, offered to show that a bookmaking business employed five or more people, were testimonial under *Crawford*); ***United States v. Al-Sadawi,*** 432 F.3d 419 (2nd Cir. 2005) (*Crawford* violation where the trial court admitted portions of a cohort's plea allocution against the defendant, even though the statement was redacted to take out any direct reference to the defendant).

Defendant charged with aiding and abetting has confrontation rights violated by admission of primary wrongdoer's guilty plea: *United States v. Head,* 707 F.3d 1026 (8th Cir. 2013): The defendant was charged with aiding and abetting a murder committed by her boyfriend in Indian country. The trial court admitted the boyfriend's guilty plea to prove the predicate offense. The court found that the guilty plea was testimonial and reversed the aiding and abetting conviction. The court relied on *Crawford's* statement that "prior testimony that the defendant was unable to cross-examine" is one of the "core class of 'testimonial' statements."

Grand jury testimony is testimonial: *United States v. Wilmore,* 381 F.3d 868 (9th Cir. 2004): The court held, unsurprisingly, that grand jury testimony is testimonial under *Crawford*. It could hardly have held otherwise, because even under the narrowest definition of "testimonial" (i.e., the specific types of hearsay mentioned by the *Crawford* Court) grand jury testimony is covered within the definition.

Implied Testimonial Statements

Testimony that a police officer's focus changed after hearing an out-of-court statement impliedly included accusatorial statements from an accomplice and so violated the defendant's right to confrontation: *United States v. Meises,* 645 F.3d 5 (1st Cir. 2011): At trial an officer testified that his focus was placed on the defendant after an interview with a cooperating witness. The government did not explicitly introduce the statement of the cooperating witness. On appeal, the defendant argued that the jury could surmise that the officer's focus changed because of an out-of-court accusation of a declarant who was not produced at trial. The government argued that there was no confrontation violation because the testimony was all about the actions of the officer and no hearsay statement was admitted at trial. But the court agreed with the defendant and reversed the

conviction. The court noted that it was irrelevant that the government did not introduce the actual statements, because such statements were effectively before the jury in the context of the trial. The court stated that "any other conclusion would permit the government to evade the limitations of the Sixth Amendment and the Rules of Evidence by weaving an unavailable declarant's statements into another witness's testimony by implication. The government cannot be permitted to circumvent the Confrontation Clause by introducing the same substantive testimony in a different form."

Statements to law enforcement were testimonial, and right to confrontation was violated even though the statements were not stated in detail at trial: *Ocampo v. Vail,* 649 F.3d 1098 (9th Cir. 2011): In a murder case, an officer testified that on the basis of an interview with Vazquez, the police were able to rule out suspects other than the defendant. Vazquez was not produced for trial. The state court found no confrontation violation on the ground that the officer did not testify to the substance of anything Vazquez said. But the court found that the state court unreasonably applied *Crawford* and reversed the district court's denial of a grant of habeas corpus. The statements from Vazquez were obviously testimonial because they were made during an investigation of a murder. And the court held that the Confrontation Clause bars not only quotations from a declarant, but also any testimony at trial that conveys the substance of a declarant's testimonial hearsay statement. It reasoned as follows:

> Where the government officers have not only "produced" the evidence, but then condensed it into a conclusory affirmation for purposes of presentation to the jury, the difficulties of testing the veracity of the source of the evidence are not lessened but exacerbated. With the language actually used by the out-of-court witness obscured, any clues to its truthfulness provided by that language — contradictions, hesitations, and other clues often used to test credibility — are lost, and instead a veneer of objectivity conveyed.
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> * * *
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> Whatever locution is used, out-of-court statements admitted at trial are "statements" for the purpose of the Confrontation Clause * * * if, fairly read, they convey to the jury the substance of an out-of-court, testimonial statement of a witness who does not testify.

Informal Circumstances, Private Statements, etc.

Private conversations and casual remarks are not testimonial: *United States v. Malpica-Garcia,* 489 F.3d 393 (1st Cir. 2007): In a drug prosecution, the defendant argued that testimony of his former co-conspirators violated *Crawford* because some of their assertions were not based on personal knowledge but rather were implicitly derived from conversations with other people (e.g.,

that the defendant ran a protection racket). The court found that if the witnesses were in fact relying on accounts from others, those accounts were not testimonial. The court noted that the information was obtained from people "in the course of private conversations or in casual remarks that no one expected would be preserved or later used at trial." There was no indication that the statements were made "to police, in an investigative context, or in a courtroom setting."

Informal letter found reliable under the residual exception is not testimonial: *United States v. Morgan,* 385 F.3d 196 (2nd Cir. 2004): In a drug trial, a letter written by the co-defendant was admitted against the defendant. The letter was written to a boyfriend and implicated both the defendant and the co-defendant in a conspiracy to smuggle drugs. The court found that the letter was properly admitted under Rule 807, and that it was not testimonial under *Crawford.* The court noted the following circumstances indicating that the letter was not testimonial: 1) it was not written in a coercive atmosphere; 2) it was not addressed to law enforcement authorities; 3) it was written to an intimate acquaintance; 4) it was written in the privacy of the co-defendant's hotel room; 4) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 5) it was not written to curry favor with the authorities or with anyone else. These were the same factors that rendered the hearsay statement sufficiently reliable to qualify under Rule 807.

Informal conversation between defendant and undercover informant was not testimonial under *Davis: United States v. Burden,* 600 F.3d 204 (2nd Cir. 2010): Appealing RICO and drug convictions, the defendant argued that the trial court erred in admitting a recording of a drug transaction between the defendant and a cooperating witness. The defendant argued that the statements on the recording were testimonial, but the court disagreed and affirmed. The defendant's part of the conversation was not testimonial because he was not aware at the time that the statement was being recorded or would be potentially used at his trial. As to the informant, "anything he said was meant not as an accusation in its own right but as bait."

> **Note: Other courts, as seen in the "Not Hearsay" section below, have come to the same result as the Second Circuit in *Burden,* but using a different analysis: 1) admitting the defendant's statement does not violate the confrontation clause because it is his own statement and he doesn't have a right to confront himself; 2) the informant's statement, while testimonial, is not offered for its truth but only to put the defendant's statements in context — therefore it does not violate the right to confrontation because it is not offered as an accusation**

Prison telephone calls between defendant and his associates were not testimonial: *United States v. Jones,* 716 F.3d 851 (4th Cir. 2013): Appealing from convictions for marriage fraud, the defendant argued that the trial court erred in admitting telephone conversations between the defendant and his associates, who were incarcerated at the time. The calls were recorded by the prison. The court found no error in admitting the conversations because they were not testimonial.

The calls involved discussions to cover up and lie about the crime, and they were casual, informal statements among criminal associates, so it was clear that they were not primarily motivated to be used in a criminal prosecution. The defendant argued that the conversations were testimonial because the parties knew they were being recorded. But the court noted that "a declarant's understanding that a statement could potentially serve as criminal evidence does not necessarily denote testimonial intent" and that "just because recorded statements are used at trial does not mean they were created for trial." The court also noted that a prison "has significant institutional reasons for recording phone calls outside or procuring forensic evidence — i.e., policing its own facility by monitoring prisoners' contact with individuals outside the prison."

Statements made to an undercover informant setting up a drug transaction are not testimonial: *Brown v. Epps,* 686 F.3d 281 (5th Cir. 2012)**:** The court found no error in the state court's admission of an intercepted conversation between the defendant, an accomplice, and an undercover informant. The conversation was to set up a drug deal. The court held that statements "unknowingly made to an undercover officer, confidential informant, or cooperating witness are not testimonial in nature because the statements are not made under circumstances which would lead an objective witness to reasonably believe that the statements would be available for later use at trial." The court elaborated further:

> The conversations did not consist of solemn declarations made for the purpose of establishing some fact. Rather, the exchange was casual, often profane, and served the purpose of selling cocaine. Nor were the unidentified individuals' statements made under circumstances that would lead an objective witness reasonably to believe that they would be available for use at a later trial. To the contrary, the statements were furthering a criminal enterprise; a future trial was the last thing the declarants were anticipating. Moreover, they were unaware that their conversations were being preserved, so they could not have predicted that their statements might subsequently become "available" at trial. The unidentified individuals' statements were * * * not part of a formal interrogation about past events—the conversations were informal cell-phone exchanges about future plans—and their primary purpose was not to create an out-of-court substitute for trial testimony. * * * No witness goes into court to proclaim that he will sell you crack cocaine in a Wal–Mart parking lot. An "objective analysis" would conclude that the "primary purpose" of the unidentified individuals' statements was to arrange the drug deal. (Quoting *Bryant*). Their purpose was not to create a record for trial and thus is not within the scope of the Confrontation Clause. We conclude that the statements were nontestimonial.
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> **Note: This case was decided after *Williams,* but is not affected by that case. Statements setting up a drug deal with a confidential informant are definitely not testimonial under either of the "primary motive" tests posited in *Williams.***

Statements made by a victim to her friends and family are not testimonial: *Doan v. Carter,* 548 F.3d 449 (6th Cir. 2008): The defendant challenged a conviction for murder of his girlfriend. The trial court admitted a number of statements from the victim concerning physical

abuse that the defendant had perpetrated on her. The defendant argued that these statements were testimonial but the court disagreed. The defendant contended that under *Davis* a statement is nontestimonial only if it is in response to an emergency, but the court rejected the defendant's "narrow characterization of nontestimonial statements." The court relied on the statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation * * * would be excluded, if at all, only by hearsay rules." ***See also United States v. Boyd,*** 640 F.3d 657 (6th Cir. 2011) (statements were non-testimonial because the declarant made them to a companion; stating broadly that "statements made to friends and acquaintances are non-testimonial").

Suicide note implicating the declarant and defendant in a crime was testimonial under the circumstances: ***Miller v. Stovall,*** 608 F.3d 913 (6th Cir. 2010): A former police officer involved in a murder wrote a suicide note to his parents, indicating he was going to kill himself so as not go to jail for the crime that he and the defendant committed. The note was admitted against the defendant. The court found that the note was testimonial and its admission against the defendant violated his right to confrontation, because the declarant could "reasonably anticipate" that the note would be passed on to law enforcement — especially because the declarant was a former police officer.

> **Note: The court's "reasonable anticipation" test appears to be a broader definition of testimoniality than that applied by the Supreme Court in *Davis* and especially *Bryant*. The Court in *Davis* looked to the "primary motivation" of the speaker. In this case, the "primary motivation" of the declarant was probably to explain to his parents why he was going to kill himself, rather than to prepare a case against the defendant. So the case appears wrongly decided.**

Statements made by an accomplice to a jailhouse informant are not testimonial: ***United States v. Honken,*** 541 F.3d 1146 (8th Cir. 2008): When the defendant's murder prosecution was pending, the defendant's accomplice (Johnson) was persuaded by a fellow inmate (McNeese) that Johnson could escape responsibility for the crime by getting another inmate to falsely confess to the crime — but that in order to make the false confession believable, Johnson would have to disclose where the bodies were buried. Johnson prepared maps and notes describing where the bodies were buried, and gave it to McNeese with the intent that it be delivered to the other inmate who would falsely confess. In fact this was all a ruse concocted by McNeese and the authorities to get Johnson to confess, in which event McNeese would get a benefit from the government. The notes and maps were admitted at the defendant's trial, over the defendant's objection that they were testimonial. The defendant argued that Johnson had been subjected to the equivalent of a police interrogation. But the court held that the evidence was not testimonial, because Johnson didn't know that he was speaking to a government agent. It explained as follows:

> Johnson did not draw the maps with the expectation that they would be used against Honken at trial * * * . Further, the maps were not a "solemn declaration" or a "formal statement." Rather, Johnson was more likely making a casual remark to an acquaintance. We simply

cannot conclude Johnson made a "testimonial" statement against Honken without the faintest notion that she was doing so.

See also United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008) (private conversation between inmates about a future course of action is not testimonial).

Statement from one friend to another in private circumstances is not testimonial: *United States v. Wright,* 536 F.3d 819 (8th Cir. 2008): The defendant was charged with shooting two people in the course of a drug deal. One victim died and one survived. The survivor testified at trial to a private conversation he had with the other victim, before the shootings occurred. The court held that the statements of the victim who died were not testimonial. The statements were made under informal circumstances to a friend. The court relied on the Supreme Court's statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial.

Accusatory statements in a victim's diary are not testimonial: *Parle v. Runnels*, 387 F.3d 1030 (9th Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The court held that the victim's diary was not testimonial, as it was a private diary of daily events. There was no indication that it was prepared for use at a trial.

Private conversation between mother and son is not testimonial: *United States v. Brown,* 441 F.3d 1330 (11th Cir. 2006): In a murder prosecution, the court admitted testimony that the defendant's mother received a phone call, apparently from the defendant; the mother asked the caller whether he had killed the victim, and then the mother started crying. The mother's reaction was admitted at trial as an excited utterance. The court found no violation of *Crawford.* The court reasoned as follows:

> We need not divine any additional definition of "testimonial" evidence to conclude that the private conversation between mother and son, which occurred while Sadie Brown was sitting at her dining room table with only her family members present, was not testimonial. The phone conversation Davis overheard obviously was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial. Thus, it is not testimonial and its admission is not barred by *Crawford*. (Citations omitted).

Interpreters

Interpreter is not a witness but merely a language conduit and so testimony about interpreter's translation does not violate *Crawford*: *United States v. Orm Hieng,* 679 F.3d 1131 (9th Cir. 2012): At the defendant's drug trial, an agent testified to inculpatory statements the defendant made through an interpreter. The interpreter was not called to testify, and the defendant argued that admitting the interpreter's statements violated his right to confrontation. The court found that the interpreter had acted as a "mere language conduit." The court noted that in determining whether an interpreter acts as a language conduit, a court must undertake a case-by-case approach, considering factors such as " which party supplied the interpreter, whether the interpreter had any motive to lead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated." The court found that these factors cut in favor of the lower court's finding that the interpreter had acted as a language conduit. Because the interpreter was only a conduit, the witness against the defendant was not the interpreter, but rather himself. The court concluded that when it is the defendant whose statements are translated, "the Sixth Amendment simply has no application because a defendant cannot complain that he was denied the opportunity to confront himself." ***See also United States v. Romo-Chavez,*** 681 F.3d 955 (9th Cir. 2012): Where an interpreter served only as a language conduit, the defendant's own statements were properly admitted under Rule 801(d)(2)(A), and the confrontation clause was not violated because the defendant was his own accuser and he had no right to cross-examine himself.

Interpreter's statements were testimonial: *United States v. Charles,* 722 F.3d 1319 (11th Cir. 2013): The defendant was convicted of knowingly using a fraudulently authored travel document. When the defendant was detained at the airport, he spoke to the Customs Officer through an interpreter. At trial, the defendant's statements were reported by the officer. The interpreter was not called. The court held that the defendant had the right to confront the interpreter. It stated that the interpreter's translations were testimonial because they were rendered in the course of an interrogation and for these purposes the interpreter was the relevant declarant. But the court found that the error was not plain and affirmed the conviction. The court did not address the conflicting authority in the Ninth Circuit, supra. ***See also United States v. Curbelo,*** 726 F.3d 1260 (11th Cir. 2013) (transcripts of a wiretapped conversation that were translated constituted the translator's implicit out-of-court representation that the translation was correct, and the translator's implicit assertions were testimonial; but there was no violation of the Confrontation Clause because a party to the conversation testified to what was said based on his independent review of the recordings and the transcript, and the transcript itself was never admitted at trial).

Interrogations, Etc.

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

the limits of the term "testimonial," it clearly covers sworn statements by accomplices to police officers.

Accomplice's statements during police interrogation are testimonial: *United States v. Alvarado-Valdez,* 521 F.3d 337 (5th Cir. 2008): The trial court admitted the statements of the defendant's accomplice that were made during a police interrogation. The statements were offered for their truth — to prove that the accomplice and the defendant conspired with others to transport cocaine. Because the accomplice had absconded and could not be produced for trial, admission of his testimonial statements violated the defendant's right to confrontation.

Identification of a defendant, made to police by an incarcerated person, is testimonial: *United States v. Pugh,* 405 F.3d 390 (6th Cir. 2005): In a bank robbery prosecution, the court found a *Crawford* violation when the trial court admitted testimony from a police officer that he had brought a surveillance photo down to a person who was incarcerated, and that person identified the defendant as the man in the surveillance photo. This statement was testimonial under *Crawford* because "the term 'testimonial' at a minimum applies to police interrogations." The court also noted that the statement was sworn and that a person who "makes a formal statement to government officers bears testimony." ***See also United States v. McGee***, 529 F.3d 691 (6th Cir. 2008) (confidential informant's statement identifying the defendant as the source of drugs was testimonial).

Accomplice statement to law enforcement is testimonial: *United States v. Nielsen,* 371 F.3d 574 (9th Cir. 2004): Nielsen resided in a house with Volz. Police officers searched the house for drugs. Drugs were found in a floor safe. An officer asked Volz who had access to the floor safe. Volz said that she did not but that Nielsen did. This hearsay statement was admitted against Nielsen at trial The court found this to be error, as the statement was testimonial under *Crawford*, because it was made to police officers during interrogation. The court noted that even the first part of Volz's statement — that she did not have access to the floor safe — violated *Crawford* because it provided circumstantial evidence that Nielsen did have access.

Statement made by an accomplice after arrest, but before formal interrogation, is testimonial: *United States v. Summers,* 414 F.3d 1287 (10th Cir. 2005): The defendant's accomplice in a bank robbery was arrested by police officers. As he was walked over to the patrol car, he said to the officer, "How did you guys find us?" The court found that the admission of this statement against the defendant violated his right to confrontation under *Crawford.* The court explained as follows:

> Although Mohammed had not been read his *Miranda* rights and was not subject to formal interrogation, he had nevertheless been taken into physical custody by police officers. His question was directed at a law enforcement official. Moreover, Mohammed's statement *

> * * implicated himself and thus was loosely akin to a confession. Under these circumstances, we find that a reasonable person in Mohammed's position would objectively foresee that an inculpatory statement implicating himself and others might be used in a subsequent investigation or prosecution.

Statements made by accomplice to police officers during a search are testimonial: *United States v. Arbolaez,* 450 F.3d 1283 (11th Cir. 2006): In a marijuana prosecution, the court found error in the admission of statements made by one of the defendant's accomplices to law enforcement officers during a search. The government argued that the statements were offered not for truth but to explain the officers' reactions to the statements. But the court found that "testimony as to the details of statements received by a government agent . . . even when purportedly admitted not for the truthfulness of what the informant said but to show why the agent did what he did after he received that information constituted inadmissible hearsay." The court also found that the accomplice's statements were testimonial under *Crawford*, because they were made in response to questions from police officers.

Joined Defendants

Testimonial hearsay offered by another defendant violates *Crawford* where the statement can be used against the defendant: *United States v. Nguyen,* 565 F.3d 668 (9th Cir. 2009): In a trial of multiple defendants in a fraud conspiracy, one of the defendants offered statements he made to a police investigator. These statements implicated the defendant. The court found that the admission of the codefendant's statements violated the defendant's right to confrontation. The statements were clearly testimonial because they were made to a police officer during an interrogation. The court noted that the confrontation analysis "does not change because a co-defendant, as opposed to the prosecutor, elicited the hearsay statement. The Confrontation Clause gives the accused the right to be confronted with the witnesses against him. The fact that Nguyen's co-counsel elicited the hearsay has no bearing on her right to confront her accusers."

Judicial Findings and Judgments

Judicial findings and an order of judicial contempt are not testimonial: *United States v. Sine,* 493 F.3d 1021 (9th Cir. 2007): The court held that the admission of a judge's findings and order of criminal contempt, offered to prove the defendant's lack of good faith in a tangentially related fraud case, did not violate the defendant's right to confrontation. The court found "no reason to believe that Judge Carr wrote the order in anticipation of Sine's prosecution for fraud, so his order was not testimonial."

