

Chapter 10

HEARSAY DEFINED

A. FEDERAL RULES OF EVIDENCE 801 AND 802

Rule 801. Definitions

The following definitions apply under this article:

(a) **Statement.** A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) **Declarant.** A “declarant” is a person who makes a statement.

(c) **Hearsay.** “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

B. TRUTH OF THE MATTER ASSERTED

[1] Illustrations

The Sheriff of Metropolis believes that Robin Rich slandered him by calling him “a liar and bribe taker” in front of Marty Manners. Robin Rich denies making the statement and alternatively contends that the statements are true.

The Sheriff of Metropolis calls Marty Manners to the stand.

Plaintiff: State your name.

Marty Manners: Marty Manners.

Plaintiff: Were you with the Sheriff and Robin Rich on the date of the alleged slander?

Marty Manners: Yes.

Plaintiff: What did Robin Rich call the Sheriff?

Defendant: Objection! That’s an out of court statement. It’s hearsay.

Court: _____ .

Barry Buyer entered into an oral contract with Sandy Seller to buy Sandy Seller’s car. Barry Buyer paid Sandy Seller, but Sandy Seller refuses to deliver the car, defending on the theory that he had no such agreement with Barry Buyer and any money received was payment on an old gambling debt.

Barry Buyer takes the stand.

Plaintiff: State your name.
 Barry Buyer: Barry Buyer.
 Plaintiff: Did you enter into an oral agreement with Sandy Seller?
 Barry Buyer: Yes.
 Plaintiff: What did you say?
 Defendant: Objection! That's an out of court statement. It's hearsay.
 Court: _____ .

If the defendant is correct, can a slander or oral contract ever be proven in court? How about proving a threat or fear of a threat? Could you ever show that someone had notice of a defect in property if the notice was given orally? How would you prove someone's reputation?

[2] Independent Legal Significance

[a] Oral Contracts

CREAGHE v. IOWA HOME MUTUAL CASUALTY CO. 323 F.2d 981 (10th Cir. 1963)

SETH, CIRCUIT JUDGE:

The plaintiff-appellant has an unsatisfied judgment against Muril J. Osborn obtained in a damage action which arose from a collision between the plaintiff's car and Osborn's truck. In the case at bar, appellant alleges that the appellee insurance company was the insurer of Osborn's truck at the time of the accident, and seeks to collect this judgment from it. The appellee admits that at one time it issued a liability policy to Osborn, but asserts that he cancelled it shortly before the accident. Osborn was not a party to this suit and did not appear as a witness. Motions for directed verdict were made by both parties. The judge reserved his ruling and submitted interrogatories to the jury. These were answered favorably for appellant, but the court found that there was no material fact for the jury and gave appellee a directed verdict. The plaintiff-appellant has taken this appeal.

The appellant * * * argues that the trial court committed error in admitting certain testimony relating to statements made by the insured on the occasion when the cancellation purportedly took place.

The record shows that the policy in question was one which Osborn was required to have as an operator of a commercial vehicle. A copy of such policy had to be filed with the Colorado Public Utilities Commission and the policy could not be cancelled without first giving the Commission a ten-day notice. The policy states that the insured may cancel it by a surrender of the policy or by mailing notice of cancellation. The policy also provides that the premium adjustment be made as soon as practicable after cancellation becomes effective.

When one of appellee's agents wrote the policy in appellee's company, only one-half of the premium was paid to the agent. The unpaid balances were on account between the agent and the insured, and did not involve appellee. The policy was thereafter changed from time to time as the coverage expanded, and the agent retained the policy in order to make the changes. As the coverage increased, so did the premium due. Osborn sent the agent a check for a part of the balance due after the initial payment, but it was returned by the bank marked insufficient funds. The agent testified that he called Osborn about the check, and was told by Osborn that he was going to cancel the insurance and would come by to pick up the returned check. Osborn did come to the agent's office on October 19 and, in the presence of the agent and a secretary, stated he wanted the insurance cancelled immediately. The check was returned to Osborn and the agent told him he did not know whether there would be a refund or not. The policy was then in the possession of the agent because of changes in coverage mentioned above, and thus there was no change in the possession of the policy as Osborn did not have it to physically surrender it. The agent then sent the policy to the appellee insurance company and advised it of the cancellation. Appellee notified the Colorado Public Utilities Commission of the cancellation. The date of receipt of this notice was not determined, but on October 29 the Commission responded to the notice. The collision between Osborn's truck and appellant's car occurred on November 25.