See also United States v. Ballesteros-Selinger, 454 F.3d 973 (9th Cir. 2006) (holding that an immigration judge's deportation order was nontestimonial because it "was not made in anticipation of future litigation").

Law Enforcement Involvement

Police officer's count of marijuana plants found in a search is testimonial: *United States v. Taylor,* 471 F.3d 832 (7th Cir. 2006): The court found plain error in the admission of testimony by a police officer about the number of marijuana plants found in the search of the defendant's premises. The officer did not himself count all of the plants; part of his total count was based on a hearsay statement of another officer who assisted in the count. The court held that the officer's hearsay statement about the amount of plants counted was clearly testimonial as it was an evaluation prepared for purposes of criminal prosecution.

Social worker's interview of child-victim, with police officers present, was the functional equivalent of interrogation and therefore testimonial: *Bobadilla v. Carlson,* 575 F.3d 785 (8th Cir. 2009): The court affirmed the grant of a writ of habeas after a finding that the defendant's state conviction for child sexual abuse was tainted by the admission of a testimonial statement by the child-victim. A police officer arranged to have the victim interviewed at the police station five days after the alleged abuse. The officer sought the assistance of a social worker, who conducted the interview using a forensic interrogation technique designed to detect sexual abuse. The court found that "this interview was no different than any other police interrogation: it was initiated by a police officer a significant time after the incident occurred for the purpose of gathering evidence during a criminal investigation." The court stated that the only difference between the questioning in this case and that in *Crawford* was that "instead of a police officer asking questions about a suspected criminal violation, he sat silent while a social worker did the same." But the court found that this was "a distinction without a difference" because the interview took place at the police station, it was recorded for use at trial, and the social worker utilized a structured, forensic method of interrogation at the behest of the police. Under the circumstances, the social worker "was simply acting as a surrogate interviewer for the police."

Statements made by a child-victim to a forensic investigator are testimonial: *United States v. Bordeaux,* 400 F.3d 548 (8th Cir. 2005): In a child sex abuse prosecution, the trial court admitted hearsay statements made by the victim to a forensic investigator. The court reversed the conviction, finding among other things that the hearsay statements were testimonial under *Crawford.* The court likened the exchange between the victim and the investigator to a police interrogation. It elaborated as follows:

> The formality of the questioning and the government involvement are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a 'forensic' interview . . . That [the victim's] statements may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.
>
> **Note: The court's statement that multi-purpose statements might be testimonial is surely correct, but it must be narrowed in light of the Supreme Court's subsequent decision in *Bryant.* There, the Court declared that it would find a hearsay statement to be testimonial only if the *primary* purpose was to prepare a statement for criminal prosecution.**

See also United States v. Eagle, 515 F.3d 794 (8th Cir. 2008) (statements from a child concerning sex abuse, made to a forensic investigator, are testimonial). ***Compare United States v. Peneaux,***

432 F.3d 882 (8th Cir. 2005) (distinguishing *Bordeaux* where the child's statement was made to a treating physician rather than a forensic investigator, and there was no evidence that the interview resulted in any referral to law enforcement: "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial."); ***United States v. DeLeon,*** 678 F.3d 317 (4th Cir. 2012) (discussed below under "medical statements" and distinguishing *Bordeaux* and *Bobodilla* as cases where statements were essentially made to law enforcement officers and not for treatment purposes).

Machines

Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Washington,* 498 F.3d 225 (4th Cir. 2007): The defendant was convicted of operating a motor vehicle under the influence of drugs and alcohol. At trial, an expert testified on the basis of a printout from a gas chromatograph machine. The machine issued the printout after testing the defendant's blood sample. The expert testified to his interpretation of the data issued by the machine — that the defendant's blood sample contained PCP and alcohol. The defendant argued that *Crawford* was violated because the expert had no personal knowledge of whether the defendant's blood contained PCP or alcohol. He read *Crawford* to require the production of the lab personnel who conducted the test. But the court rejected this argument, finding that the machine printout was not hearsay, and therefore its use at trial by the expert could not violate *Crawford* even though it was prepared for use at trial. The court reasoned as follows:

> The technicians could neither have affirmed or denied independently that the blood contained PCP and alchohol, because all the technicians could do was to refer to the raw data printed out by the machine. Thus, the statements to which Dr. Levine testified in court . . . did not come from the out-of-court technicians [but rather from the machine] and so there was no violation of the Confrontation Clause. . . . The raw data generated by the diagnostic machines are the "statements" of the machines themselves, not their operators. But "statements" made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause.

The court noted that the technicians might have needed to be produced to provide a chain of custody, but observed that the defendant made no objection to the authenticity of the machine's report.

> **Note: The result in *Washington* appears unaffected by *Williams,* as the Court in *Williams* had no occasion to consider whether a machine output can be testimonial hearsay.**

See also United States v. Summers, 666 F.3d 192 (4th Cir. 2011): (expert's reliance on a "pure instrument read-out" did not violate the Confrontation Clause because such a read-out is not "testimony").

Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone."

Electronic tabulation of phone calls is not a statement and therefore cannot be testimonial hearsay: *United States v. Lamons,* 532 F.3d 1251 (11th Cir. 2008): Bomb threats were called into an airline, resulting in the disruption of a flight. The defendant was a flight attendant accused of sending the threats. The trial court admitted a cd of data collected from telephone calls made to the airline; the data indicated that calls came from the defendant's cell phone at the time the threats were made. The defendant argued that the information on the cd was testimonial hearsay, but the court disagreed, because the information was entirely machine-generated. The court stated that "the witnesses with whom the Confrontation Clause is concerned are *human* witnesses" and that the purposes of the Confrontation Clause "are ill-served through confrontation of the machine's human operator. To say that a wholly machine-generated statement is unreliable is to speak of mechanical error, not mendacity. The best way to advance the truth-seeking process * * * is through the process of authentication as provided in Federal Rule of Evidence 901(b)(9)." The court concluded that there was no hearsay statement at issue and therefore the Confrontation Clause was inapplicable.

Medical/Therapeutic Statements

Statements by victim of abuse to treatment manager of Air Force medical program were admissible under Rule 803(4) and non-testimonial: *United States v. DeLeon,* 678 F.3d 317 (4th Cir. 2012): The defendant was convicted of murdering his eight-year-old son. Months before his death, the victim had made statements about incidents in which he had been physically abused by the defendant as part of parental discipline. The statements were made to the treatment manager of an Air Force medical program that focused on issues of family health. The court found that the statements were properly admitted under Rule 803(4) and (essentially for that reason) were non-testimonial because their primary purpose was not for use in a criminal prosecution of the defendant. The court noted that the statements were not made in response to an emergency, but that emergency was only one factor under *Bryant.* The court also recognized that the Air Force program "incorporates reporting requirements and a security component" but stated that these factors were not sufficient to render statements to the treatment manager testimonial. The court explained why the "primary motive" test was not met in the following passage:

> We note first that Thomas [the treatment manager] did not have, nor did she tell Jordan [the child] she had, a prosecutorial purpose during their initial meeting. Thomas was not employed as a forensic investigator but instead worked * * * as a treatment manager. And there is no evidence that she recorded the interview or otherwise sought to memorialize Jordan's answers as evidence for use during a criminal prosecution. * * * Rather, Thomas used the information she gathered from Jordan and his family to develop a written treatment plan and continued to provide counseling and advice on parenting techniques in subsequent meetings with family members. * * * Thomas also did not meet with Jordan in an interrogation room or at a police station but instead spoke with him in her office in a building that housed * * * mental health service providers.
>
> Importantly, ours is also not a case in which the social worker operated as an agent of law enforcement. * * * Here, Thomas did not act at the behest of law enforcement, as there was no active criminal investigation when she and Jordan spoke. * * * An objective review of the parties' actions and the circumstances of the meeting confirms that the primary purpose was to develop a treatment plan — not to establish facts for a future criminal prosecution. Accordingly, we hold that the contested statements were nontestimonial and that their admission did not violate DeLeon's Sixth Amendment rights.

Statement admitted under Rule 803(4) are presumptively non-testimonial: *United States v. Peneaux,* 432 F.3d 882 (8th Cir. 2005): "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial."

Miscellaneous

Statement of an accomplice made to his attorney is not testimonial: *Jensen v. Pliler,* 439 F.3d 1086 (9th Cir. 2006): Taylor was in custody for the murder of Kevin James. He confessed the murder to his attorney, and implicated others, including Jensen. After Taylor was released from jail, Jensen and others murdered him because they thought he talked to the authorities. Jensen was tried for the murder of both James and Taylor, and the trial court admitted the statements made by Taylor to his attorney (Taylor's next of kin having waived the privilege). The court found that the statements made by Taylor to his attorney were not testimonial, as they "were not made to a government officer with an eye toward trial, the primary abuse at which the Confrontation Clause was directed." Finally, while Taylor's statements amounted to a confession, they were not given to a police officer in the course of interrogation.

Non-Testimonial Hearsay and the Right to Confrontation

Clear statement and holding that *Crawford* overruled *Roberts* even with respect to non-testimonial hearsay: *Whorton v. Bockting*, 549 U.S. 406 (2007): The habeas petitioner argued that testimonial hearsay was admitted against him in violation of *Crawford.* His trial was conducted ten years before *Crawford*, however, and so the question was whether *Crawford* applies retroactively to benefit habeas petitioners. Under Supreme Court jurisprudence, a new rule is applicable on habeas only if it is a "watershed" rule that is critical to the truthseeking function of a trial. The Court found that *Crawford* was a new rule because it overruled *Roberts.* It further held that *Crawford* was not essential to the truthseeking function; its analysis on this point is pertinent to whether *Roberts* retains any vitality with respect to non-testimonial hearsay. The Court declared as follows:

> *Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials. Indeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay statements. Accordingly, it is not surprising that the overall effect of *Crawford* with regard to the accuracy of fact-finding in criminal cases is not easy to assess.
>
> With respect to *testimonial* out-of-court statements, *Crawford* is more restrictive than was *Roberts*, and this may improve the accuracy of fact-finding in some criminal cases. Specifically, under *Roberts*, there may have been cases in which courts erroneously determined that testimonial statements were reliable. But see 418 F.3d at 1058 (O'Scannlain, J., dissenting from denial of rehearing en banc) (observing that it is unlikely that this occurred "in anything but the exceptional case"). *But whatever improvement in reliability Crawford produced in this respect must be considered together with Crawford's elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.* (Emphasis added).

One of the main reasons that *Crawford* in not retroactive (the holding) is that it is not essential to the accuracy of a verdict. And one of the reasons *Crawford* is not essential to accuracy is that, with respect to non-testimonial statements, *Crawford* conflicts with accurate factfinding because it lifts all constitutional reliability requirements imposed by *Roberts.* Thus, if hearsay is non-testimonial, there is no constitutional limit on its admission.

Not Offered for Truth

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's own statements: *United States v. Hansen,* 434 F.3d 92 (1st Cir. 2006): After a crime and as part of cooperation with the authorities, the father of an accomplice surreptitiously recorded his conversation with the defendant, in which the defendant admitted criminal activity. The court found that the father's statements during the conversation were testimonial under *Crawford* — as they were made specifically for use in a criminal prosecution. But their admission did not violate the defendant's right to confrontation. The defendant's own side of the conversation was admissible as a statement of a party-opponent, and the father's side of the conversation was admitted not for its truth but to provide context for the defendant's statements. *Crawford* does not bar the admission of statements not offered for their truth. ***Accord United States v. Walter,*** 434 F.3d 30 (1st Cir. 2006) (*Crawford* "does not call into question this court's precedents holding that statements introduced solely to place a defendant's admissions into context are not hearsay and, as such, do not run afoul of the Confrontation Clause."). ***See also Furr v. Brady,*** 440 F.3d 34 (1st Cir. 2006) (the defendant was charged with firearms offenses and intimidation of a government witness; an accomplice's confession to law enforcement did not implicate *Crawford* because it was not admitted for its truth; rather, it was admitted to show that the defendant knew about the confession and, in contacting the accomplice thereafter, intended to intimidate him).

Note: Five members of the Court in *Williams* disagreed with Justice Alito's analysis that the Confrontation Clause was not violated because the testimonial lab report was never admitted for its truth. The question from *Williams* is whether those five Justices are opposed to *any* use of the not-for-truth analysis in answering Confrontation Clause challenges. The answer is apparently that their objection to the not-for truth analysis in *Williams* does not extend to situations in which (in their personal view) the statement has a *legitimate* not-for-truth purpose. Thus, Justice Thomas distinguishes the expert's use of the lab report from the prosecution's admission of an accomplice's confession in *Tennessee v. Street,* where the confession "was not introduced for its truth, but only to impeach the defendant's version of events." In *Street* the defendant challenged his confession on the ground that he had been coerced to copy Peele's confession. Peele's confession was introduced not for its truth but only to show that it differed from Street's. For that purpose, it didn't matter whether it was true. Justice Thomas stated that "[u]nlike the confession in *Street,* statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose" because "to use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true." Justice Kagan in her opinion essentially repeats Justice Thomas's analysis and agrees with his distinction between legitimate and illegitimate use of the "not-for-truth" argument. Both Justices Kagan and Thomas agree with the Court's statement in *Crawford* that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Both would simply add the proviso that the not-for-truth use must be *legitimate* or *plausible.*

It follows that the cases under this "not-for-truth" headnote are probably unaffected by *Williams,* as they largely permit admission of testimonial statements as offered "not-for-truth" only when that purpose is legitimate, i.e., *only when the statement is offered for a purpose as to which it is relevant regardless of whether it is true or not.*

Statements by informant to police officers, offered to prove the "context" of the police investigation, probably violate *Crawford,* but admission is not plain error: *United States v. Maher,* 454 F.3d 13 (1st Cir. 2006): At the defendant's drug trial, several accusatory statements from an informant (Johnson) were admitted ostensibly to explain why the police focused on the defendant as a possible drug dealer. The court found that these statements were testimonial under *Crawford*, because "the statements were made while the police were interrogating Johnson after Johnson's arrest for drugs; Johnson agreed to cooperate and he then identified Maher as the source of drugs. . . . In this context, it is clear that an objectively reasonable person in Johnson's shoes would understand that the statement would be used in prosecuting Maher at trial." The court then addressed the government's argument that the informant's statements were not admitted for their truth, but to explain the context of the police investigation:

> The government's articulated justification — that any statement by an informant to police which sets context for the police investigation is not offered for the truth of the statements and thus not within *Crawford* — is impossibly overbroad [and] may be used not just to get around hearsay law, but to circumvent *Crawford's* constitutional rule. . . . Here, Officer MacVane testified that the confidential informant had said Maher was a drug dealer, even though the prosecution easily could have structured its narrative to avoid such testimony. The . . . officer, for example, could merely say that he had acted upon "information received," or words to that effect. It appears the testimony was primarily given exactly for the truth of the assertion that Maher was a drug dealer and should not have been admitted given the adequate alternative approach.

The court noted, however, that the defendant had not objected to the admission of the informant's statements. It found no plain error, noting among other things, the strength of the evidence and the fact that the testimony "was followed immediately by a sua sponte instruction to the effect that any statements of the confidential informant should not be taken as standing for the truth of the matter asserted, i.e., that Maher was a drug dealer who supplied Johnson with drugs."

Accomplice statements purportedly offered for "context" were actually admitted for their truth, resulting in a Confrontation Clause violation: *United States v. Cabrera-Rivera,* 583 F.3d 26 (1st Cir. 2009): In a robbery prosecution, the government offered hearsay statements that accomplices made to police officers. The government argued that the statements were not offered for their truth, but rather to explain how the government was able to find other evidence in the case. But the court found that the accusations were not properly admitted to provide context. The government at trial emphasized the details of the accusations that had nothing to do with leading the government to other evidence; and the government did not contend that one of the accomplice's

confessions led to any other evidence. Because the statements were testimonial, and because they were in fact offered for their truth, admission of the statements violated *Crawford.*

Note: The result in *Cabrera-Rivera* is certainly unchanged by *Williams.* The prosecution's was not offering the accusations for any *legitimate* not-for-truth purpose.

Statements offered to provide context for the defendant's part of a conversation were not hearsay and therefore could not violate the Confrontation Clause: *United States v. Hicks,* 575 F.3d 130 (1st Cir. 2009): The court found no error in admitting a telephone call that the defendant placed from jail in which he instructed his girlfriend how to package and sell cocaine. The defendant argued that admission of the girlfriend's statements in the telephone call violated *Crawford.* But the court found that the girlfriend's part of the conversation was not hearsay and therefore did not violate the defendant's right to confrontation. The court reasoned that the girlfriend's statements were admissible not for their truth but to provide the context for understanding the defendant's incriminating statements. The court noted that the girlfriend's statements were "little more than brief responses to Hicks's much more detailed statements."

Accomplice's confession, when offered to explain why police did not investigate other suspects and leads, is not hearsay and therefore its admission does not violate *Crawford: United States v. Cruz-Diaz,* 550 F.3d 169 (1st Cir. 2008): In a bank robbery prosecution, defense counsel cross-examined a police officer about the decision not to pursue certain investigatory opportunities after apprehending the defendants. Defense counsel identified "eleven missed opportunities" for tying the defendants to the getaway car, including potential fingerprint and DNA evidence. In response, the officer testified that the defendant's co-defendant had given a detailed confession. The defendant argued that introducing the cohort's confession violated his right to confrontation, because it was testimonial under *Crawford.* But the court found the confession to be not hearsay — as it was offered for the not-for-truth purpose of explaining why the police conducted the investigation the way they did. Accordingly admission of the statement did not violate *Crawford.*

The defendant argued that the government's true motive was to introduce the confession for its truth, and that the not-for-truth purpose was only a pretext. But the court disagreed, noting that the government never tried to admit the confession until defense counsel attacked the thoroughness of the police investigation. Thus, introducing the confession for a not-for-truth purpose was proper rebuttal. The defendant suggested that "if the government merely wanted to explain why the FBI and police failed to conduct a more thorough it could have had the agent testify in a manner that entirely avoided referencing Cruz's confession" — for example, by stating that the police chose to truncate the investigation "because of information the agent had." But the court held that this kind of sanitizing of the evidence was not required, because it "would have come at an unjustified cost to the government." Such generalized testimony, without any context, "would not have sufficiently rebutted Ayala's line of questioning" because it would have looked like one more cover-up. The court concluded that "[w]hile there can be circumstances under which Confrontation Clause concerns prevent the admission of the substance of a declarant's out-of-court statement where a less

prejudicial narrative would suffice in its place, this is not such a case." ***See also United States v. Diaz,*** 670 F.3d 332 (1st Cir. 2012)(testimonial statement from one police officer to another to effect an arrest did not violate the right to confrontation because it was not hearsay: "The government offered Perez's out-of-court statement to explain why Veguilla had arrested [the defendant], not as proof of the drug sale that Perez allegedly witnesses. Out-of-court statements providing directions from one individual to another do not constitute hearsay.").

False alibi statements made to police officers by accomplices are testimonial, but admission does not violate the Confrontation Clause because they are not offered for their truth: *United States v. Logan,* 419 F.3d 172 (2nd Cir. 2005): The defendant was convicted of conspiracy to commit arson. The trial court admitted statements made by his coconspirators to the police. These statements asserted an alibi, and the government presented other evidence indicating that the alibi was false. The court found no Confrontation Clause violation in admitting the alibi statements. The court relied on *Crawford* for the proposition that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than proving the truth of the matter asserted." The statements were not offered to prove that the alibi was true, but rather to corroborate the defendant's own account that the accomplices planned to use the alibi. Thus "the fact that Logan was aware of this alibi, and that [the accomplices] actually used it, was evidence of conspiracy among [the accomplices] and Logan."

> **Note: The *Logan* court reviewed the defendant's Confrontation Clause argument under the plain error standard. This was because defense counsel at trial objected on grounds of hearsay, but did not make a specific Confrontation Clause objection.**

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's statements: *United States v. Paulino,* 445 F.3d 211 (2nd Cir. 2006): The court stated: "It has long been the rule that so long as statements are not presented for the truth of the matter asserted, but only to establish a context, the defendant's Sixth Amendment rights are not transgressed. Nothing in *Crawford v. Washington* is to the contrary."

> **Note: This typical use of "context" is not in question after *Williams*, because the focus is on the defendant's statements and not on the truth of the declarant's statements. Use of context could be *illegitimate* however if the focus is in fact on the truth of the declarant's statements. See, e.g., *United States v. Powers* from the Sixth Circuit, infra.**

Co-conspirator statements made to government officials to cover-up a crime (whether true or false) do not implicate *Crawford* because they were not offered for their truth: *United States v. Stewart,* 433 F.3d 273 (2nd Cir. 2006)**:** In the prosecution of Martha Stewart, the government introduced statements made by each of the defendants during interviews with

government investigators. Each defendant's statement was offered against the other, to prove that the story told to the investigators was a cover-up. The court held that the admission of these statements did not violate *Crawford,* even though they were "provided in a testimonial setting." It noted first that to the extent the statements were false, they did not violate *Crawford* because "*Crawford* expressly confirmed that the categorical exclusion of out-of-court statements that were not subject to contemporaneous cross-examination does not extend to evidence offered for purposes other than to establish the truth of the matter asserted." The defendants argued, however, that some of the statements made during the course of the obstruction were actually true, and as they were made to government investigators, they were testimonial. The court observed that there is some tension in *Crawford* between its treatment of co-conspirator statements (by definition not testimonial) and statements made to government investigators (by their nature testimonial), where truthful statements are made as part of a conspiracy to obstruct justice. It found, however, that admitting the truthful statements did not violate *Crawford* because they were admitted not for their truth, but rather to provide context for the false statements. The court explained as follows:

> It defies logic, human experience and even imagination to believe that a conspirator bent on impeding an investigation by providing false information to investigators would lace the totality of that presentation with falsehoods on every subject of inquiry. To do so would be to alert the investigators immediately that the conspirator is not to be believed, and the effort to obstruct would fail from the outset. * * * The truthful portions of statements in furtherance of the conspiracy, albeit spoken in a testimonial setting, are intended to make the false portions believable and the obstruction effective. Thus, the truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire testimonial presentation and thereby obstruct justice.

> **Note: Offering a testimonial statement to prove it is false is a typical and presumably legitimate not-for-character purpose and so would appear to be unaffected by *Williams.* That is, to the extent five (or more) members of the Court apply a distinction between legitimate and illegitimate not-for-truth usage, offering the statement to prove it is false is certainly on the legitimate side of the line. It is one of the clearest cases of a statement not being offered to prove that the assertions therein are true. Of course, the government must provide independent evidence that the statement is in fact false.**

Accomplice statements to police officer were testimonial, but did not violate the Confrontation Clause because they were admitted to show they were false: *United States v. Trala,* 386 F.3d 536 (3rd Cir. 2004): An accomplice made statements to a police officer that misrepresented her identity and the source of the money in the defendant's car. While these were accomplice statements to law enforcement, and thus testimonial, their admission did not violate *Crawford,* as they were not admitted for their truth. In fact the statements were admitted because they were false. Under these circumstances, cross-examination of the accomplice would serve no

purpose. ***See also United States v. Lore,*** 430 F.3d 190 (3rd Cir. 2005) (relying on *Trala*, the court held that grand jury testimony was testimonial, but that its admission did not violate the Confrontation Clause because the self-exculpatory statements denying all wrongdoing "were admitted because they were so obviously false.").

Confessions of other targets of an investigation were testimonial, but did not violate the Confrontation Clause because they were offered to rebut charges against the integrity of the investigation: *United States v. Christie,* 624 F.3d 558 (3rd Cir. 2010): In a child pornography investigation, the FBI obtained the cooperation of the administrator of a website, which led to the arrests of a number of users, including the defendant. At trial the defendant argued that the investigation was tainted because the FBI, in its dealings with the administrator, violated its own guidelines in treating informants. Specifically the defendant argued that these misguided law enforcement efforts led to unreliable statements from the administrator. In rebuttal, the government offered and the court admitted evidence that twenty-four other users confessed to child pornography-related offenses. The defendant argued that admitting the evidence of the others' confessions violated the hearsay rule and the Confrontation Clause, but the court rejected these arguments and affirmed. It reasoned that the confessions were not offered for their truth, but to show why the FBI could believe that the administrator was a reliable source, and therefore to rebut the charge of improper motive on the FBI's part. As to the confrontation argument, the court declared that "our conclusion that the testimony was properly introduced for a non-hearsay purpose is fatal to Christie's *Crawford* argument, since the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."

Accomplice's testimonial statement was properly admitted for impeachment purposes, but failure to give a limiting instruction was error: *Adamson v. Cathel,* 633 F.3d 248 (3rd Cir. 2011): The defendant challenged his confession at trial by arguing that the police fed him the details of his confession from other confessions by his alleged accomplices, Aljamaar and Napier. On cross-examination, the prosecutor introduced those confessions to show that they differed from the defendant's confession on a number of details. The court found no error in the admission of the accomplice confessions. While testimonial, they were offered for impeachment and not for their truth and so did not violate the Confrontation Clause. However, the trial court gave no limiting instruction, and the court found that failure to be error. The court concluded as follows:

> Without a limiting instruction to guide it, the jury that found Adamson guilty was free to consider those facially incriminating statements as evidence of Adamson's guilt. The careful and crucial distinction the Supreme Court made between an impeachment use of the evidence and a substantive use of it on the question of guilt was completely ignored during the trial.
>
> **Note: The use of the cohort's confessions to show differences from the defendant's confession is precisely the situation reviewed by the Court in *Tennessee v. Street.* As noted above, while five Justices in *Williams* rejected the "not-for-truth" analysis as**

applied to expert reliance on testimonial statements, all of the Justices approved of that analysis as applied to the facts of *Street.*

Statements made in a civil deposition might be testimonial, but admission does not violate the Confrontation Clause if they are offered to prove they are false: *United States v. Holmes,* 406 F.3d 337 (5th Cir. 2005): The defendant was convicted of mail fraud and conspiracy, stemming from a scheme with a court clerk to file a backdated document in a civil action. The defendant argued that admitting the deposition testimony of the court clerk, given in the underlying civil action, violated his right to confrontation after *Crawford*. The clerk testified that the clerk's office was prone to error and thus someone in that office could have mistakenly backdated the document at issue. The court considered the possibility that the clerk's testimony was a statement in furtherance of a conspiracy, and noted that coconspirator statements ordinarily are not testimonial under *Crawford*. It also noted, however, that the clerk's statement "is not the run-of-the-mill co-conspirator's statement made unwittingly to a government informant or made casually to a partner in crime; rather, we have a co-conspirator's statement that is derived from a formalized testimonial source — recorded and sworn civil deposition testimony." Ultimately the court found it unnecessary to determine whether the deposition testimony was "testimonial" within the meaning of *Crawford* because it was not offered for its truth. Rather, the government offered the testimony "to establish its *falsity* through independent evidence." ***See also United States v. Acosta,*** 475 F.3d 677 (5th Cir. 2007) (accomplice's statement offered to impeach him as a witness — by showing it was inconsistent with the accomplice's refusal to answer certain questions concerning the defendant's involvement with the crime — did not violate *Crawford* because the statement was not admitted for its truth and the jury received a limiting instruction to that effect).

Informant's accusation, offered to explain why police acted as they did, was testimonial but it was not hearsay, and so its admission did not violate the Confrontation Clause: *United States v. Deitz,* 577 F.3d 672 (6th Cir. 2009): The court found no error in allowing an FBI agent to testify about why agents tailed the defendant to what turned out to be a drug transaction. The agent testified that a confidential informant had reported to them about Deitz's drug activity. The court found that the informant's statement was testimonial — because it was an accusation made to a police officer — but it was not hearsay and therefore its admission did not violate Deitz's right to confrontation. The court found that the testimony "explaining why authorities were following Deitz to and from Dayton was not plain error as it provided mere background information, not facts going to the very heart of the prosecutor's case." The court also observed that "had defense counsel objected to the testimony at trial, the court could have easily restricted its scope." ***See also United States v. Davis***, 577 F.3d 660 (6th Cir. 2009): A woman's statement to police that she had recently seen the defendant with a gun in a car that she described along with the license plate was not hearsay — and so even though testimonial did not violate the defendant's right to confrontation — because it was offered only to explain the police investigation that led to the defendant and the defendant's conduct when he learned the police were looking for him.

Statement offered to prove the defendant's knowledge of a crime was non-hearsay and so did not violate the accused's confrontation rights: *United States v. Boyd,* 640 F.3d 657 (6th Cir. 2011): A defendant charged with being an accessory after the fact to a carjacking and murder had confessed to police officers that his friend Davidson had told him that he had committed those crimes. At trial the government offered that confession, which included the underlying statements of Boyd. The defendant argued that admitting Davidson's statements violated his right to confrontation. But the court found no error because the hearsay was not offered for its truth: "Davidson's statements to Boyd were offered to prove Boyd's knowledge [of the crimes that Davidson had committed] rather than for the truth of the matter asserted."

Admission of complaints offered for non-hearsay purpose did not violate the Confrontation Clause: *United States v. Adams,* 722 F.3d 788 (6th Cir. 2013): The defendants were convicted for participation in a vote-buying scheme in three elections. They complained that their Confrontation rights were violated when the court admitted complaints that were contained within state election reports. The court of appeals rejected that argument, because the complaints were offered for proper non-hearsay purposes. Some of the information was offered to prove it was false, and other information was offered to show that the defendants adjusted their scheme based on the complaints received. The court did find, however, that the complaints were erroneously admitted under Rule 403, because of the substantial risk that the jury would use the assertions for their truth; that the probative value for the non-hearsay purpose was "minimal at best"; and the government had other less prejudicial evidence available to prove the point. Technically, this should mean that there was a violation of the Confrontation Clause, because the evidence was not *properly* offered for a not-for-truth purpose. But the court did not make that holding. It reversed on evidentiary grounds.

Informant's statements were not properly offered for "context," so their admission violated *Crawford*: *United States v. Powers,* 500 F.3d 500 (6th Cir. 2007): In a drug prosecution, a law enforcement officer testified that he had received information about the defendant's prior criminal activity from a confidential informant. The government argued on appeal that even though the informant's statements were testimonial, they did not violate *Crawford*, because they were offered "to show why the police conducted a sting operation" against the defendant. But the court disagreed and found a *Crawford* violation. It reasoned that "details about Defendant's alleged prior criminal behavior were not necessary to set the context of the sting operation for the jury. The prosecution could have established context simply by stating that the police set up a sting operation." ***See also United States v. Hearn***, 500 F.3d 479 (6th Cir.2007) (confidential informant's accusation was not properly admitted for background where the witness testified with unnecessary detail and "[t]he excessive detail occurred twice, was apparently anticipated, and was explicitly relied upon by the prosecutor in closing arguments").

Admitting informant's statement to police officer for purposes of "background" did not violate the Confrontation Clause: *United States v. Gibbs,* 506 F.3d 479 (6th Cir. 2007): In a

trial for felon-firearm possession, the trial court admitted a statement from an informant to a police officer; the informant accused the defendant of having firearms hidden in his bedroom. Those firearms were not part of the possession charge. While this accusation was testimonial, its admission did not violate the Confrontation Clause, "because the testimony did not bear on Gibbs's alleged possession of the .380 Llama pistol with which he was charged." Rather, it was admitted "solely as background evidence to show why Gibbs's bedroom was searched." ***See also United States v. Macias-Farias,*** 706 F.3d 775 (6th Cir. 2013) (officer's testimony that he had received information from someone was offered not for its truth but to explain the officer's conduct, thus no confrontation violation).

Admission of the defendant's conversation with an undercover informant does not violate the Confrontation Clause, where the undercover informant's part of the conversation is offered only for "context": ***United States v. Nettles,*** 476 F.3d 508 (7th Cir. 2007): The defendant made plans to blow up a government building, and the government arranged to put him in contact with an undercover informant who purported to help him obtain materials. At trial, the court admitted a recorded conversation between the defendant and the informant. Because the informant was not produced for trial, the defendant argued that his right to confrontation was violated. But the court found no error, because the admission of the defendant's part of the conversation was not barred by the Confrontation Clause, and the informant's part of the conversation was admitted only to place the defendant's part in "context." Because the informant's statements were not offered for their truth, they did not implicate the Confrontation Clause.

The *Nettles* court did express some concern about the breadth of the "context" doctrine, stating "[w]e note that there is a concern that the government may, in future cases, seek to submit based on 'context' statements that are, in fact, being offered for their truth." But the court found no such danger in this case, noting the following: 1) the informant presented himself as not being proficient in English, so most of his side of the conversation involved asking the defendant to better explain himself; and 2) the informant did not "put words in Nettles's mouth or try to persuade Nettles to commit more crimes in addition to those that Nettles had already decided to commit." ***See also United States v. Tolliver,*** 454 F.3d 660 (7th Cir. 2006) (statements of one party to a conversation with a conspirator were offered not for their truth but to provide context to the conspirator's statements: "*Crawford* only covers testimonial statements proffered to establish the truth of the matter asserted. In this case, . . . Shye's statements were admissible to put Dunklin's admissions on the tapes into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth. As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused."); ***United States v. Bermea-Boone***, 563 F.3d 621 (7th Cir. 2009): A conversation between the defendant and a coconspirator was properly admitted; the defendant's side of the conversation was a statement of a party-opponent, and the accomplice's side was properly admitted to provide context for the defendant's statements: "Where there is no hearsay, the concerns addressed in *Crawford* do not come in to play. That is, the declarant, Garcia, did not function as a witness against the accused."; ***United States v. York,*** 572

F.3d 415 (7th Cir. 2009) (informant's recorded statements in a conversation with the defendant were admitted for context and therefore did not violate the Confrontation Clause: "we see no indication that Mitchell tried to put words in York's mouth"); ***United States v. Hicks,*** 635 F.3d 1063 (7th Cir. 2011): (undercover informant's part of conversations were not hearsay, as they were offered to place the defendant's statements in context; because they were not offered for truth their admission did not violate the defendant's right to confrontation); ***United States v. Gaytan,*** 649 F.3d 573 (7th Cir. 2011) (undercover informant's statements to the defendant in a conversation setting up a drug transaction were clearly testimonial, but not offered for their truth: "Gaytan's responses ['what you need?' and 'where the loot at?'] would have been unintelligible without the context provided by Worthen's statements about his or his brother's interest in 'rock'"; the court noted that there was no indication that the informant was "putting words in Gaytan's mouth"); ***United States v. Foster,*** 701 F.3d 1142 (7th Cir. 2012) ("Here, the CI's statement regarding the weight [of the drug] was not offered to show what the weight *actually* was * * * but rather to explain the defendant's acts and make his statements intelligible. The defendant's statement to 'give me sixteen fifty' (because the original price was 17) would not have made sense without reference to the CI's comment that the quantity was off. Because the statements were admitted only to prove context, *Crawford* does not require confrontation."); ***United States v. Ambrose,*** 668 F.3d 943 (7th Cir. 2012) (conversation between two crime family members about actions of a cooperating witness were not offered for their truth but rather to show that information had been leaked; because the statements were not offered for their truth, there was no violation of the right to confrontation); ***United States v. Wright,*** 722 F.3d 1064 (7th Cir. 2013) (The defendant's statement 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 noted, however, that the district court's limiting instruction on "context" was boilerplate, and that the jury "could have been told that the CI's half of the conversation was being played only so that it could understand what Wright was responding to, and that the CI's statements standing alone were not to be considered as evidence of Wright's guilt.").

> **Note: The concerns expressed in *Nettles* about possible abuse of the "context" usage are along the same lines as those expressed by Justices Thomas and Kagan in *Williams,* when they seek to distinguish legitimate and illegitimate not-for-truth purposes. If the only relevance of the statement requires the factfinder to assess its truth, then the statement is not being offered for a legitimate not-for-truth purpose.**

Police report offered for a purpose other than proving the truth of its contents is properly admitted even if it is testimonial: *United States v. Price,* 418 F.3d 771 (7th Cir. 2005): In a drug conspiracy trial, the government offered a report prepared by the Gary Police Department. The report was an "intelligence alert"identifying some of the defendants as members of a street gang dealing drugs. The report was found in the home of one of the conspirators. The government offered the report at trial to prove that the conspirators were engaging in counter-surveillance, and the jury was instructed not to consider the accusations in the report as true, but only for the fact that the

report had been intercepted and kept by one of the conspirators. The court found that even if the report was testimonial, there was no error in admitting the report as proof of awareness and counter-surveillance. It relied on *Crawford* for the proposition that the Confrontation Clause does not bar the use of out-of-court statements "for purposes other than proving the truth of the matter asserted."

Accusation offered not for truth, but to explain police conduct, was not hearsay and did not violate the defendant's right to confrontation: *United States v. Dodds,* 569 F.3d 336 (7th Cir. 2009): Appealing a firearms conviction, the defendant argued that his right to confrontation was violated when the trial court admitted a statement from an unidentified witness to a police officer. The witness told the officer that a black man in a black jacket and black cap was pointing a gun at people two blocks away. The court found no confrontation violation because "the problem that *Crawford* addresses is the admission of hearsay" and the witness's statement was not hearsay. It was not admitted for its truth — that the witness saw the man he described pointing a gun at people — but rather "to explain why the police proceeded to the intersection of 35th and Galena and focused their attention on Dodds, who matched the description they had been given." The court noted that the trial judge did not provide a limiting instruction, but also noted that the defendant never asked the court to do so and that the lack of an instruction was not raised on appeal. ***See also United States v. Taylor,*** 569 F.3d 742 (7th Cir. 2009): An accusation from a bystander to a police officer that the defendant had just taken a gun across the street was not hearsay because it was offered to explain the officers' actions in the course of their investigation — "for example, why they looked across the street * * * and why they handcuffed Taylor when he approached." The court noted that absent "complicating circumstances, such as a prosecutor who exploits nonhearsay statements for their truth, nonhearsay testimony does not present a confrontation problem." The court found no "complicating circumstances" in this case.

> **Note: The Court's reference in *Taylor* to the possibility of exploiting a not-for-truth purpose unfairly runs along the same lines as those expressed by Justice Thomas and Kagan in *Williams.***

Testimonial statement was not legitimately offered for context or background and so was a violation of *Crawford: United States v. Adams,* 628 F.3d 407 (7th Cir. 2010): In a narcotics prosecution, statements made by confidential informants to police officers were offered against the defendant. For example, the government offered testimony from a police officer that he stopped the defendant's car on a tip from a confidential informant that the defendant was involved in the drug trade and was going to by crack. A search of the car uncovered a large amount of money and a crack pipe. The government offered the informant's statement not for the truth of the assertion but as "foundation for what the officer did." The trial court admitted the statement and gave a limiting instruction. But the court of appeals found error, though harmless, because the informant's statements "were not necessary to provide any foundation for the officer's subsequent actions." It explained as follows:

> The CI's statements here are different from statements we have found admissible that gave context to an otherwise meaningless conversation or investigation. [cites omitted] Here the

CI's accusations did not counter a defense strategy that police officers randomly targeted Adams. And, there was no need to introduce the statements for context — even if the CI's statements were excluded, the jury would have fully understood that the officer searched Adams and the relevance of the items recovered in that search to the charged crime.