* * *

The trial judge found that there was no question of fact for the jury, and with this we agree.

* * *

Appellant challenges the action of the trial court in admitting the testimony of the agent of appellee and his employee as to what took place, and what was said by the insured, on the occasion when he came to the agent's office to receive back the check. The agent's testimony and that of his employee was, as mentioned, that the insured stated he wanted the policy cancelled, also that his check for some of the premiums in addition to those initially made was then returned. Appellant asserts that this testimony was hearsay.

The hearsay rule does not exclude *relevant* testimony as to what the contracting parties said with respect to the making or the terms of an oral agreement. The presence or absence of such words and statements of themselves are part of the issues in the case. This use of such testimony does not require a reliance by the jury or the judge upon the competency of the person who originally made the statements for the truth of their content. Neither the truth of the statements nor their accuracy are then involved. In the case at bar we are not concerned with whether the insured was truthful or not when he told the agent he wanted the policy cancelled and that he did not need it any more. It is enough for the issues here presented to determine only whether or not he made such statements to the agent. The fact that these statements were made was testified to by the agent, and his competency and

truthfulness as to this testimony was subject to testing through cross-examination by counsel for appellant, and this was done at considerable length. The fact that the statements with which we are here concerned related to an oral termination of a written contract does not lead to a rule different from that prevailing for the formation of an oral agreement. The reasons for the rule permitting such testimony are the same in both instances.

* * *

[T]he testimony with which we are here concerned is admissible since it is part of, or is the oral agreement to cancel the insurance policy. Oral agreements can only be established by testimony as to the conversation which was had between the parties. This testimony may be given by a witness to such conversation, as was the agent of the appellee in this instance.

* * *

Affirmed.

NOTES

1. In the formation of a contract, does it matter whether the words of offer and acceptance are true?

See *Kepner-Tregoe v. Leadership Software, Inc.*, 12 F.3d 527, 540 (5th Cir. 1994), where the court noted that under the objective theory of contracting, it does not matter what the parties are thinking when they enter into a contract. Instead, it is the words spoken or written that determine the rights and responsibilities of the parties. Accordingly, testimony concerning the words spoken is not prohibited by the hearsay rule.

2. Under what other circumstances are words, spoken to create or terminate a legal relationship, not hearsay?

Words spoken to create agency relationships, promissory notes, wills, leases, and assignments are all nonhearsay when offered to show the existence of the legal relationship.

United States v. Bellucci, 995 F.2d 157 (9th Cir. 1993), was a bank fraud case, in which the government proved the federally insured status of the bank by introducing the bank's FDIC certificate of insurance. The defendant argued that proof of the bank's status through the certificate violated the hearsay rule. But the Court rejected this argument, reasoning that the FDIC certificate "affects the legal rights of the parties" independent of the truth of any assertion in the certificate. In this respect, the certificate is like a written contract that memorializes the fact of an agreement. Statements that create substantive rights and liabilities are not hearsay.

In *Stuart v. Unum Life Ins. Co. Of Am.*, 217 F.3d 1145 (9th Cir. 2000), the Trial Judge remanded an insurance dispute removed from State Court on the ground that the defendants had not carried their burden of showing that the

plan was an ERISA plan, which would have subjected the case to federal jurisdiction. Reversing an order granting the plaintiff's costs and expenses for improper removal, the Court held that it was error to treat the group insurance policy as inadmissible hearsay, since it was a legally operative document that defined the rights and liabilities of the parties in the case, including the rights and liabilities bearing on whether it was an ERISA plan.