See also United States v. Walker, 673 F.3d 649 (7th Cir. 2012): (confidential informant's statements to the police — that he got guns from the defendant — were not properly offered for context but rather were testimonial hearsay: "The government repeatedly hides behind its asserted needs to provide 'context' and relate the 'course of investigation.' These euphemistic descriptions cannot disguise a ploy to pin the two guns on Walker while avoiding the risk of putting Ringswald on the stand. * * * A prosecutor surely knows that hearsay results when he elicits from a government agent that 'the informant said he got this gun from X' as proof that X supplied the gun."); ***Jones v. Basinger,*** 635 F.3d 1030 (7th Cir. 2011) (accusation made to police was not offered for background and therefore its admission violated the defendant's right to confrontation; the record showed that the government encouraged the jury to use the statements for their truth).

Note: *Adams, Walker* and *Jones* are all examples of illegitimate use of not-for-truth purposes and so finding a Confrontation violation in these cases is quite consistent with the analysis of not-for-truth purposes in the Thomas and Kagan opinions in *Williams.*

Statements by confidential informant included in a search warrant were testimonial and could not be offered at trial to explain the police investigation: ***United States v. Holmes,*** 620 F.3d 836 (8th Cir. 2010): In a drug trial, the defendant tried to distance himself from a house where the drugs were found in a search pursuant to a warrant. On redirect of a government agent — after defense counsel had questioned the connection of the defendant to the residence — the trial judge permitted the agent to read from the statement of a confidential informant. That statement indicated that the defendant was heavily involved in drug activity at the house. The government acknowledged that the informant's statements were testimonial, but argued that the statements were not hearsay, as they were offered only to show the officer's knowledge and the propriety of the investigation. But the court found the admission to be error. It noted that informants' statements are admissible to explain an investigation "only when the propriety of the investigation is at issue in the trial." In this case, the defendant did not challenge the validity of the search warrant and the propriety of the investigation was not disputed. The court stated that if the real purpose of admitting the evidence was to explain the officer's knowledge and the nature of the investigation, "a question asking whether someone had told him that he had seen Holmes at the residence would have addressed the issue * * * without the need to go into the damning details of what the CI told Officer Singh." ***Compare United States v. Brooks,*** 645 F.3d 971 (8th Cir. 2011) ("In this case, the statement at issue [a report by a confidential informant that Brooks was selling narcotics and firearms from a certain premises] was not offered to prove the truth of the matter asserted — that is, that Brooks was indeed a drug and firearms dealer. It was offered purely to explain why the officers were at the multi-family dwelling in the first place, which distinguishes this case from *Holmes.* In *Holmes,* it was undisputed that officers had a valid warrant. Accordingly less explanation was necessary. Here, the CI's

information was necessary to explain why the officers went to the residence without a warrant and why they would be more interested in apprehending the man on the stairs than the man who fled the scene. Because the statement was offered only to show why the officers conducted their investigation in the way they did, the Confrontation Clause is not implicated here."). ***See also United States v. Shores,*** 700 F.3d 366 (8th Cir. 2012) (confidential informant's accusation made to police officer was properly offered to prove the propriety of the investigation: "From the early moments of the trial, it was clear that Shores would be premising his defense on the theory that he was a victim of government targeting.").

Accusatory statements offered to explain why an officer conducted an investigation in a certain way are not hearsay and therefore admission does not violate *Crawford: United States v. Brown,* 560 F.3d 754 (8th Cir. 2009): Challenging drug conspiracy convictions, one defendant argued that it was error for the trial court to admit an out-of-court statement from a shooting victim to a police officer. The victim accused a person named "Clean" who was accompanied by a man named Charmar. The officer who took this statement testified that he entered "Charmar" into a database to help identify "Clean" and the database search led him to the defendant. The court found no error in admitting the victim's statement, stating that "it is not hearsay when offered to explain why an officer conducted an investigation in a certain way." The defendant argued that the purported nonhearsay purpose for admitting the evidence "was only a subterfuge to get Williams' statement about Brown before the jury." But the court responded that the defendant "did not argue at trial that the prejudicial effect of the evidence outweighed its nonhearsay value." The court also observed that the trial court twice instructed the jury that the statement was admitted for the limited purpose of understanding why the officer searched the database for Charmar. Finally, the court held that because the statement properly was not offered for its truth, "it does not implicate the confrontation clause."

Statement offered as foundation for good faith basis for asking question on cross-examination does not implicate *Crawford: United States v. Spears,* 533 F.3d 715 (8th Cir. 2008): In a bank robbery case, the defendant testified and was cross-examined and asked about her knowledge of prior bank robberies. In order to inquire about these bad acts, the government was required to establish to the court a good-faith basis for believing that the acts occurred. The government's good-faith basis was the confession of the defendant's associate to having taken part in the prior robberies. The defendant argued that the associate's statements, made to police officers, were testimonial. But the court held that *Crawford* was inapplicable because the associate's statements were not admitted for their truth — indeed they were not admitted at all. The court noted that there was "no authority for the proposition that use of an out-of-court testimonial statement merely as the good faith factual basis for relevant cross-examination of the defendant at trial implicates the Confrontation Clause."

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

Admitting testimonial statements that were part of a conversation with the defendant did not violate the Confrontation Clause because they were not offered for their truth: *United States v. Spencer,* 592 F.3d 866 (8th Cir. 2010): Affirming drug convictions, the court found no error in admitting tape recordings of a conversation between the defendant and a government informant. The defendant's statements were statements by a party-opponent and admitting the defendant's own statements cannot violate the Confrontation Clause. The informant's statements were not hearsay because they were admitted only to put the defendant's statements in context.

Statement offered to prove it was false is not hearsay and so did not violate the Confrontation Clause: *United States v. Yielding,* 657 F.3d 688 (8th Cir. 2011): In a fraud prosecution, the trial court admitted the statement of an accomplice to demonstrate that she used a false cover story when talking to the FBI. The court found no error, noting that "the point of the prosecutor's introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false." The court found that the government introduced other evidence to show that the declarant's assertions that a transaction was a loan were false. The court cited *Bryant* for the proposition that because the statements were not hearsay, their admission did not violate the Confrontation Clause.

Statements not offered for truth do not violate the Confrontation Clause even if testimonial: *United States v. Faulkner,* 439 F.3d 1221 (10th Cir. 2006): The court stated that "it is clear from *Crawford* that the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement." ***See also United States v. Mitchell,*** 502 F.3d 931 (9th Cir. 2007) (information given by an eyewitness to a police officer was not offered for its truth but rather "as a basis" for the officer's action, and therefore its admission did not violate the Confrontation Clause).

Accomplice's confession, offered to explain a police officer's subsequent conduct, was not hearsay and therefore did not violate the Confrontation Clause: *United States v. Jiminez,*

564 F.3d 1280 (11th Cir. 2009): The court found no plain error in the admission of an accomplice's confession in the defendant's drug conspiracy trial. The police officer who had taken the accomplice's confession was cross-examined extensively about why he had repeatedly interviewed the defendant and about his decision not to obtain a written and signed confession from him. This cross-examination was designed to impeach the officer's credibility and suggest that he was lying about the circumstances of the interviews and about the defendant's confession. In explanation, the officer stated that he approached the defendant the way he did because the accomplice had given a detailed confession that was in conflict with what the defendant had said in prior interviews. The court held that in these circumstances, the accomplice's confession was properly admitted to explain the officer's motivations, and not for its truth. Accordingly its admission did not violate the Confrontation Clause, even though the statement was testimonial.

> **Note**: **The court assumed that the accomplice's confession was admitted for a proper, not-for-truth purpose, even though there was no such finding on the record, and the trial court never gave a limiting instruction. Part of the reason for this deference is that the court was operating under a plain error standard. The defendant at trial objected only on hearsay grounds, and this did not preserve any claim of error on confrontation clause grounds. The concurring judge noted, however, "that the better practice in this case would have been for the district court to have given an instruction as to the limited purpose of Detective Wharton's testimony" because "there is no assurance, and much doubt, that a typical jury, on its own, would recognize the limited nature of the evidence."**

See also United States v. Augustin, 661 F.3d 1105 (11th Cir. 2011) (no confrontation violation where declarant's statements "were not offered for the truth of the matters asserted, but rather to provide context for [the defendant's] own statements").

Present Sense Impression

911 call describing ongoing drug crime is admissible as a present sense impression and not testimonial under *Bryant*: *United States v. Polidore*, 690 F.3d 705 (5th Cir. 2012): In a drug trial, the defendant objected that a 911 call from a bystander to a drug transaction — together with answers to questions from the 911 operators— was testimonial and also admitted in violation of the rule against hearsay. On the hearsay question, the court found that the bystander's statements in the 911 call were admissible as present sense impressions, as they were made while the transaction was ongoing. As to testimoniality, the court held that the case was unlike the 911 call cases decided by the Supreme Court, as there was no ongoing emergency — rather the caller was simply recording that a crime was taking across the street, and no violent activity was occurring. But the court noted that under *Bryant* an ongoing emergency is relevant but not dispositive to whether statements about

a crime are testimonial. Ultimately the court found that the caller's statements were not testimonial, reasoning as follows:

> [A]lthough the 911 caller appeared to have understood that his comments would start an investigation that could lead to a criminal prosecution, the primary purpose of his statements was to request police assistance in stopping an ongoing crime and to provide the police with the requisite information to achieve that objective. Like a statement made to resolve an ongoing emergency, the caller's "purpose [was] not to provide a solemn declaration for use at trial, but to bring to an end an ongoing [drug trafficking crime]," *Williams v. Illinois*, 132 S.Ct. 2221, 2243 (2012) (citing *Bryant*, 131 S.Ct. at 1155), even though the crime did not constitute an ongoing emergency. The 911 caller simply was not acting as a witness; he was not testifying. What he said was not a weaker substitute for live testimony at trial. In other words, the caller's statements were not ex parte communications that created evidentiary products that aligned perfectly with their courtroom analogues. No witness goes into court to report that a man is currently selling drugs out of his car and to ask the police to come and arrest the man while he still has the drugs in his possession. [most internal quotations and citations omitted].
>
> **Note: This case was decided after *Williams* (and cites *Williams*) but the court did not refer to the fight over the primary motive test in *Williams*. It appears, however, that the court's analysis comports with both versions of the primary motive test — the statement was targeted at a particular individual, but its primary motive was to get the police to respond to an ongoing crime rather than to prepare a statement for trial.**

Present sense impression, describing an event that occurred months before a crime, is not testimonial: *United States v. Danford,* 435 F.3d 682 (7th Cir. 2005): The defendant was convicted of insurance fraud after staging a fake robbery of his jewelry store. At trial, one of the employees testified to a statement made by the store manager, indicating that the defendant had asked the manager how to disarm the store alarm. The defendant argued that the store manager's statement was testimonial under *Crawford*, but the court disagreed. The court stated that "the conversation between [the witness] and the store manager is more akin to a casual remark than it is to testimony in the *Crawford*-sense. Accordingly, we hold that the district court did not err in admitting this testimony under Fed.R.Evid. 803(1), the present-sense impression exception to the hearsay rule."

Present-sense impressions of DEA agents during a buy-bust operation were safety-related and so not testimonial. *United States v. Solorio,* 669 F.3d 943 (9th Cir. 2012): Appealing from a conviction arising from a "buy-bust" operation, the defendant argued that hearsay statements of DEA agents at the scene — which were admitted as present sense impressions — were testimonial and so should have been excluded under *Crawford.* The court disagreed. It stated that the statements were made in order to communicate observations to other agents in the field and thus

assure the success of the operation, "by assuring that all agents involved knew what was happening and enabling them to gauge their actions accordingly." Thus the statements were not testimonial because the primary purpose for making them was not to prepare a statement for trial but rather to assure that the arrest was successful and that the effort did not escalate into a dangerous situation. The court noted that the buy-bust operation "was a high-risk situation involving the exchange of a large amount of money and a substantial quantity of drugs" and also that the defendant was visibly wary of the situation.

> **Note: This case was decided before *Williams,* but it would appear to satisfy both the Alito and the Kagan version of the "primary motive" test. Both tests agree that a statement cannot be testimonial unless the primary motive for making it is to have it used in a criminal prosecution. The difference is that Justice Alito provides another qualification — the statement is testimonial only if it was made to be used in the *defendant's* criminal prosecution. In *Solorio* the first premise was not met — the statements were made for safety and coordination purposes, and not primarily for use in any criminal prosecution.**

Records, Certificates, Etc.

Reports on forensic testing by law enforcement are testimonial: *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009): In a drug case, the trial court admitted three "certificates of analysis" showing the results of the forensic tests performed on the seized substances. The certificates stated that "the substance was found to contain: Cocaine." The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health. The Court, in a highly contentious 5-4 case, held that these certificates were "testimonial" under *Crawford* and therefore admitting them without a live witness violated the defendant's right to confrontation. The majority noted that affidavits prepared for litigation are within the core definition of "testimonial" statements. The majority also noted that the only reason the certificates were prepared was for use in litigation. It stated that "[w]e can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose — as stated in the relevant state-law provision — was reprinted on the affidavits themselves."

The implications of *Melendez-Diaz* — beyond requiring a live witness to testify to the results of forensic tests conducted primarily for litigation — are found in the parts of the majority opinion that address the dissent's arguments that the decision will lead to substantial practical difficulties. These implications are discussed in turn:

1. In a footnote, the majority declared in dictum that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." Apparently these are more like traditional business records than records prepared primarily

for litigation, though the question is close — the reason these records are maintained, with respect to forensic testing equipment, is so that the tests conducted can be admitted as reliable. At any rate, the footnote shows some flexibility, in that not every record involved in the forensic testing process will necessarily be found testimonial.

2. The dissent argued that forensic testers are not "accusatory" witnesses in the sense of preparing factual affidavits about the crime itself. But the majority rejected this distinction, declaring that the text of the Sixth Amendment "contemplates two classes of witnesses — those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." This statement raises questions about the reasoning of some lower courts that have admitted autopsy reports and other certificates after *Crawford* — these cases are discussed below.

3. Relatedly, the defendant argued that the affidavits at issue were nothing like the affidavits found problematic in the case of Sir Walter Raleigh. The Raleigh affidavits were a substitute for a witness testifying to critical historical facts about the crime. But the majority responded that while the ex parte affidavits in the Raleigh case were the paradigmatic confrontation concern, "the paradigmatic case identifies the core of the right to confrontation, not its limits. The right to confrontation was not invented in response to the use of the ex parte examinations in Raleigh's Case." Again, some lower courts after *Crawford* had distinguished between ministerial affidavits on collateral matters from Raleigh-type ex parte affidavits; this reasoning is in conflict with *Melendez-Diaz*.

4. The majority noted that cross-examining a forensic analyst may be necessary because "[a]t least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination." This implies that if the evidence is nothing but a machine print-out, it will not run afoul of the Confrontation Clause. As discussed earlier in this Outline, a number of courts have held that machine printouts are not hearsay at all — because a machine can't make a "statement" — and have also held that a machine's output is not "testimony" within the meaning of the Confrontation Clause. This case law appears to survive the Court's analysis in *Melendez-Diaz* — and the later cases of *Bullcoming* and *Williams* do not touch the question of machine evidence.

5. The majority does approve the basic analysis of Federal courts after *Crawford* with respect to business and public records, i.e., that if the record is admissible under FRE 803(6) or 803(8) it is, for that reason, non-testimonial under *Crawford.* For business records, this is because, to be admissible under Rule 803(6), it cannot be prepared primarily for litigation. For public records, this is because law enforcement reports prepared for a specific litigation are excluded under Rule 803(8)(B) and (C).

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

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

> Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an official record under respondent's definition — it was prepared by a public officer in the regular course of his official duties — and although the clerk was certainly not a "conventional witness" under the dissent's approach, the clerk was nonetheless subject to confrontation. See People v. Bromwich, 200 N. Y. 385, 388-389, 93 N. E. 933, 934 (1911).

This passage should probably be read to mean that any use of Rule 803(10) in a criminal case is prohibited. But the Court did find that a notice-and-demand provision would satisfy the Confrontation Clause because if, after notice, the defendant made no demand to produce, a waiver could properly be found. Accordingly, the Committee proposed an amendment to Rule 803(10) that added a notice-and-demand provision. That amendment was approved by the Judicial Conference and if all goes well it will become effective December 1, 2013.

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

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

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

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

Note: While 902(11) may still be viable after *Melendez-Diaz,* some of the rationales used by the *Adefehinti* court are now suspect. First, the *Melendez-Diaz* Court rejects the argument that the certificate is not testimonial just because the underlying records are nontestimonial. Second, the argument that the defendant can challenge the affidavit by calling the signatory is questionable because the *Melendez-Diaz* majority rejected the government's argument that any confrontation problem was solved by allowing the defendant to call the analyst. In response to that argument, Justice Scalia stated that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses."

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

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

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

Warrant of deportation is not testimonial: ***United States v. Garcia***, 452 F.3d 36 (1st Cir. 2006): In an illegal reentry case, the defendant argued that his confrontation rights were violated by the admission of a warrant of deportation. The court disagreed, finding that the warrant was not testimonial under *Crawford*. The court noted that every circuit considering the matter has held "that defendants have no right to confront and cross-examine the agents who routinely record warrants of deportation" because such officers have no motivation to do anything other than "mechanically register an unambiguous factual matter."

Note: Other circuits before Melendez-Diaz reached the same result on warrants of deportation. See, e.g., United States v. Valdez-Matos, 443 F.3d 910 (5th Cir. 2006) (warrant of deportation is non-testimonial because "the official preparing the warrant had no motivation other than mechanically register an unambiguous factual matter"); ***United States v. Torres-Villalobos,*** 487 F.3d 607 (8th Cir. 2007) (noting that warrants of deportation "are produced under circumstances objectively indicating that their primary purpose is to maintain records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts for use in future criminal prosecutions."); ***United States v. Bahena-Cardenas,*** 411 F.3d 1067 (9th Cir. 2005) (a warrant of deportation is non-testimonial "because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter."); ***United States v. Cantellano,*** 430 F.3d 1142 (11th Cir. 2005) (noting that a warrant of deportation s recorded routinely and not in preparation for a criminal trial").

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

Proof of absence of business records is not testimonial: ***United States v. Munoz-Franco,*** 487 F.3d 25 (1st Cir. 2007): In a prosecution for bank fraud and conspiracy, the trial court admitted

the minutes of the Board and Executive Committee of the Bank. The defendants did not challenge the admissibility of the minutes as business records, but argued that it was constitutional error to allow the government to rely on the absence of certain information in the minutes to prove that the Board was not informed about such matters. The court rejected the defendants' confrontation argument in the following passage:

> The Court in *Crawford* plainly characterizes business records as "statements that by their nature [are] not testimonial." 541 U.S. at 56. If business records are nontestimonial, it follows that the absence of information from those records must also be nontestimonial.

Note: This analysis appears unaffected by *Melendez-Diaz,* as no certificate or affidavit is involved and the record itself was not prepared for litigation purposes.

Business records are not testimonial: *United States v. Jamieson,* 427 F.3d 394 (6th Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were essentially business records. The court found that admitting the summaries did not violate the defendant's right to confrontation. The underlying records were not testimonial under *Crawford* because they did not "resemble the formal statement or solemn declaration identified as testimony by the Supreme Court." ***See also United States v. Baker,*** 458 F.3d 513 (6th Cir. 2006) ("The government correctly points out that business records are not testimonial and therefore do not implicate the Confrontation Clause concerns of *Crawford*.").

Note: The court's analysis of business records appears unaffected by *Melendez-Diaz,* because the records were not prepared primarily for litigation and no certificate or affidavit was prepared for use in the litigation.

Post office box records are not testimonial: *United States v. Vasilakos*, 508 F.3d 401 (6th Cir. 2007): The defendants were convicted of defrauding their employer, an insurance company, by setting up fictitious accounts into which they directed unearned commissions. The checks for the commissions were sent to post office boxes maintained by the defendants. The defendants argued that admitting the post office box records at trial violated their right to confrontation. But the court held that the government established proper foundation for the records through the testimony of a postal inspector, and that the records were therefore admissible as business records; the court noted that "the Supreme Court specifically characterizes business records as non-testimonial."

Note: The court's analysis of business records is unaffected by *Melendez-Diaz.*

Drug test prepared by a hospital with knowledge of possible use in litigation is not testimonial; certification of that business record under Rule 902(11) is not testimonial: *United States v. Ellis,* 460 F.3d 920 (7th Cir. 2006): In a trial for felon gun possession, the trial court admitted the results of a drug test conducted on the defendant's blood and urine after he was arrested. The test was conducted by a hospital employee named Kristy, and indicated a positive result for methamphetamine. At trial, the hospital record was admitted without a qualifying witness; instead, a qualified witness prepared a certification of authenticity under Rule 902(11). The court held that neither the hospital record nor the certification were testimonial within the meaning of *Crawford* and *Davis* — despite the fact that both records were prepared with the knowledge that they were going to be used in a prosecution.

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

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

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

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

> As should be clear, we do not find as controlling the fact that a certification of authenticity under 902(11) is made in anticipation of litigation. What is compelling is that *Crawford* expressly identified business records as nontestimonial evidence. Given the records themselves do not fall within the constitutional guarantee provided by the Confrontation Clause, it would be odd to hold that the foundational evidence authenticating the records do. We also find support in the decisions holding that a CNR is nontestimonial. A CNR is quite like a certification under 902(11); it is a signed affidavit attesting that the

signatory had performed a diligent records search for any evidence that the defendant had been granted permission to enter the United States after deportation.

The certification at issue in this case is nothing more than the custodian of records at the local hospital attesting that the submitted documents are actually records kept in the ordinary course of business at the hospital. The statements do not purport to convey information about Ellis, but merely establish the existence of the procedures necessary to create a business record. They are made by the custodian of records, an employee of the business, as part of her job. As such, we hold that written certification entered into evidence pursuant to Rule 902(11) is nontestimonial just as the underlying business records are. Both of these pieces of evidence are too far removed from the "principal evil at which the Confrontation Clause was directed" to be considered testimonial.

Note: As discussed in the treatment of *Melendez-Diaz* earlier in this outline, the fact that the certificate conveys no personal information about Ellis is not dispositive, because the information imparted is being used against Ellis. Moreover, the certificate is prepared exclusively for use in litigation. On the other hand, as discussed above, Rule 902(11) might well be upheld as a rule simply permitting the authentication of a record.

Note: Two 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), and ***United States v. Johnson***, 688 F.3d 494 (8th Cir. 2012), both infra.

Odometer statements, prepared before any crime of odometer-tampering occurred, are not testimonial: *United States v. Gilbertson,* 435 F.3d 790 (7th Cir. 2006): In a prosecution for odometer-tampering, the government proved its case by introducing the odometer statements prepared when the cars were sold to the defendant, and then calling the buyers to testify that the mileage on the odometers when they bought their cars was substantially less than the mileage set forth on the odometer statements. The defendant argued that introducing the odometer statements violated *Crawford.* He contended that the odometer statements were essentially formal affidavits, the very kind of evidence that most concerned the Court in *Crawford*. But the court held that the concern in *Crawford* was limited to affidavits prepared for trial as a testimonial substitute. This concern did not apply to the odometer statements. The court explained as follows:

The odometer statements in the instant case are not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution. The statements were not initiated by the government in the hope of later using them against Gilbertson (or anyone else), nor could the declarants (or any reasonable person) have had such a belief. The reason is simple: each declaration was made *prior* to Gilbertson even engaging in the crime. Therefore, there is no way for the sellers to anticipate that their statements regarding the

mileage on the individual cars would be used as evidence against Gilbertson for a crime he commits in the future.

Note: this result is unaffected by *Melendez-Diaz* as the records clearly were not prepared for purposes of litigation — the crime had not occurred at the time the records were prepared.

Tax returns are business records and so not testimonial: *United States v. Garth,* 540 F.3d 766 (8th Cir. 2008): The defendant was accused of assisting tax filers to file false claims. The defendant argued that the her right to confrontation was violated when the trial court admitted some tax returns of the filers. But the court found no error. The tax returns were business records, and the defendant made no argument that they were prepared for litigation, "as is expected of testimonial evidence."

Note: this result is unaffected by *Melendez-Diaz.*

Certificate of a record of a conviction found not testimonial: *United States v. Weiland,* 420 F.3d 1062 (9th Cir. 2006): The court held that a certificate of a record of conviction prepared by a public official was not testimonial under *Crawford*: "Not only are such certifications a 'routine cataloguing of an unambiguous factual matter,' but requiring the records custodians and other officials from the various states and municipalities to make themselves available for cross-examination in the countless criminal cases heard each day in our country would present a serious logistical challenge without any apparent gain in the truth-seeking process. We decline to so extend *Crawford*, or to interpret it to apply so broadly."

***Note:* The reliance on burdens in countless criminal cases is precisely the argument that was rejected in *Melendez-Diaz.* Nonetheless, certificates of conviction may still be found non-testimonial, because the *Melendez-Diaz* majority states, albeit in dicta, that a certificate is not testimonial if it does nothing more than authenticate another document.**

Absence of records in database is not testimonial; and drug ledger is not testimonial: *United States v. Mendez,* 514 F.3d 1035 (10th Cir. 2008): In an illegal entry case, an agent testified that he searched the ICE database for information indicating that the defendant entered the country legally, and found no such information. The ICE database is "a nation-wide database of information which archives records of entry documents, such as permanent resident cards, border crossing cards, or certificates of naturalization." The defendant argued that the entries into the database (or the asserted lack of entries in this case) were testimonial. But the court disagreed, because the records "are not prepared for litigation or prosecution, but rather administrative and regulatory purposes." The court also observed that Rule 803(8) tracked *Crawford* exactly: a public record is admissible under Rule 803(8) unless it is prepared with an eye toward litigation or prosecution; and under

Crawford, "the very same characteristics that preclude a statement from being classified as a public record are likely to render the statement testimonial."

Mendez also involved drug charges, and the defendant argued that admitting a drug ledger with his name on it violated his right to confrontation under *Crawford.* The court also rejected this argument. It stated first that the entries in the ledger were not hearsay at all, because they were offered to show that the book was a drug ledger and thus a "tool of the trade." As the entries were not offered for truth, their admission could not violate the Confrontation Clause. But the court further held that even if the entries were offered for truth, they were not testimonial, because "[a]t no point did the author keep the drug ledger for the *primary purpose* of aiding police in a criminal investigation, the focus of the *Davis* inquiry." (emphasis the court's). The court noted that it was not enough that the statements were relevant to a criminal prosecution, otherwise "any piece of evidence which aids the prosecution would be testimonial."

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

Letter describing results of a search of court records is testimonial after *Melendez-Diaz: United States v. Smith,* 640 F.3d 358 (D.C. Cir. 2011): To prove a felony in a felon firearm case, the government admitted a letter from a court clerk stating that "it appears from an examination of the files in this office" that Smith had been convicted of a felony. Each letter had a seal and a signature by a court clerk. The court found that the letters were testimonial. The clerk did not merely authenticate a record, rather he created a record of the search he conducted. The letters were clearly prepared in anticipation of litigation — they "respond[ed] to a prosecutor's question with an answer."

> **Note: The analysis in *Smith* provides more indication that certificates of the absence of a record are testimonial after *Melendez-Diaz.* The clerk's letters in *Smith* are exactly like a CNR; the only difference is that they report on the presence of a record rather than an absence.**

> **Note: The case also highlights the question of whether a certificate qualifying a business record under Rule 902(11) is testimonial under *Melendez-Diaz.* The letters did not come within the narrow "authentication" exception recognized by the *Melendez-Diaz* Court because they provided "an interpretation of what the record contains or shows." Arguably 902(11) certificates do just that. But because the only Circuit Court cases on the specific subject of Rule 902(11) certificates find that they are *not* testimonial, there is certainly no call at this point to propose an amendment to Rule 902(11).**

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

> The Office of the Medical Examiner is required by D.C.Code § 5–1405(b)(11) to investigate "[d]eaths for which the Metropolitan Police Department ["MPD"], or other law enforcement agency, or the United States Attorney's Office requests, or a court orders investigation." The autopsy reports do not indicate whether such requests were made in the instant case but the record shows that MPD homicide detectives and officers from the Mobile Crimes Unit were present at several autopsies. Another autopsy report was supplemented with diagrams containing the notation: "Mobile crime diagram (not [Medical Examiner]—use for info only)." Still another report included a "Supervisor's Review Record" from the MPD Criminal Investigations Division commenting: "Should have indictment re John Raynor for this murder." Law enforcement officers thus not only observed the autopsies, a fact that would have signaled to the medical examiner that the autopsy might bear on a criminal investigation, they participated in the creation of reports. Furthermore, the autopsy reports were formalized in signed documents titled "reports."

> These factors, combined with the fact that each autopsy found the manner of death to be a homicide caused by gunshot wounds, are "circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez–Diaz*, 129 S.Ct. at 2532 (citation and quotation marks omitted).

In a footnote, the court emphasized that it was *not* holding that all autopsy reports are testimonial:

> Certain duties imposed by the D.C.Code on the Office of the Medical Examiner demonstrate, the government suggests, that autopsy reports are business records not made for the purpose of litigation. It is unnecessary to decide as a categorical matter whether autopsy reports are testimonial, and, in any event, it is doubtful that such an approach would comport with Supreme Court precedent. See *Melendez–Diaz*, 129 S.Ct. at 2532; cf. *Michigan v. Bryant*, —— U.S. ——, 131 S.Ct. 1143, 1155–56, 179 L.Ed.2d 93 (2011).

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

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

> Abstractly, an autopsy report can be distinguished from, or assimilated to, the sworn documents in *Melendez–Diaz* and *Bullcoming*, and it is uncertain how the Court would resolve the question. We treated such reports as not covered by the Confrontation Clause, *United States v. De La Cruz*, 514 F.3d 121, 133–34 (1st Cir.2008), but the law has continued to evolve and no one can be certain just what the Supreme Court would say about that issue today. However, our concern here is with "clearly established" law when the SJC acted. * * * That close decisions in the later Supreme Court cases extended *Crawford* to new situations hardly shows the outcomes were clearly preordained. And, even now it is uncertain whether, under its primary purpose test, the Supreme Court would classify autopsy reports as testimonial.

Immigration interview form was not testimonial: *United States v. Phoeun Lang,* 672 F.3d 17 (1st Cir. 2012): The defendant was convicted of making false statements and unlawfully applying for and obtaining a certificate of naturalization. The defendant argued that his right to confrontation was violated because the immigration form (N-445) on which he purportedly lied contained verification checkmarks next to his false responses — thus the contention was that the verification checkmarks were testimonial hearsay of the immigration agent who conducted the interview. But

the court found no error. The court concluded that the form was not "primarily to be used in court proceedings." Rather it was a record prepared as "a matter of administrative routine, for the primary purpose of determining Lang's eligibility for naturalization." For essentially the same reasons, the court held that the form was admissible under Rule 803(8)(A)(ii) despite the fact that the rule appears to exclude law enforcement reports. The court distinguished between "documents produced in an adversarial setting and those produced in a routine non-adversarial setting for purposes of Rule 803(8)(A)(ii)." The court relied on the passage in *Melendez-Diaz* which declared that the test for admissibility or inadmissibility under Rule 803(8) was the same as the test of testimoniality under the Confrontation Clause, i.e., whether the primary motive for preparing the record was for use in a criminal prosecution.

Note: This case was decided before *Williams,* but it would appear to satisfy both the Alito and the Kagan version of the "primary motive" test. Both tests agree that a statement cannot be testimonial unless the primary motive for making it is to have it used in a criminal prosecution. The difference is that Justice Alito provides another qualification — the statement is testimonial only if it was made to be used in the *defendant's* criminal prosecution. In *Phoeun Lang* the first premise was not met — the statements were made for administrative purposes, and not primarily for use in any criminal prosecution.

Certain records of internet activity sent to law enforcement found testimonial: *United States v. Cameron*, 699 F.3d 621 (1st Cir. 2012): In a child pornography prosecution, the court held that admission of certain business records violated the defendant's right to Confrontation Clause. The evidence principally at issue related to accounts with Yahoo. Yahoo received an anonymous report that child pornography images were contained in a Yahoo account. Yahoo sent a report—called a "CP Report" — to the National Center for Missing and Exploited Children (NCMEC) listing the images being sent with the report, attaching the images, and listing the date and time at which the image was uploaded and the IP Address from which it was uploaded. NCMEC in turn sent a report of child pornography to the Maine State Police Internet Crimes Against Children Unit (ICAC), which obtained a search warrant for the defendant's computers. The government introduced testimony of a Yahoo employee as to how certain records were kept and maintained by the company, but the government did not introduce the Image Upload Data indicating the date and time each image was uploaded to the Internet. The government also introduced testimony by a NCMEC employee explaining how NCMEC handled tips regarding child pornography. The court held that admission of various data collected by Yahoo and Google automatically in order to further their business purposes was proper, because the data was contained in business records and was not testimonial for Sixth Amendment purposes. The court held, 2-1, that the reports Yahoo prepared and sent to NCMEC were different and were testimonial because there was strong evidence that the primary purpose of the reports was to prove past events that were potentially relevant to a criminal prosecution. The court relied on the following considerations to conclude that the CP Reports were testimonial: 1) they referred to a "suspect" screen name, email address, and IP address — and Yahoo did not treat its customers as "suspects" in the ordinary course of its business; 2) before a CP Report

is created, someone in the legal department at Yahoo has to determine that an account contained child pornography images; 3) Yahoo did not simply keep the reports but sent them to NCMEC, which was under the circumstances an agent of law enforcement, because it received a government grant to accept reports of child pornography and forward them to law enforcement. The government argued that Confrontation was not at issue because the CP Reports contained business records that were unquestionably nontestimonial, such as records of users' IP addresses. But the court responded that the CP Reports were themselves statements. The court noted that "[i]f the CP Reports simply consisted of the raw underlying records, or perhaps underlying records arranged and formatted in a reasonable way for presentation purposes, the Reports might well have been admissible."

The government also argued that the CP Reports were not testimonial under the Alito definition of primary motive in *Williams*. Like the DNA reports in *Williams*, the CP Reports were prepared at a time when the perpetrator was unknown and so they were not targeted toward a particular individual. The court distinguished *Williams* by relying on a statement in the Alito opinion that at the time of the DNA report, the technicians had "no way of knowing whether it will turn out to be incriminating or exonerating." In contrast, when the CP Reports were prepared, Yahoo personnel knew that they were incriminating: "Yahoo's employees may not have known *whom* a given CP Report might incriminate, but they almost certainly were aware that a Report would incriminate *somebody."*

Finally, the court held that the NCMEC reports sent to the police were testimonial, because they were statements independent of the CP Reports, and they were sent to law enforcement for the primary purpose of using them in a criminal prosecution. One judge, dissenting in part, argued that the connection between an identified user name, the associated IP address, and the digital images archived from that user's account all existed well before Yahoo got the anonymous tip, were an essential part of the service that Yahoo provided, and thus were ordinary business records that were not testimonial.

> **Note: *Cameron* does not explicitly hold that business records admissible under Rule 803(6) can be testimonial under *Crawford.* The court notes that under *Palmer v. Hoffman*, 318 U.S. 109 (1943), records are not admissible as business records when they are calculated for use in court. *Palmer* is still good law under Rule 803(6), as the Court recognized in *Melendez-Diaz.* The *Cameron* court noted that the Yahoo reports were subject to the same infirmity as the records found inadmissible in *Hoffman:* they were not made for business purposes, but rather for purposes of litigation.**
>
> **It should also be noted that the Court's attempt to distinguish the Alito primary motive test is weak. The court relies on one sentence in Justice Alito's analysis, but the gravamen of that analysis is that there was no primary motive because the lab was not targeting a known individual. That is the same with the Yahoo CP reports.**

Routine autopsy report was not testimonial: *United States v. James,* 712 F.3d 79 (2nd Cir. 2013): The court considered whether its *pre-Melendez-Diaz* case law — stating that autopsy reports were not testimonial — was still valid. The court adhered to its view that "routine" autopsy reports

were not testimonial because they are not primarily motivated to create a record for a criminal trial. Applying the test of "routine" to the facts presented, the court found as follows:

> Somaipersaud's autopsy was anything other than routine — there is no suggestion that Jindrak or anyone else involved in this autopsy process suspected that Somaipersaud had been murdered and that the medical examiner's report would be used at a criminal trial. Ambrosi testified that causes of death are often undetermined in cases like this because it could have been a recreational drug overdose or a suicide. The autopsy report itself refers to the cause of death as "undetermined" and attributes it both to "acute mixed intoxication with alcohol and chlorpromazine" combined with "hypertensive and arteriosclerotic cardiovascular disease."
>
> The autopsy was completed on January 24, 1998, and the report was signed June 16, 1998, substantially before any criminal investigation into Somaipersaud's death had begun. During the course of Ambrosi's lengthy trial testimony, neither the government nor defense counsel elicited any information suggesting that law enforcement was ever notified that Somaipersaud's death was suspicious, or that any medical examiner expected a criminal investigation to result from it. Indeed, there is reason to believe that none is pursued in the case of most autopsies.

The court noted that "something in the order of ten percent of deaths investigated by the OCME lead to criminal investigations." It distinguished the 11th Circuit's opinion — discussed below — which found an autopsy report to be testimonial, noting that "the decision was based in part on the fact that the Florida Medical Examiner's Office was created and exists within the Department of Law Enforcement. Here, the OCME is a wholly independent office." Thus, an autopsy report prepared outside the auspices of a criminal investigation is very unlikely to be found testimonial under the Second Circuit's view.

Business records are not testimonial: *United States v. Bansal,* 663 F.3d 634 (3rd Cir. 2011): In a prosecution related to a controlled substance distribution operation, the trial court admitted records kept by domestic and foreign businesses of various transactions. The court rejected the claim that the records were testimonial, stating that "the statements in the records here were made for the purpose of documenting business activity, like car sales and account balances, and not for providing evidence to law enforcement or a jury."

Admission of purported drug ledgers violated the defendant's confrontation rights where the proof of authenticity was the fact that they were produced by an accomplice at a proffer session: *United States v. Jackson,* 625 F.3d 875 (5th Cir. 2010), amended 636 F.3d 687 (5th Cir. 2011): In a drug prosecution, purported drug ledgers were offered to prove the defendant's participation in drug transactions. An officer sought to authenticate the ledgers as business records

but the court found that he was not a "qualified witness" under Rule 803(6) because he had no knowledge that the ledgers came from any drug operation associated with the defendant. The court found that the only adequate basis of authentication was the fact that the defendant's accomplice had produced the ledgers at a proffer session with the government. But because the production at the proffer session was unquestionably a testimonial statement — and because the accomplice was not produced to testify — admission of the ledger against the defendant violated his right to confrontation under *Crawford.*

> ***Note:*** **The *Jackson* court does *not* hold that business records are testimonial. The reasoning is muddled, but the best way to understand it is that the evidence used to *authenticate* the business record — the cohort's production of the records at a proffer session — was testimonial.**

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 recordkeeping. 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.

Affidavit pertinent to illegal immigration was testimonial: *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 found that it was testimonial and reversed. The court found that the context of preparing the affidavit indicated that it was primarily motivated for use in a criminal prosecution, and the government had not met its burden of showing otherwise. 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 in any event qualify as a business record because the grandmother was not acting in the ordinary course of regularly conducted activity.