[b] Slander and Perjury

UNITED STATES v. ANFIELD

539 F.2d 674 (9th Cir. 1976)

SNEED, CIRCUIT JUDGE:

Appellant was convicted on five counts of perjury * * *. The trial court allowed a motion for judgment of acquittal as to Count One and imposed sentence on the remaining counts. We affirm.

Statement of Facts

Appellant's indictment on five counts of perjury stemmed from his testimony before the grand jury and during the trial in the case of *United States v. Leslie Jackson*, CR 74-250. His involvement in the *Jackson* case arose when he reported a burglary of his mother's house to the police and indicated that he suspected Leslie Jackson, the brother of a friend. The FBI, also suspecting Jackson of bank robbery, contacted appellant and sought to elicit information from him about his knowledge of Jackson's involvement in the bank robbery. Appellant on several occasions exhibited reluctance to become involved, but upon issuance of a subpoena did appear and testify before the grand jury and gave evidence which linked Jackson to the robbery.

* * *

At the *Jackson* trial appellant testified concerning the same matter with respect to which he testified before the grand jury, but his testimony differed in certain pertinent respects from that given before the grand jury. * * *

Subsequent to the final disposition of the *Jackson* case, appellant was indicted and charged with five counts of perjury. * * *

Appellant has let fly a quiver full of arrows directed at his perjury convictions. All have missed their mark.

* * *

Motion To Strike As Hearsay Evidence the Testimony of Prosecutor in Jackson Trial

Appellant * * * complains that the testimony in his perjury trial of the prosecutor in the *Jackson* trial, was hearsay and, as such, should have been excluded. We do not agree.

The hearsay rule does not operate to render inadmissible every statement repeated by a witness as made by another person. It does not exclude evidence offered to prove the fact that a statement was made, rather than the truth. * * * The prosecutor's testimony at appellant's trial that appellant had testified before the grand jury that Jackson told him that there was a camera and a single girl in the bank which was robbed and then denied this at Jackson's trial was not hearsay for the purposes of the present case. The prosecutor was not attempting to prove that there was in fact a camera and single girl in the bank; those facts were not in issue at appellant's trial. Rather, the prosecutor's statements indicate only that the appellant made inconsistent statements under oath. His testimony was independently relevant.

Affirmed.

NOTE

Is a slanderous statement hearsay when offered by the plaintiff in a suit for defamation? To prevail, doesn't the plaintiff have to prove the slanderous statement was untrue?

In *M.F. Patterson Dental Supply Co., Inc. v. Wadley*, 401 F.2d 167 (10th Cir. 1968), the court held that slanderous statements were not hearsay since they were not offered for the truth of the statements, but instead to show the statements were made and therefore had independent legal significance.

[c] Threats and Fraud

UNITED STATES v. JONES 663 F.2d 567 (5th Cir. 1981)

JAMES C. HILL, CIRCUIT JUDGE:

On May 4, 1979, appellant Lloyd Jones stood before the United States District Court, Northern District of Georgia, for sentencing in connection with his conviction for murder committed at the Atlanta Federal Penitentiary. Judge William C. O'Kelley addressed Jones, who appeared with counsel, to determine whether Jones wished to be heard on matters bearing upon his sentence. Jones responded:

Yes, sir. I'd like to say that, I'd like to say that I don't think you passed sentence on me, you know, like, I think, during the process of the trial that I was totally insane, you know, which I also think that you should have looked over into the matter when I told you that them people out there was threatening me and stuff, which you said you would but you never have. But now today you bring me down here to pass sentence on me. It's nothing really too much I could do about it. When you can't beat them you join them. *So, Judge O'Kelley, U.S. Attorney, Mr. Bostic, I pass sentence on you, the sentence would be death, you and all your relatives. Now you can pass your sentence. It is death to*

you, you, and you, and all your relatives by gunshot wound. Now do as you please. I don't give a fuck if you throw the whole Empire State building at me, the whole State of Georgia.

For threatening the lives of Judge O'Kelley and the prosecutor, Jones was indicted and convicted under 18 U.S.C. § 1503 (1976), and sentenced to five years in prison. * * * We affirm the conviction.

* * *

The district court permitted the transcript of the hearing, save certain prejudicial portions and a short final section, to be read to the jury. Only the language containing the actual threats * * * was admitted into evidence as an exhibit for the jury during its deliberation. * * * The statement at issue is paradigmatic nonhearsay; it was offered because it contains threats made against officers of the federal courts, *i.e.*, it contains the operative words of this criminal action. It was not "offered in evidence to prove the truth of the matter asserted" * * *.

* * *

This conviction is AFFIRMED.

NOTE

Is a fraudulent statement hearsay when offered against the declarant of the statement as proof of the fraud?

In *United States v. Adkins*, 741 F.2d 744 (5th Cir. 1984), the prosecution offered the defendant's Dun and Bradstreet report in a fraud case against the defendant. The Court held that the report was not hearsay because it was not offered to prove the truth of the contents of the report. Rather, the report was offered to establish a foundation for a later showing, through other evidence, that the information in the report was false. *See also United States v. Perholtz*, 842 F.2d 343 (D.C. Cir. 1988) (in a racketeering case involving procurement of Postal Service contracts, the Court held that a "script" prepared by one defendant for another person, in an effort to influence what he would say about the scheme, was nonhearsay; the government offered the script to prove that the information therein was false, rather than true); *United States v. Costa*, 31 F.3d 1073 (11th Cir. 1994) (custodial statement in which the declarant sought to exculpate himself was not hearsay, where the government sought to create an inference of the declarant's guilt by showing, through the introduction of other evidence, that the declarant had lied to his interrogators).

[3] Notice — Statement Offered for Its Effect on the Listener

VINYARD v. VINYARD FUNERAL HOME, INC.
435 S.W.2d 392 (Mo. Ct. App. 1968)

CLEMENS, COMMISSIONER:

Plaintiff got a verdict and \$13,000 judgment for injuries from a fall on defendant's parking lot. (Plaintiff was the daughter-in-law of the corporate defendant's president.) Defendant appeals, challenging * * * the admission of evidence about other patrons slipping on the parking lot.

Defendant contends the evidence failed to show that its premises were unsafe and, even so, that the condition was undiscoverable by plaintiff. We recite the verdict-consistent evidence.

In short, one rainy night plaintiff slipped and fell when she stepped from a roughly paved surface onto a smoothly paved surface of a ramp in defendant's dimly lighted parking lot. The defendant knew the smoothly paved area was slippery when wet. * * * In September, 1961 — fourteen months before plaintiff's fall — the defendant spread a clear liquid sealer on the upper level of the parking lot. This sealed area extended half way down the ramps; it was smoother than the unsealed area and slick when wet. Thus a person walking up the ramp would start out on a rough surface and cross over onto a smooth surface. Daylight photographs show the two surfaces differ only slightly in color.

* * *

Defendant's prior knowledge that the sealed surface was dangerously slick when wet was shown in three ways: observations by defendant's officers and employees, remedial actions taken by them, and notice received through other patrons' complaints of slickness.

As soon as the clear sealer was applied on the lot's upper level, the defendant's officers and employees noticed the surface was slick when it rained. They discussed the condition numerous times; they spoke to paving contractors about "roughing it up" but did nothing except spread sand on the smooth paving when it rained. (This, however, was not done on the night plaintiff fell.) This sanding followed complaints by patrons about the slickness. These complaints began right after the sealer was applied and came from several persons.