Records of sales at a pharmacy are business records and not testimonial under *Melendez-Diaz: United States v. Mashek,* 606 F.3d 922 (8th Cir. 2010): The defendant was convicted of attempt to manufacture methamphetamine. At trial the court admitted logbooks from local pharmacies to prove that the defendant made frequent purchases of pseudoephedrine. The defendant argued that the logbooks were testimonial under *Melendez-Diaz,* but the court disagreed and affirmed his conviction. The court first noted that the defendant probably waived his confrontation argument because at trial he objected only on the evidentiary grounds of hearsay and Rule 403. But even assuming the defendant preserved his confrontation argument, "*Melendez-Diaz* does not provide him any relief. The pseudoephedrine logs were kept in the ordinary course of business pursuant to Iowa law and are business records under Federal Rule of Evidence 803(6). Business records under Rule 803(6) are not testimonial statements; *see Melendez-Diaz,* 129 S.Ct. At 2539-40 (explaining that business records are typically not testimonial))." ***Accord, United States v. Ali,*** 616 F.3d 745 (8th Cir. 2010) (business records prepared by financial services company, offered as proof that tax returns were false, were not testimonial, as "*Melendez-Diaz* does not apply to the HSBC records that were kept in the ordinary course of business."); ***United States v. Wells,*** 706 F.3d 908 (8th Cir. 2013) (*Melendez–Diaz* did not preclude the admission of pseudoephedrine logs because they constituted non-testimonial business records under Federal Rule of Evidence 803(6)).

Rule 902(11) authentication was not testimonial: *United States v. Thompson,* 686 F.3d 575 (8th Cir. 2012): To prove unexplained wealth in a drug case, the government offered and the court admitted a record from the Iowa Workforce Development Agency showing no reported wages for Thompson's social security number during 2009 and 2010. The record was admitted through an affidavit of self-authentication offered pursuant to Rule 902(11). The court found that the earnings records themselves were non-testimonial because they were prepared for administrative purposes. As to the exhibit itself, the court stated that "[b]ecause the IWDA record itself was not created for the purpose of establishing or proving some fact at trial, admission of a certified copy of that record did not violate Thompson's Confrontation Clause rights." The court emphasized that "[b]oth the majority and dissenting opinions in *Melendez–Diaz* noted that a clerk's certificate authenticating a record—or a copy thereof—for use as evidence was traditionally admissible even though the certificate itself was testimonial, having been prepared for use at trial." It concluded that "[t]o the

extent Thompson contends that a copy of an existing record or a printout of an electronic record constitutes a testimonial statement that is distinguishable from the non-testimonial statement inherent in the original business record itself, we reject this argument." ***See also United States v. Johnson***, 688 F.3d 494 (8th Cir. 2012) (certificates of authenticity presented under Rule 902(11) are not testimonial, and the notations on the lab report by the technician indicating when she checked the samples into and out of the lab did not raise a confrontation question because they were offered only to establish a chain of custody and not to prove the truth of any matter asserted).

GPS tracking reports were properly admitted as non-testimonial business records: ***United States v. Brooks,*** 715 F.3d 1069 (8th Cir. 2013): Affirming bank robbery and related convictions, the court rejected the defendant's argument that admission at trial of GPS tracking reports violated his right to confrontation. The reports recorded the tracking of a GPS device that was hidden by a teller in the money taken from the bank. The court held that the records were properly admitted as business records under Rule 803(6), and they were not testimonial even though they were prepared by law enforcement. The court reasoned that the primary purpose of the tracking reports was to track the perpetrator in an ongoing pursuit — not for use at trial. The court stated that "[a]lthough the reports ultimately were used to link him to the bank robbery, they were not *created* . . . to establish some fact at trial. Instead, the GPS evidence was generated by the credit union's security company for the purpose of locating a robber and recovering stolen money."

Prior conviction in which the defendant did not have the opportunity to cross-examine witnesses cannot be used in a subsequent trial to prove the facts underlying the conviction: ***United States v. Causevic,*** 636 F.3d 998 (8th Cir. 2011): The defendant was charged with making materially false statements in an immigration matter — specifically that he lied about committing a murder in Bosnia. To prove the lie at trial, the government offered a Bosnian judgment indicating that the defendant was convicted in absentia of the murder. The court held that the judgment was testimonial to prove the underlying facts, and there was no showing that the defendant had the opportunity to cross-examine the witnesses in the Bosnian court. The court distinguished proof of the *fact* of a conviction being entered (such as in a felon-firearm prosecution), as in that situation the public record is prepared for recordkeeping and not for a trial. In contrast the factual findings supporting the judgment were obviously generated for purposes of a criminal prosecution.

> **Note: The statements of facts underlying the prior conviction are testimonial under both versions of the primary motive test contested in *Williams.* They meet the Kagan test because they were obviously prepared for purpose of — indeed as part of — a criminal prosecution. And they meet the Alito proviso because they targeted the specific defendant against whom they were used at trial.**

Affidavit that birth certificate existed was testimonial: *United States v. Bustamante,* 687 F.3d 1190 (9th Cir. 2012): The defendant was charged with illegal entry and the dispute was whether he was a United States citizen. The government contended that he was a citizen of the Philippines but could not produce a birth certificate, as the records had been degraded and were poorly kept. Instead it produced an affidavit from an official who searched birth records in the Phillipines as part of the investigation into the defendant's citizenship by the Air Force 30 years earlier. The affidavit stated that birth records indicated that the defendant was born in the Philippines and the affidavit purported to transcribe the information from the records. The court held that the affidavit was testimonial under *Melendez-Diaz* and reversed the conviction. The court distinguished this case from cases finding that birth records and certificates of authentication are not testimonial:

> Our holding today does not question the general proposition that birth certificates, and official duplicates of them, are ordinary public records "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial." *Melendez–Diaz*, 129 S.Ct. at 2539–40. But Exhibit 1 is not a copy or duplicate of a birth certificate. Like the certificates of analysis at issue in Melendez–Diaz, despite being labeled a copy of the certificate, Exhibit 1 is "quite plainly" an affidavit. It is a typewritten document in which Salupisa testifies that he has gone to the birth records of the City of Bacolod, looked up the information on Napoleon Bustamante, and summarized that information at the request of the U.S. government for the purpose of its investigation into Bustamante's citizenship. Rather than simply authenticating an existing non-testimonial record, Salupisa created a new record for the purpose of providing evidence against Bustamante. The admission of Exhibit 1 without an opportunity for cross examination therefore violated the Sixth Amendment.

Government concedes a *Melendez-Diaz* error in admitting affidavit on the absence of a public record: *United States v. Norwood,* 603 F.3d 1063 (9th Cir. 2010): In a drug case, the government sought to prove that the defendant had no legal source for the large amounts of cash found in his car. The trial court admitted an affidavit of an employee of the Washington Department of Employment Security, which certified that a diligent search failed to disclose any record of wages reported for the defendant in a three-month period before the crime. On appeal, the government conceded that the affidavit was erroneously admitted in light of the intervening decision in *Melendez-Diaz.* (The court found the error to be harmless).

CNR is testimonial but a warrant of deportation is not: *United States v. Orozco-Acosta,* 607 F.3d 1156 (9th Cir. 2010): In an illegal reentry case, the government proved removal by introducing a warrant of deportation under Rule 803(8), and it proved unpermitted reentry by introducing a certificate of non-existence of permission to reenter (CNR) under Rule 803(10). The trial was conducted and the defendant convicted before *Melendez-Diaz.* On appeal, the government conceded that introducing the CNR violated the defendant's right to confrontation because under *Melendez-Diaz* the record is testimonial. The court in a footnote agreed with the government's concession, stating that its previous cases holding that CNRs were not testimonial were "clearly inconsistent with *Melendez-Diaz*" because like the certificates in that case, a CNR is prepared solely

for purposes of litigation. In contrast, however, the court found that the warrant of deportation was properly admitted even under *Melendez-Diaz.* The court reasoned that "neither a warrant of removal's sole purpose nor even its primary purpose is use at trial." It explained that a warrant of removal must be prepared in every case resulting in a final order of removal, and only a "small fraction of these warrants are used in immigration prosecutions." The court concluded that "*Melendez-Diaz* cannot be read to establish that the mere possibility that a warrant of removal — or, for that matter, any business or public record — could be used in a later criminal prosecution renders it testimonial under *Crawford*." The court found that the error in admitting the CNR was harmless and affirmed the conviction. ***See also United States v. Rojas-Pedroza,*** 716 F.3d 1253 (9th Cir. 2013) (adhering to *Orozco-Acosta* in response to the defendant's argument that it had been undermined by *Bullcoming* and *Bryant;* holding that a Notice of Intent in the defendant's A-File — which apprises the alien of the determination that he is removable — was non-testimonial because "their primary purpose is to effect removals, not to prove facts at a criminal trial.").

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 forms record the date and location of arrest, the funds found in the alien's possession, and basic biographical data about the alien, and also provides the alien options, including an admission that the alien is illegally in the country and wishes to return home. The court of appeals rejected the defendant's argument that these forms were testimonial. It stated that "a Border Patrol agent uses the form in the field to document basic information, to notify the aliens of their administrative rights, and to give the aliens a chance to request their preferred disposition. The Field 826s are completed whether or not the government decides to prosecute the aliens or anyone else criminally. The nature and use of the Field 826 makes clear that its primary purpose is administrative, not for use as evidence at a future criminal trial. Even though statements within the form may become relevant to later criminal prosecution, this potential future use does not automatically place the statements within the ambit of 'testimonial.'" The court did find that the part of the report that contained information from the aliens was improperly admitted in violation of the *hearsay* rule. The Field 826 is a public record but information coming from the alien is not information coming from a public official. The court found the violation of the hearsay rule to be harmless error.

Social Security application was not testimonial as it was not prepared under adversarial circumstances: *United States v. Berry*, 683 F.3d 1015 (9th Cir. 2012): The court affirmed the defendant's conviction for social security fraud for taking money paid for maintenance of his son while the defendant was a representative payee. The trial judge admitted routine Social Security Administration records showing that the defendant applied for benefits on behalf of the son. The defendant argued that an SSA application was tantamount to a police report and therefore the record was inadmissible under Rule 803(8) and also that its admission violated his right to confrontation. The court disagreed, reasoning "that a SSA interviewer completes the application as part of a routine administrative process" and such a record is prepared for each and every request for benefits. "No affidavit was executed in conjunction with preparation of the documents, and there was no anticipation that the documents would become part of a criminal proceeding. Rather, every expectation was that Berry would use the funds for their intended purpose." The court quoted Melendez–Diaz for the proposition that "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." The court concluded as follows:

> [N]o reasonable argument can be made that the agency documents in this case were created solely for evidentiary purposes and/or to aid in a police investigation. Importantly, no police investigation even existed when the documents were created. * * * Because the evidence at trial established that the SSA application was part of a routine, administrative procedure unrelated to a police investigation or litigation, we conclude that the district court did not abuse its discretion by admitting the application under Fed.R.Evid. 803(8), and no constitutional violation occurred.

Affidavits authenticating business records and foreign public records are not testimonial: *United States v. Anekwu,* 695 F.3d 967 (9th Cir. 2012): In a fraud case, the government authenticated foreign public records and business records by submitting certificates of knowledgeable witnesses. This is permitted by 18 U.S.C. § 3505 for foreign records and Rule 902(12) for foreign business records. The court found that the district court did not commit plain error in finding that the certificates were not testimonial. The certificates were not themselves substantive evidence but rather a means to authenticate records. The court relied on the 10th Circuit's decision in *Yeley-Davis*, immediately below, and on the statement in *Melendez-Diaz* that certificates that do no more than authenticate other records are not testimonial.

Records of cellphone calls kept by provider as business records are not testimonial, and Rule 902(11) affidavit authenticating the records is not testimonial: *United States v. Yeley-Davis,* 632 F.3d 673 (10th Cir. 2011): In a drug case the trial court admitted cellphone records indicating that the defendant placed calls to coconspirators. The foundation for the records was provided by an affidavit of the records custodian that complied with Rule 902(11). The defendant argued that both the cellphone records and the affidavit were testimonial. The court rejected both

arguments and affirmed the conviction. As to the records, the court found that they were not prepared "simply for litigation." Rather, the records were kept for Verizon's business purposes, and accordingly were not testimonial. As to the certificate, the court relied on pre-*Melendez-Diaz* cases such as *United States v. Ellis, supra*, which found that authenticating certificates were not the kind of affidavits that the Confrontation Clause was intended to cover. The defendant responded that cases such as *Ellis* had been abrogated by *Melendez-Diaz*, but the court disagreed:

> If anything, the Supreme Court's recent opinion supports the conclusion in *Ellis.* * * * Justice Scalia expressly described the difference between an affidavit created to provide evidence against a defendant and an affidavit created to authenticate an admissible record: "A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant." Id. at 2539. In addition, Justice Scalia rejected the dissent's concern that the majority's holding would disrupt the long-accepted practice of authenticating documents under Rule 902(11) and would call into question the holding in *Ellis*. See *Melendez-Diaz*, 129 S.Ct. at 2532 n. 1 ("Contrary to the dissent's suggestion, ... we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the ... authenticity of the sample ... must appear in person as part of the prosecution's case."); see also id. at 2547 (Kennedy, J., dissenting) (expressing concern about the implications for evidence admitted pursuant to Rule 902(11) and future of *Ellis*). The Court's ruling in *Melendez-Diaz* does not change our holding that Rule 902(11) certifications of authenticity are not testimonial.

See also United States v. Keck, 643 F.3d 789 (10th Cir. 2011): Records of wire-transfer transactions were not testimonial because they "were created for the administration of Moneygram's affairs and not the purpose of establishing or proving some fact at trial. And since the wire-transfer data are not testimonial, the records custodian's actions in preparing the exhibits [by cutting and pasting the data] do not constitute a Confrontation Clause violation."

Immigration forms containing biographical data, country of origin, etc. are not testimonial: *United States v. Caraballo,* 595 F.3d 1214 (11th Cir. 2010): In an alien smuggling case, the trial court admitted I-213 forms prepared by an officer who found aliens crammed into a small room in a boat near the shore of the United States. The forms contained basic biographical information, and were used at trial to prove that the persons were aliens and not admittable. The defendant argued that the forms were inadmissible hearsay and also testimonial. The court of appeals found no error. On the hearsay question, the court held that the forms were properly admitted as public records — the exclusion of law enforcement records in Rule 803(8) did not apply because the forms were routine and nonadversarial documents requested from every alien entering the United States. Nor were the forms testimonial, even after *Melendez-Diaz.* The court distinguished *Melendez-Diaz* in the following passage:

> Like a Warrant of Deportation * * * (and unlike the certificates of analysis in *Melendez-Diaz*), the basic biographical information recorded on the I-213 form is routinely

requested from every alien entering the United States, and the form itself is filled out for anyone entering the Untied States without proper immigration papers. * * * Rose gathered that biographical information from the aliens in the normal course of administrative processing at the Pembroke Pines Border Patrol Station in Pembroke Pines, Florida. * * *

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

Summary charts of admitted business records is not testimonial: *United States v. Naranjo,* 634 F.3d 1198 (11th Cir. 2011): In a prosecution for concealing money laundering, the defendant argued that his confrontation rights were violated when the government presented summary charts of business records. The court found no error. The bank records and checks that were the subject of the summary were business records and "[b]usiness records are not testimonial." And "[s]ummary evidence also is not testimonial if the evidence underlying the summary is not testimonial."

Autopsy reports prepared as part of law enforcement are found testimonial under *Melendez-Diaz: United States v. Ignasiak,* 667 F.3d 1217 (11th Cir. 2012): In a prosecution against a doctor for health care fraud and illegally dispensing controlled substances, the court held that the admission of autopsy reports of the defendant's former patients were testimonial under *Melendez-Diaz.* The court relied heavily on the fact that the autopsy reports were filed from an arm of law enforcement. The court reasoned as follows:

We think the autopsy records presented in this case were prepared "for use at trial." Under Florida law, the Medical Examiners Commission was created and exists within the Department of Law Enforcement. Fla. Stat. § 406.02. Further, the Medical Examiners Commission itself must include one member who is a state attorney, one member who is a public defender, one member who is sheriff, and one member who is the attorney general or his designee, in addition to five other non-criminal justice members. Id. The medical examiner for each district "shall determine the cause of death" in a variety of circumstances and "shall, for that purpose, make or have performed such examinations, investigations, and autopsies as he or she shall deem necessary or as shall be requested by the state attorney." Fla. Stat. § 406.11(1). Further, any person who becomes aware of a person dying under

circumstances described in section § 406.11 has a duty to report the death to the medical examiner. Id. at § 406.12. Failure to do so is a first degree misdemeanor. Id.

* * *

In light of this statutory framework, and the testimony of Dr. Minyard, the autopsy reports in this case were testimonial: "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." As such, even though not all Florida autopsy reports will be used in criminal trials, the reports in this case are testimonial and subject to the Confrontation Clause.

State of Mind Statements

Statement admissible under the state of mind exception is not testimonial: *Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004): Horton was convicted of drug-related murders. At his state trial, the government offered hearsay statements from Christian, Horton's accomplice. Christian had told a friend that he was broke; that he had asked a drug supplier to front him some drugs; that the drug supplier declined; and that he thought the drug supplier had a large amount of cash on him. These statements were offered under the state of mind exception to show the intent to murder and the motivation for murdering the drug supplier. The court held that Christian's statements were not "testimonial" within the meaning of *Crawford*. The court explained that the statements "were not ex parte in-court testimony or its equivalent; were not contained in formalized documents such as affidavits, depositions, or prior testimony transcripts; and were not made as part of a confession resulting from custodial examination. . . . In short, Christian did not make the statements under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial."

Testifying Declarant

Cross-examination sufficient to admit prior statements of the witness that were testimonial: *United States v. Acosta,* 475 F.3d 677 (5th Cir. 2007): The defendant's accomplice testified at his trial, after informing the court that he did not want to testify, apparently because of threats from the defendant. After answering questions about his own involvement in the crime, he refused on direct examination to answer several questions about the defendant's direct participation in the crime. At that point the government referenced statements made by the accomplice in his

guilty plea. On cross-examination, the accomplice answered all questions; the questioning was designed to impeach the accomplice by showing that he had a motive to lie so that he could receive a more lenient sentence. The government then moved to admit the accomplice's statements made to qualify for a safety valve sentence reduction — those statements directly implicated the defendant in the crime. The court found that statements made pursuant to a guilty plea and to obtain a safety valve reduction were clearly testimonial. However, the court found no error in admitting these statements, because the accomplice was at trial subject to cross-examination. The court noted that the accomplice admitted making the prior statements, and answered every question he was asked on cross-examination. While the cross-examination did not probe into the underlying facts of the crime or the accomplice's previous statements implicating the defendant, the court noted that "Acosta could have probed either of these subjects on cross-examination." The accomplice was therefore found sufficiently subject to cross-examination to satisfy the Confrontation Clause.

Crawford* inapplicable where hearsay statements are made by a declarant who testifies at trial: *United States v. Kappell, 418 F.3d 550 (6th Cir. 2005): In a child sex abuse prosecution, the victims testified and the trial court admitted a number of hearsay statements the victims made to social workers and others. The defendant claimed that the admission of hearsay violated his right to confrontation under *Crawford.* But the court held that *Crawford* by its terms is inapplicable if the hearsay declarant is subject to cross-examination at trial. The defendant complained that the victims were unresponsive or inarticulate at some points in their testimony, and therefore they were not subject to effective cross-examination. But the court found this claim foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). Under *Owens,* the Constitution requires only an opportunity for cross-examination, not cross-examination in whatever way the defendant might wish. The defendant's complaint was that his cross-examination would have been more effective if the victims had been older. "Under *Owens,* however, that is not enough to establish a Confrontation Clause violation."