* * *

Defendant * * * [claims error in] the admission of evidence that people complained to its officers and employees that the sealed surface was slippery when wet. Plaintiff offered this evidence to show that defendant knew its parking lot was slippery when wet. Witness Keith Vinyard was defendant's vice-president and plaintiff's husband. Testifying for plaintiff he was asked: "Now, Keith, after this sealer was put on did you receive any complaints from anyone visiting the funeral home?" Over defense objection that the question

was hearsay unless limited to the same conditions as plaintiff's fall, the witness answered: "Yes, several people said it was slick." Later, witness Leroy Lucas, one of defendant's regular employees, was asked: "Did you yourself hear complaints of people that would come in and complain about it being slick when it was wet?" Over the defendant's hearsay objection Mr. Lucas answered: "I had heard different people comment on it that it was slick when it was wet."

These questions and answers were improper as hearsay if offered only to prove the fact that the sealed area was slick. But aside from the *fact* of slickness there was the issue of defendant's *knowledge* of slickness. Evidence of *complaints* of slickness made to defendant was relevant to the material issue of defendant's knowledge.* * *

* * * [T]o make her case the plaintiff was obliged to show that defendant's officers knew about the slickness. Under the circumstances of this case the trial court properly admitted evidence that this knowledge had come to them through complaints of patrons that the parking lot's sealed area was slick when wet.

* * *

NOTE

Is there a foundation requirement for introducing an out-of-court statement to prove notice?

To be probative of notice and thus admissible as nonhearsay, the statement must be one that either was or should have been known about by the party whose state of mind is in dispute. Thus, in *George v. Celotex Corp.*, 914 F.2d 26 (2d Cir. 1990), the court held that an unpublished 1947 report regarding the dangers of asbestos could not be admitted for the nonhearsay purpose of showing notice. There was no proof presented by the plaintiff that the defendant ever saw the report or should have seen it as part of the published literature in the industry.

McCLURE v. STATE
575 S.W.2d 564 (Tex. Crim. App. 1979)

ONION, PRESIDING JUDGE:

This is an appeal from a conviction for the offense of murder; punishment is imprisonment for ninety-nine years.

* * *

Appellant's testimony raised the issue of voluntary manslaughter, and the court instructed the jury thereon. In support of the defensive theory that he was guilty of only this lesser included offense, appellant offered the testimony of Keith Crowder, Harvey Gordon and Ronnie Davis. Each of these witnesses

testified outside of the presence of the jury that he had had sexual intercourse with the deceased while she was married to appellant. Crowder also testified to seeing appellant in a restaurant while Crowder and the deceased were eating breakfast together, and that appellant appeared "real nervous, shaky, upset." Appellant also offered the testimony of Larry Subia. Subia was allowed to testify outside the presence of the jury that the deceased, clad in a bath robe, had answered the door of Davis' apartment at approximately 2 a.m. at a time when she was married to appellant. Appellant also offered to testify — and was allowed to do so only outside the presence of the jury — that one Cindy Haynes had told him that the deceased had had sexual relations with Crowder and Davis. Appellant testified before the jury that he had seen the deceased leave on a "date" with Gordon, and that she had not returned home until 10 a.m. the next day.

* * *

* * * It long has been the rule in this state that evidence such as that offered by appellant to prove his wife's infidelity is admissible as bearing on the accused's state of mind.

* * *

In order for the evidence of the deceased's infidelity to be admissible, appellant was required to show that he had knowledge thereof. * * * To prove that he had knowledge of the deceased having had sexual relations with Crowder and Davis, appellant offered to testify that Cindy Haynes had so informed him. The court erred in refusing to allow appellant to testify as to what Haynes had told him on the ground that such testimony would have been hearsay.

When it is proved that D made a statement to X, with the purpose of showing the probable state of mind thereby induced in X, such as being put on notice or having knowledge, or motive, or to show the information which X had as bearing on the reasonableness or good faith of the subsequent conduct of X, or anxiety, the evidence is not subject to attack as hearsay.

McCormick, Evidence § 249, pp. 589-90 (2d ed. 1972).

Whenever an utterance is offered to evidence the *state of mind* which ensued *in another person* in consequence of the utterance, it is obvious that no assertive or testimonial use is to be made of it, and the utterance is therefore admissible, so far as the hearsay rule is concerned.