Admission of testimonial statements does not violate the Confrontation Clause because declarant testified at trial — even though the declarant did not recall making the statements: *Cookson v. Schwartz,* 556 F.3d 647 (7th Cir. 2009): In a child sex abuse prosecution, the trial court admitted the victim's hearsay statements accusing the defendant. These statements were testimonial. The victim then testified at trial, describing some incidents perpetrated by the defendant. But the victim could not remember making any of the hearsay statements that had previously been admitted. The court found no error in admitting the victim's testimonial hearsay, because the victim had been subjected to cross-examination at trial. The defendant argued that the victim was in effect unavailable because she lacked memory. But the court found this argument was foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). The court noted that the defendant in this case was better off than the defendant in *Owens* because the victim in this case "could remember the underlying events described in the hearsay statements."

Witness's reference to statements made by a victim in a forensic report did not violate the Confrontation Clause because the declarant testified at trial: *United States v. Charbonneau,* 613 F.3d 860 (8th Cir. 2010): Appealing from child-sex-abuse convictions, the defendant argued that it was error for the trial court to allow the case agent to testify that he had conducted a forensic interview with one of the victims and that the victim identified the perpetrator. The court recognized that the statements by the victim may have been testimonial. But in this case the victim testified at trial. The court declared that "*Crawford* did not alter the principle that the Confrontation Clause is satisfied when the hearsay declarant, here the child victim, actually appears in court and testifies in person."

Statements of interpreter do not violate the right to confrontation where the interpreter testified at trial: *United States v. Romo-Chavez,* 681 F.3d 955 (9th Cir. 2012): The court held that even if the translator of the defendant's statements could be thought to have served as a witness against the defendant, there was no confrontation violation because the translator testified at trial. "He may not have remembered the interview, but the Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. All the Confrontation Clause requires is the ability to cross-examine the witness about his faulty recollections."

Statements to police officers implicating the defendant in the conspiracy are testimonial, but no confrontation violation because the declarant testified: *United States v. Allen,* 425 F.3d 1231 (9th Cir. 2005): The court held that a statement made by a former coconspirator to a police officer, after he was arrested, identifying the defendant as a person recruited for the conspiracy, was testimonial. There was no error in admitting this statement, however, because the declarant testified at trial and was cross-examined. ***See also United States v. Lindsey,*** 634 F.3d 541 (9th Cir. 2011) ("Although Gibson's statements to Agent Arbuthnot qualify as testimonial statements, they do not offend the Confrontation Clause because Gibson himself testified at trial and was cross-examined by Lindsey's counsel.").

Admitting hearsay accusation did not violate the right to confrontation where the declarant testified and was subject to cross-examination about the statement: *United States v. Pursley,* 577 F.3d 1204 (10th Cir. 2009): A victim of a beating identified the defendant as his assailant to a federal marshal. That accusation was admitted at trial as an excited utterance. The victim testified at trial to the underlying event, and he also testified that he made the accusation, but he did not testify on either direct or cross-examination *about* the statement. The defendant argued that admitting the hearsay statement violated his right to confrontation. The court assumed arguendo that the accusation was testimonial — even though it had been admitted as an excited utterance. But even if it was testimonial hearsay, the defendant's confrontation rights were not violated because he had a full opportunity to cross-examine the victim about the statement. The court stated that the defendant's "failure to seize this opportunity demolishes his Sixth Amendment claim." The court observed that the defendant had a better opportunity to confront the victim "than defendants have

had when testifying declarants have indicated that they cannot remember their out-of-court statements. Yet, courts have found no Confrontation Clause violation in that situation."

Statement to police admissible as past recollection recorded is testimonial but admission does not violate the right to confrontation: *United States v. Jones*, 601 F.3d 1247 (11th Cir. 2010): Affirming firearms convictions, the court held that the trial judge did not abuse discretion in admitting as past recollection recorded a videotaped police interview of a 16-year-old witness who sold a gun to the defendant and rode with him to an area out of town where she witnessed the defendant shoot a man. The court also rejected a Confrontation Clause challenge. Even though the videotaped statement was testimonial, the declarant testified at trial — as is necessary to qualify a record under Rule 803(5) — and was subject to unrestricted cross-examination.

IV. Suggestions for Rulemaking

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

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

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

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

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

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

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

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

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TAB 8

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To: Advisory Committee on Rules of Evidence

From: Ken Broun, consultant

Re: Report on privilege project; draft rules on Secrets of State Privilege, identity of informer and Political Vote

Date: February 26, 2014

I am close to completing the more than ten-year process of drafting survey rules covering evidentiary privileges in the federal courts. I attach three additional privileges, Secrets of State, Identity of Informer and Political Vote. I am working on one additional privilege, Deliberative Process. Although my work is still in the early stages, I hope to have a draft of that privilege by the time of the meeting on April 4.

I have decided not to have a general waiver rule covering all privileges. Waiver rules differ depending on the privilege involved. For example, even prior disclosure of information may not constitute waiver of the Secrets of State privilege. Instead, I have added a waiver provision to those privileges where I think it appropriate. For example, I have added the following provision to my draft of the survey rule governing the Attorney-Client privilege;

> **(g) Waiver. Subject to Federal Rule of Evidence 502, a client having a privilege under this rule waives the privilege if the client or the client's predecessor while holding of the privilege voluntarily discloses or consents to disclosure of any significant part of the communication. Waiver does not apply if the disclosure is itself a privileged communication under this rule or if the disclosure was compelled erroneously or made without an opportunity to claim the privilege.**

I have decided against drafting survey rules with regard to several privileges that have been recognized by the federal courts. Although I completed a draft rule dealing with a Journalist's privilege, I have decided not to include that draft in the final version. Based on advice from this Committee, I believe that the law governing this area is too unsettled even to suggest that there is a privilege governed by the same rules that is recognized in all circuits.

There was a Required Reports privilege included in the proposed rules rejected by Congress, Proposed Rule 502. However, in looking at the case law, the existence and dimensions of that privilege is so dependent on the language of individual statutes that it did not seem worthwhile to include a general survey rule. I considered adding a Presidential or Executive privilege. However, the application of that privilege is so rare and so dependent on the special circumstances that it did seem useful to do so. Other privileges applied or at least mentioned by federal courts, such as an accountant's privilege and self-critical analysis, are not sufficiently engrained in federal law to make a survey rule worthwhile at this point.

I await the Committee's advice as to whether I should attempt to have my work published and, if so, where it should be submitted.

SECRETS OF STATE PRIVILEGE SURVEY RULE

(a) Definition. A "secret of state" is a governmental secret relating to the national defense or the international relations of the United States.

(b) General rule of privilege. The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state.

(c) Procedures. The privilege for secrets of state may be claimed only by the chief officer of the government agency or department administering the subject matter which the secret information sought concerns.

(d) Notice to government. If the circumstances of the case indicate a substantial possibility that a claim of privilege would be appropriate but has not been made because of oversight or lack of knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege.

(e) Effect of sustaining claim. If a claim of secrets of state privilege is sustained and it appears that a party is thereby deprived of material evidence, the court shall make any further orders the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding upon an issue as to which the evidence is relevant, or dismissing the action.

COMMENTARY

In general

Proposed Federal Rule of Evidence 509 provided a privilege for secrets of state and official information. The rule was a highly controversial part of the overall proposal. The shadow of the contemporaneous Watergate scandal of the early 1970s made the official information portion of the rule particularly problematic. See Kenneth S. Broun, Giving Codification a Second Chance, 53 Hastings L. J. 769, 777 (2002). But the state secrets privilege itself was, at the time of the Proposed Federal Rules, firmly established federal law. *See United States v. Reynolds*, 345 U.S. 1 (1953); *Totten v. United States,* 92 U.S. 105 (1875). It has remained so since that time and has been increasingly invoked since the tragic events of September 11, 2001. See Imwinkelried, The New Wigmore, § 8.2 (2d ed. 2010).

Unlike most evidentiary privilege, which protect communications, the state secrets privilege protects the facts themselves. The critical time is not the time of the creation of a communication but rather the existence of facts at the time of the request for disclosure for information. The concept of waiver does not apply. Imwinkelried, The New Wigmore, § 8.1 (2d ed. 2010) Prior disclosure of information may affect whether or not information is "secret" but it does not constitute a waiver of the government's ability to claim the privilege. (*See, e.g., Al-Haramain Islamic Foundation, Inc. v. Bush,* 507 F.3d 1190 (9th Cir. 2007) (where a document that had inadvertently been revealed was nevertheless protected by the state secrets privilege).

There are two different kinds of situations in which the privilege can be raised. One is where the very nature of the subject matter of the action is a state secret. The clearest example is *Totten v. United States, supra.* In *Totten,* plaintiff sought compensation under an alleged contract for services as a Civil War spy. The court noted that the nature of the contract was such that both the employer and the agent must have understood that no action against the government could be maintained. Dismissal of the action is the only remedy in this situation. *See also Tenet v. Doe, 544 U.S. 1 (2005)* (suit for on contract for services as spies in Communist countries).

The other situation assumes that the subject matter of the suit is not itself a state secret but that information may be disclosed in the course of the litigation that would reveal military or state secrets. The leading case on this more common fact pattern is *United States v. Reynolds, supra*. In *Reynolds,* plaintiffs sought an accident investigation report of the crash of a B-29 testing secret electronic equipment. The court upheld the privilege claimed by the Secretary of the Air Force in which the secretary claiming that the material could not be

furnished without "seriously hampering national security." A claim of privilege in this latter situation may result in dismissal of the action but will not necessarily do so. In *Reynolds,* the Court remanded the case with the direction that it might go forward without the privileged information. Numerous federal cases at all levels have required dismissal where no amount of effort and care will safeguard the privileged material. *E.g., Mohamed v. Jeppesen Dataplan, Inc.,* 614 F.3d 1070 (9th Cir. 2010) (extraordinary rendition case dismissed); *Bowles v. United States,* 950 F.2d 154 (4th Cir. 1991) (Federal Torts Claim action based on automobile action in Oman); *Farnsworth Common v. Grimes,* 635 F.2d 268 (4th Cir. 1980) (suit for wrongful interference with prospective contraction relations between plaintiff and United States Navy; case dismissed where the court found that any attempt to make out a *prima facie* cased would threaten disclosure of state secrets).

This survey rule recognizes the three-part test for application of the privilege set out in several cases, most notably *Al-Haramain Islamic Foundation, Inc. v. Bush,* 507 F.3d 1190, 2002 (9th Cir. 2007).

1. The procedural requirements for invoking the privilege have been met. Survey Rule (c)
2. The court must make an independent determination whether the information is privileged. Survey Rule (b)
3. How the matter should proceed in light of the successful privilege claim? Survey Rule (e)

(a) Definition. A "secret of state" is a governmental secret relating to the national defense or the international relations of the United States.

The definition is taken from Proposed Federal Rule 509(a)(1). The language is fully consistent with the federal case law.

The courts have had little difficulty in finding that information is secret when it relates to national defense. One author has attempted to articulate the areas of sensitive information with regard to defense:

> The specific areas of sensitive information appear to be: (a) The plans and capabilities of specific combat operations; (b) the official estimates of the military plans and capabilities of potential enemy nations; (c) the existence, design, and production of new weapons or equipment or the existence and results of research programs specifically directed toward producing new weapons and equipment; (d) the existence and nature of special ways and means of organizing combat operations; (e) the identity and location of vulnerable areas such as production facilities, critical supply depots, or weapons installations; (f) the existence and nature of clandestine intelligence operations, special plans, or data; (g) the keys to

> communication codes; [and] (h) the existence and nature of international agreements relative to military plans and capabilities and the exchange of intelligence.
>
> James Zagel, The State Secrets Privilege, 50 Minn. L. Rev. 875, 884-85 (1966).

Although all of the listed areas would seem logically to fall within the scope of the kind of sensitive information likely to be protected, the case law has most typically involved protection of information dealing with military weapons and equipment (*e.g.*, *Reynolds; Kasza v. Browner,* 133 F.3d 1159 (9th Cir. 1998); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395 (D.C. Cir. 1984) or intelligence operations (*e.g.*, *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007); In re United States, 872 F.2d 472 (D.C. Cir. 1989).

Cases involving information relating to international relations are less common. The broad statement in *Republic of China v. Nat'l Union Fire Ins. Co of Pittsburgh, Pa.,* 142 F. Supp. 551 (D.C. Md. 1956) that disclosure "would be prejudicial to the foreign relations of the United States and contrary to public interest" is consistent with the policy behind the privilege. Some gloss to this definition is added by Imwinkelried, The New Wigmore, §8.3, where the author states:

> When the state secret privilege is claimed, the judge must ensure that the information is not being shield merely to prevent embarrassment to U.S. officials. Rather. . . the privilege claim should be upheld only in situations such as when the likely effect of disclosing the information would be to anger officials of a foreign government and imperil relations between that government and the United States.

See also Black v. United States, 62 F.3d 1115, 1118 (8th Cir. 1995), quoting from *Jabara v. Kelley,* 75 F.R.D. 475, 483, n. 25 (E.D. Mich. 1977):

> "Although the term 'military or state secrets' is amorphous in nature, it should be defined in the light of 'reason and experience,' much in the same way that the term 'national defense' has been defined ... [as] a 'generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.' " . . . It is not proper to characterize this, as does Black, as some "creature" of the Cold War; the privilege preceded that state of affairs, and having an independent existence, cannot be held to have terminated with the (current, and perhaps temporary) demise of superpower rivalry. Indeed, it could be argued that the *absence* of a relatively stable world order of the sort that prevailed during the Cold War makes the availability of the privilege in appropriate cases all the more important.

(b) General rule of privilege. The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state.

The language of this subsection is based upon Proposed Federal Rule 509(b), but limited to secrets of state without the addition of "official information."

The language is consistent with *Reynolds,* where the Court stated that, in order to uphold the invocation of the privilege, there must be a "reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *United States v. Reynolds,* 345 U.S. at 10. Lower courts have consistently quoted and adhered to the *Reynolds* language. *See, e.g., Mohamed v. Jeppesen Dataplan, Inc.,* 614 F.3d 1070 (9th Cir. 2010); *El Masri v. United States,* 479 F.3d 296 (4th Cir. 2007); *Northrop Corp. v. McDonnell Douglas Corp.,* 751 F.2d 395 (D.C. Cir. 1984).

The procedure for determining the existence of the privilege has been a perplexing one for the court. The difficulty was recognized in *Reynolds,* where the Court noted that it must determine whether the circumstances are appropriate for the claim of privilege without forcing a disclosure of the very thing the privilege is designed to protect. 345 U.S. at 8. In seeking to resolve the dilemma, the Court suggested an analogy to determining the existence of a privilege against self-incrimination. Quoting from *Hoffman v. United States,* 341 U.S. 479, 486-87 (1951), a court must be satisfied from all the evidence and circumstances and from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. "If the court is so satisfied, the claim of the privilege will be accepted without requiring further disclosure." 345 U.S. at 9.

The Court in *Reynolds* further elaborated on the procedure (345 U.S. at 9-10):

> Regardless of how it is articulated, some like formula of compromise must be applied here. Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

See also El Masri v. United States, 479 F.3d at 305:

> Frequently, the explanation of the department head who has lodged the formal privilege claim, provided in an affidavit or personal declaration, is sufficient to carry the Executive's burden. . . . In some situations, a court may conduct an in camera examination of the actual information sought to be protected, in order to ascertain that the criteria set forth in *Reynolds* are fulfilled. . . .

Similarly, in *In re United States,* 872 F.2d 472, 475 (D.C. Cir. 1989), the court stated:

> The court itself must determine whether the circumstances are appropriate for allowing the claim; such a judicial enterprise requires delicacy, so as not to "force a disclosure of the very thing that the privilege is designed to protect. [citing *Reynolds}* Yet a court must not merely unthinkingly ratify the executive's assertion of absolute privilege lest it inappropriately abandon its important judicial role. To properly fulfill its obligations, while according the " 'utmost deference' " to the executive's expertise in assessing privilege upon grounds of military or diplomatic security, *see Halkin v. Helms,* 598 F2d 1, 9 (D.C. Cir. 1978) (Halkin 1) (quoting *United States v. Nixon,* 418 U.S. 683, 710, 94 S. Ct. 3090, 3108, 41 L.Ed. 1039 (1974), a court must uphold the privilege if the government shows that "the information poses a reasonable danger to secrets of state." Halkin v. Helms, 690 F.2d 977, 990 (D.C. Cir. 1982) (Halkin 2).

See also, consistent with the language of these cases, the thorough analysis of the procedure for determining the existence of the privilege in *Mohamed v. Jeppesen Dataplan, Inc.,* 614 F.3d 1070 (2010).

As suggested in the *El Masri* case, a court may or may not conduct an *in camera* review of material claimed to come under the privilege. In *Ellsberg v. Mitchell*, 709 F.2d 51, 59, nn. 37-38 (D.C. Cir. 193), the court established a sliding scale to determine when a court may, or should, make an *in* camera examination of material over which a claim of state secrets privilege is made:

> When a litigant must lose if the claim [of privilege] is upheld and the government's assertions are dubious in view of the nature of the information requested and the circumstances surrounding the case, careful *in camera* examination of the material is not only appropriate ... but obligatory. . . . . When the litigant requesting the information has made only a trivial showing of need for it and the circumstances of the case point to a significant risk of serious

> harm if the information is disclosed, the trial judge should evaluate (and uphold) the privilege claim solely on the basis of the government's public representations, without an *in camera* examination of the documents.

Compare Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998) (*in camera* review conducted) *with Northrop Corp. v. McDonnell Douglas Corp,* 751 F.2d 395 (D.C. Cir. 1984) (Department of Defense claim of privilege upheld without *in camera* review).

(c) Procedures. The privilege for secrets of state may be claimed only by the chief officer of the government agency or department administering the subject matter which the secret information sought concerns.

Similar language was contained in Proposed Federal Rule 509(c). The requirement that the privilege be asserted by the head of the government department having control over the matter is contained in the *Reynolds* case. 345 U.S. at 7-8. Although the requirement is often repeated by courts dealing with the privilege, *See, e.g, Mohamed v. Jeppesen Dataplan, Inc.,* 614 F.3d at 1080 (2010), it has not proved problematic. All cases reaching the Courts of Appeal have involved claims properly made by the appropriate department heads.

In 2009, Attorney General Eric H. Holder, Jr. issued a Memorandum for heads of executive departments and agencies in which he stated:

> The Department [of Justice} will defend an assertion of the state secrets privilege . . . in litigation when a government department or agency seeking to assert the privilege makes a sufficient showing that assertion of the privilege is necessary to protect information the unauthorized disclosure of which reasonably could be expected to cause significant harm to the national defense or foreign relations . . . of the United States.

The Memorandum also stated:

> A government department or agency seeking invocation of the privilege in litigation must submit to the Division in the Department [of Justice] with responsibility for the litigation in question a detailed declaration based on personal knowledge that specifies in detail: (1) the nature of the information that must be protected from unauthorized disclosure; (ii) the significant harm to national security that disclosure can reasonably be expected to cause; (iii) the reason why unauthorized disclosure is reasonably likely to cause such harm; and (iv) any other information relevant to the decision whether the privilege should be invoked in litigation.

(d) Notice to government. If the circumstances of the case indicate a substantial possibility that a claim of privilege would be appropriate but has not been made because of oversight or lack of knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege.

The language of this subsection comes from Proposed Federal Rule 509(d).

The state secrets privilege is often raised is litigation to which the United States government is not a party. *See, e.g., Mohamed v. Jeppesen Dataplan, inc.,* 614 F.3d 1070 (9th Cir. 2010) (government intervened); *Fitzgerald v. Penthouse Intern. Ltd,* 776 F.2d 1236 (4th Cir. 1985); *Farnsworth Common v. Grimes,* 635 F.2d 268 (4th Cir. 1980). In all instances that have reached Courts of Appeal, the government has had sufficient notice for the appropriate department head to raise the privilege.

(e) Effect of sustaining claim. If a claim of secrets of state privilege is sustained and it appears that a party is thereby deprived of material evidence, the court shall make any further orders the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding upon an issue as to which the evidence is relevant, or dismissing the action.

The language of this subsection is taken from Proposed Federal Rule 509(e). Uniform Rule 508, dealing generally with governmental privileges, also contains this language.

The impact of a successful privilege on litigation has been the most frequently litigated aspect of the law governing the privilege. In most of the cases reaching the Courts of Appeal, the action of the District Court has been to dismiss the case – whether or not the government is a party to it. In virtually all such cases, the District Court's dismissal has been upheld.

The relatively recent case of *Mohamed v. Jeppesen Dataplan, Inc.,* 614 F.3d 1070 (9th Cir. 2010) (*en banc*) is a prime example. In this case, foreign nationals brought action against a company that had allegedly assisted in a Central Intelligence Agency extraordinary rendition program, that involved transferring of these individuals to foreign countries for detention and interrogation by United States and foreign officials. The CIA Director moved to intervene seeking dismissal of the action under the state secrets privilege – publicly declaring that "disclosure of the information covered by this privilege assertion reasonably could be expected to cause serious – and in some instances, exceptionally grave – damage to the national security of the United States." 614 F.3d at 1076.

The court noted that in some instances, "simply excluding or otherwise walling off the privileged information may suffice to protect the state secrets and the case can proceed with no consequences other than those resulting from the loss of the evidence. 614 F.3d at 1082 (citing Al-Haramain, 507 F.3d 1190, 1204). A prime example of the kind of a case that might continue even after a successful claim of state secrets privilege is the *Reynolds* case itself.

However, the court noted that in some instances, the application of the privilege may require dismissal of the action. The court noted that there were three circumstances when the application of the privilege justified terminating a case(614 F.3d at 1083):

> First, if "the plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence, then the court may dismiss her claim as it would with any plaintiff who cannot prove her case." [citing *Kasza v. Browner,* 133 F.3d 1159, 1166 (9th Cir. 1998) and Ellsberg v. Mitchell, 709 F.2d 51, 65 (D.C. Cir. 1983)] Second, " 'if the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant." [citing Kasza]
>
> Third, and relevant here, even if the claims and defenses might theoretically be established without relying on privileged evidence, it may be impossible to proceed with the litigation because—privileged evidence being inseparable from nonprivileged information that will be necessary to the claims or defenses—litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.

The court found that the facts of the case before it came within the third circumstance described by it in the opinion (614 F.3d at 1087):

> . . . [W]e assume without deciding that plaintiffs' prima facie case and Jeppesen's defense may not inevitably depend on privileged evidence. Proceeding on that assumption, we hold that dismissal is nonetheless required under *Reynolds* because there is no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets.

The court in *Jeppesen* gave several examples of other cases falling into this third category. In *In re Sealed Case,* 494 F.3d 139, 153 (D.C. Cir. 2007) ("If the district court determines that the subject matter of a case is so sensitive that there is no way it can be litigated without risking national secrets, then the case must be dismissed."); *El-Masri, 479 F.3d at 308* ("[A] proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure."); *Bareford v. General Dynamics Corp.,* 973 F.2d 1138, 1144 (5th Cir. 1992) ("We are compelled to conclude that the trial of this case would inevitably lead to a significant risk that highly sensitive information concerning this defense system would be disclosed."); *Fitzgerald v. Penthouse Int'l,*

Ltd., 776 F.2d 123467, 1241-42 (4th Cir. 1985) ("[I]n some circumstances sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters."); *Farnsworth Cannon v. Grimes,* 635 F.2d 268, 281 (4th Cir. 1980) (*en banc)* (dismissing the action at the outset because "any attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation") See also the concurring and dissenting opinion from the three-judge panel decision of Phillips, J. Judge Phillips concluded that "litigation should be entirely foreclosed at the outset by dismissal of the action" if it appears that "the danger of inadvertent compromise of the protected state secrets outweighs the public and private interests in attempting formally to resolve the dispute while honoring the privilege". *Id.* at 279-80.

In addition to the common law rule, there are two federal statutes that interact with the privilege. The Classified Information Procedures Act (CIPA) recognizes that the executive branch may determine that public disclosure of classified information shall not be made in a criminal trial. The Act outlines procedures to protect against unnecessary disclosure of classified information. The Act is intended to address situations where a criminal defendant is already in possession of classified information. It does not provide for discovery of classified information. *See* discussion in Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers (2d ed. Federal Judicial Center 2013); McCormick, Evidence § 103 (7th ed. 2013).

The other relevant statute is the Freedom of Information Act (FOIA), which provides an exemption for certain information similar to that protected by the state secrets privilege. See McCormick, *supra.*

IDENTITY OF INFORMER SURVEY RULE

(a) Rule of privilege. The government or a state or state subdivision has a privilege to refuse to disclose, and to refuse to reveal communications that would tend to disclose, the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law by a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who may claim. An appropriate representative of the government or of a state or state subdivision may claim the privilege, regardless of whether the information was furnished to an officer of the government or of the state or subdivision.

(c) Exceptions.

(1) No privilege exists under this rule if the identity of the informer has been disclosed by a holder of the privilege or by the informer's own action to all persons who would have cause to resent the communication or if the informer appears as a witness for the government or state or state subdivision.

(2) The court may require disclosure of the informer's identity, or of communications that may tend to disclose the identity of the informer, if it appears that an informer may be able to give testimony essential to a fair determination of a material issue in a criminal case, including evidence with regard to the legality of the means by which evidence was obtained, or in a civil case to which the government, state or state subdivision is a party. In reaching a determination of whether to require disclosure the court must balance the public interest in protecting the flow of information against the individual's right to prepare a defense, given the particular circumstances of the case, the crime charged or issue involved, the possible defenses, the possible significance of the informer's testimony and other relevant factors. The court may, but is not required to, hear evidence *in camera,* with regard to any of these factors. The court has discretion to exclude counsel and the parties concerned from *in camera* proceedings, provided a sealed record is made of the proceedings. If disclosure is required and the government, state or state subdivisions refuses to reveal the identify of the informer, the court may make any order justice requires including the dismissal of charges against the defendant in a criminal case or judgment against the government, state or state subdivision in a civil case.

COMMENTARY

The privilege protecting the identity of informants is well recognized in federal law. The leading case is *Roviaro v United States,* 353 U.S. 53 (1957), where the court recognized the privilege but found that the government had a duty to disclose the informant's identity under the circumstances.

The privilege was included as Federal Rule 510 as part of the Proposed Federal Rules of Evidence promulgated by the Supreme Court, but rejected by Congress. Uniform Rule of

Evidence 509 also sets out a privilege for the identity of the informer. The substance of this survey rule is based on Proposed Rule 510 and Uniform Rule 509. However, as will be discussed below, the language of the survey rule as a whole differs from both the Proposed Federal Rule and the Uniform Rule.

The essence of the privilege is stated in the *Roviaro* case (353 U.S. at 59-61):

> What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with the enforcement of that law. [citations omitted] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.
>
> The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identify of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

The Supreme Court further elaborated on the scope of the privilege in *McCray v. Illinois*, 386 U.S. 300, 305 (1967, dealing with a claim that the failure of to disclose the identity of the informant whose information had been the basis of the stop that resulted in the defendant's arrest. The court recognized the privilege and found that the withholding of the informant's identity under the circumstances did not violate defendant's constitutional rights. Police officers need not invariably be required to disclose an informant's identity if the trial judge is convinced that the officers "relied in good faith upon credible information supplied by a reliable informant."

(a) Rule of privilege. The government or a state or state subdivision has a privilege to refuse to disclose, and to refuse to reveal communications that would tend to disclose, the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law by a law enforcement officer or by a member of a legislative committee or its staff conducting an investigation.

The basic statement of the rule is based primarily on Proposed Federal Rule of Evidence 510(a) and Uniform Rule of Evidence 509(a), as well as the case law. *E.g., Roviaro v. United States, supra; United States v. Gaston,* 357 F.3d 77 (D.C. Cir. 2004); *United States v. Robinson,* 144 F.3d 104 (1st Cir. 1998). The language "refuse to reveal communications that

would tend to disclose" is taken from federal cases dealing with the privilege. *See, e.g., United States v. Cartagena,* 593 F.3d 104, 113 (1st Cir. 2010) (content protected where it would effectively identify informant); *United States v. Wilburn,* 581 F.3d 618 (7th Cir. 2009) (lines of inquiry likely to reveal identity).

The language of part (a) differs from the language of both Proposed Federal Rule 510 and Uniform Rule 509 in a minor respect. The last clause of both those rules states "to a law enforcement officer or member of a legislative committee or its staff conducting an investigation." In contrast, the survey rule states "by a law enforcement officer or by a member of a legislative committee or its staff conducting an investigation." The author of the survey rule believes that the word "by" more accurately sets out the intent of the rule in that it describes who is conducting the investigation rather than indicating the person to whom the communication is made. This difference is especially significant because of subsection (b), which states in both the Proposed Federal Rule and the survey rule that the information need not be furnished to an officer of the government.

(b)Who may claim. An appropriate representative of the government or of a state or state subdivision may claim the privilege, regardless of whether the information was furnished to an officer of the government or of the state or subdivision.

The language of this subsection is based upon Proposed Federal Rule 510(b) and Uniform Rule 510(b) The language is consistent with the federal case law in that all cases in which the privilege has been recognized have involved a claim by a government official, usually the prosecutor or the police. As reflected in the last clause of the subsection, although it rarely occurs, the information may have come to a law officer indirectly. See discussion in Wigmore, Evidence (3d ed. 19409) § 2374, p. 751.

(c)Exceptions.

(1) No privilege exists under this rule if the identity of the informer has been disclosed by a holder of the privilege or by the informer's own action to all persons who would have cause to resent the communication or if the informer appears as a witness for the government or state or state subdivision.

This language is derived from Proposed Federal Rule 510(c)(1) and Uniform Rule 509(c). The general statement that the privilege disappears if the identity is already known to those who would have cause to resent the communication is contained in *Roviaro v. United States,* 353 U.S. at 60. The survey rule language differs from the Proposed and Uniform Rules in order specifically to provide that the privilege no longer exists only if the identity is disclosed to <u>all</u> persons who would have cause to resent the communication. The addition of the word "all" is consistent with the federal case law. For example, in *United States v. Long,* 533 F.2d 505 (9th Cir. 1976), the court was held to have properly precluded the defense from calling an informant as a witness even though his identity was disclosed to the defense and counsel was given an

opportunity to examine the informant *in camera.* The privilege continue to exist where persons who would resent his role in the case did not know of his involvement.

See also United States v. Smith, 780 F.2d 1102 (4th Cir. 1985) where the privilege applied to protect the address or location of an informant even after his name had been disclosed to the defendants.

(2) The court may require disclosure of the informer's identity, or of communications that may tend to disclose the identity of the informer, if it appears that an informer may be able to give testimony essential to a fair determination of a material issue in a criminal case, including evidence with regard to the legality of the means by which evidence was obtained, or in a civil case to which the government, state or state subdivision is a party. In reaching a determination of whether to require disclosure the court must balance the public interest in protecting the flow of information against the individual's right to prepare a defense, given the particular circumstances of the case, the crime charged or issue involved, the possible defenses, the possible significance of the informer's testimony and other relevant factors. The court may, but is not required to, hear evidence *in camera,* with regard to any of these factors. The court has discretion to exclude counsel and the parties concerned from *in camera* proceedings, provided a sealed record is made of the proceedings. If disclosure is required and the government, state or state subdivisions refuses to reveal the identify of the informer, the court may make any order justice requires including the dismissal of charges against the defendant in a criminal case or judgment against the government, state or state subdivision in a civil case.

The concept of an exception to the privilege where an informant's identity is necessary to a fair determination of the guilt or innocence of a defendant in a criminal case or an issue in a civil case in which the government is a party is contained in both Proposed Rule 510 (c) and Uniform Rule 509(d). However, the language of this survey rule attempts more closely to follow the federal case law. The federal courts follow the language of *Roviaro v. United States,* 353 U.S. at 60-62:

> A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action. . . .
>
> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a

> proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charge, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Lower court opinions with regard to the disclosure of the identity of an informant rely on this language from *Roviaro.* In applying the *Roviaro* test, the courts distinguish situations in which the informant was an active participant in or percipient witness to the crime charged from situations in which he or she was a mere "tipster."

Disclosure is more likely to be ordered in where the informant has had a role in the crime itself. *See, e.g., United States v. Cartagena,* 593 F.3d 104 (1st Cir. 2010) (no disclosure required where informant was a "mere tipster" whose testimony was not vital to the trial); *United States v. Gaston,* 357 F.3d 77 (D.C.Cir. 2004) *(*privilege upheld where informant had no direct connection, either as a participant or an eyewitness, to the crime charged); *United States v. Robinson,* 144 F.3d 104 (1st Cir. 1998) (no disclosure required where the informant neither participated in nor witnessed the events that inculpated the defendant. " . . . we have held with a regularity bordering on the echolalic that tipsters, as opposed to informants who are active participants in the crimes charged, generally deserve anonymity."); *United States v. Moore,* 129 F.3d 989, 992 (8th Cir. 1997) (disclosure not required where informant a mere "tipster); *United States v. Fairchild,* 122 F.3d 605 (8th Cir. 1997) (court correctly weighed the crime charged, potential defenses, possible significance of the informers testimony and other relevant factors in upholding the privilege); *United States v. Mabry,* 953 F.2d 127 (4th Cir. 1991) (no abuse of discretion to refuse to require government to disclose identity of informant).

Whether to hold an *in camera* hearing with regard to the fairness of requiring disclosure is in the discretion of the trial court, subject to reversal for abuse. *See United States v. Wilburn,* 581 F.3d 618 (7th Cir. 2009) (refusal to require disclosure upheld; no *in* camera hearing held); *United States v. Rutherford,* 175 F.3d 899 (11th Cir. 1999) (court should have held *in camera* hearing to ascertain whether testimony might be of assistance to defendant);*United States v. Ramirez-Rangel,* 103 F.3d 1501 (9th Cir. 1997) (error to deny motion to reveal identity where informant was a "percipient witness" to part of the transaction in issue; court should have at least held *in camera* hearing).; *Suarez v. United States,* 582 F.2d 1007)(11th Cir. 1978) (district court properly refused to conduct *in camera* hearing where potential value of the testimony to the taxpayers in civil case was of marginal weight as compared to the government's interest in preserving anonymity).

The issue of the informant's privilege may arise in hearings with regard to suppression of evidence based on alleged illegal searches or seizures as well as at the trial itself. The issue of fairness is the same as at the trial stage. *See, e.g., United States v. Wilburn, supra* (no genuine need for disclosure established); *United States v. Kime,* 99 F.3d 870 (8th Cir. 1996) (no

showing that informant's identity was vital to challenge to sufficiency of affidavit used to procure search warrant for wiretap and video surveillance); *United States v. Cummins,* 912 F.2d 98 (6th Cir. 1990) (*in camera* disclosure of name to court; no disclosure to defendant required); *United States v. Moore,* 522 F.2d 1068 (9th Cir. 1975) (no need to disclose identity of informant for the purpose of enabling defendant to show that there were falsehoods in FBI agent's affidavit seeking search warrant).

As illustrated in *Suarez v. United States, supra,* the privilege protecting the identity of an informer can be raised by the government in a civil, as well as criminal case.

A broad range of actions by the court are permitted If disclosure is required but the government nevertheless declines to disclose the identity. As stated in *Roviaro,* the prosecution may be dismissed. *Roviaro v. United States,* 353 U.S. at 61. *See also United State v. Keown*, 19 F. Supp. 639 (D.Ky 1937) (federal agent's testimony favorable to government foreclosed where agent refused to disclose informant's name).

POLITICAL VOTE SURVEY RULE

Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot unless the vote was cast illegally.

Commentary

The language of the survey rule dealing with the political vote privilege is the same as in Proposed Federal Rule 507. Uniform Rule of Evidence 506 is substantively the same:

> Political Vote.
>
> (a) General rule of privilege. An individual has a privilege to refuse to disclose the tenor of the individual's vote at a political election conducted by secret ballot.
> (b) Exceptions. The privilege under subdivision (a) does not apply if the court finds that the vote was cast illegally or determines that disclosure should be compelled pursuant to [the election laws of the State].

As noted in Saltzburg, Martin & Capra, Federal Rules of Evidence Manual § 501.02[2], the political vote privilege was of only three proposed privileges that was not vigorously attacked by at least one critic. (The other two were the lawyer-client privilege, Proposed Rule 503, and communications to clergy, Proposed Rule 506).

There are only a few cases dealing with this privilege. The Advisory Committee note to the Proposed Federal Rule cites only *Johnston v. Charleston,* 1 Bay 441, 442 (S.C. 1795) where the Supreme Court states that required disclosure would be the exercise of "a kind of inquisitorial power unknown to the principles of our government and constitution and might be highly injurious to the suffrages of a free people, as well as tending to create cabals and disturbances between contending parties in popular elections."

Weinstein & Berger, Federal Evidence ¶ 507 [02] states:

> The political vote privilege is a logical corollary of the secret ballot. Secrecy in voting is essential to the democratic process in obtaining the free exercise of the franchise and accurate voter opinion. This secrecy could be nullified if the privilege of a voter to remain silent after he had voted were not also guaranteed. Although the voter alone can invoke the privilege or waive the privilege * * *, the interest protected is not solely that of the voter himself. The interest of society as a whole predominates.

Weinstein and Berger quote from Nutting, Freedom of Silence: Constitutional Protection Against Governmental Intrusion in Political Affairs, 47 Mich. L. Rev. 181, 195 (1948) (also relied on in the Advisory Committee Note):

> ‘Obviously, then, the social interest in honest elections is of the greatest importance. One of the means by which that interest can be protected is through the secrecy of the ballot which, in turn, is accomplished by requiring secrecy from the individual voter at the time the ballot is cast and by according him the privilege of secrecy thereafter. But the extent of the privilege depends primarily on considerations of social utility rather than on the convenience of the individual. In a sense, protection is always granted to individual interests for social reasons, but here it would seem that, unlike, for example, situations involving the privilege against self-incrimination or the right of free speech, the social interest is relatively more immediate and direct than is that of the individual.’

Similar support for the privilege is found in 8 Wigmore, Evidence § 2214(b) (McNaughton ed. 1961) and 2 Mueller & Kirkpatrick, Evidence §217.

The court in *D’Aurizio v. Borough of Palisades Park,* 899 F. Supp. 1352, 1361 (1995) relied on all of these authorities to hold that a voter could not be compelled to disclose the tenor of her vote in a school board or general election. The court stated:

> I am satisfied that “the principles of the common law” interpreted “in the light of reason and experience” as well as the factors set forth by Wigmore, Judge Weinstein and Professors Mueller and Kirkpatrick, compel recognition of the privilege. The political vote privilege should apply to protect (1) from compulsory disclosure (2) the tenor of a person's vote (3) at a political election (4) conducted by secret ballot (5) unless the vote was cast illegally.

Other federal cases dealing with the privilege include *Chadwell v. Lee County School Bd.,* 535 F. Supp. 2d 586 (W. D. Va. 2008) (court recognizes that it would be objectionable to ask about vote); *Hoch v. Phelan,* 796 F. Supp. 130 (D.N.J. 1992) (no privilege if the court determines that the vote was cast illegally).

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