6 Wigmore, Evidence § 1789, p. 314 (Chadbourn rev. 1976).

* * *

The judgment is reversed and the cause remanded.

NOTE

In what other circumstances would the state of mind of the listener apply to render a statement non-hearsay?

In *United States v. Norwood*, 798 F.2d 1094 (7th Cir. 1986), the defendant was allowed to testify that the person who gave him a stolen credit card told him it was a friend's card and that it was okay to use it. Because the statement was offered to show the listener's state of mind (i.e., the belief that his use of the card was legal), the statement was not hearsay.

United States v. Cantu, 876 F.2d 1134 (5th Cir. 1989), provides a good example of the nonhearsay use of an out-of-court statement for its effect on the listener. Cantu was charged with a drug crime and offered a defense of entrapment. At trial he was not permitted to testify to the statements that were made to him by Santander, an undercover government agent, that reflected a persistent effort on Santander's part to get Cantu to secure drug customers. Santander's statements were excluded as hearsay, but the court found that this was error. The court reasoned that the statements "were offered as evidence of Cantu's state of mind, bearing directly on his entrapment defense," and that the actual truth of the statements was therefore irrelevant. The trial court in *Cantu* had expressed concern that Cantu might have been lying on the witness stand about whether Santander actually made these statements. But the Court of Appeals rightly rejected this concern as misplaced. As the court explained: "Cantu's credibility, like the testimony of any witness, was subject to the crucible of cross-examination and was within the exclusive province of the jury. The veracity of a claim that certain statements were made was subject to evaluation like any other testimony presented at trial." The hearsay rule is concerned about the credibility of out-of-court declarants; the credibility of in-court witnesses is left to the jury.

In criminal cases, police officers are often called to testify to information they heard about the defendant, e.g., the defendant was selling drugs from a third-floor apartment. These statements are purportedly offered not for their truth (that the defendant was actually selling drugs), but rather for the effect on the listener, i.e., the police officer. While use of the out of court statement for these purposes does not offend the hearsay rule, the relevance of the statements for the nonhearsay purpose is often questionable. Some courts have admitted such statements in order to explain why the *officer* acted as he did, e.g., why he got a search warrant, why he arrested the defendant, etc. where there is probative value for the non-hearsay purpose, and the prejudicial effect — i.e., the risk that the jury will use the statement for its truth — does not substantially outweigh that probative value under Rule 403. *See, e.g., United States v. Slaughter*, 386 F.3d 401 (2d Cir. 2004) (the court affirmed a conviction for felon firearm possession, finding no abuse of discretion in the admission of testimony that a civilian had pointed out the discarded weapon, allowing a policeman to recover it. The testimony was proffered for the legitimate purpose of explaining how the officer came to find the weapon and its probative value was not substantially outweighed by any danger of prejudice). Some courts have not troubled themselves much, however, in applying that Rule 403 balance where the statement is offered for its effect on the listener. *See, e.g., United States v. Norquay*, 987 F.2d 475 (8th Cir. 1993)

(in a rape case, witnesses testified concerning statements made by the victim to the effect that she had been raped; the court held that the statements were not hearsay, because they were offered not for the truth of their content but rather “to explain why the witnesses stopped on the highway late at night, took her to the police station, and sent her to be interviewed by the investigator”).

Other courts note that in a criminal case, where the disputed issue is the guilt of the defendant, it is often unimportant to explain why an officer acted as he did in response to an accusation about the defendant; and they further recognize that accusations of guilt may be misused by the jury for their truth. Accordingly, these courts have excluded accusatory statements about the defendant when offered for their effect on the listener. *See United States v. Dean*, 980 F.2d 1286 (9th Cir. 1992) (statements accusing the defendant of criminal activity, made to a police officer, were improperly admitted for the nonhearsay purpose of explaining why the officer went to the defendant’s home to arrest him: the officer’s reasons for going to the defendant’s home “are not of consequence to the determination of the action, i.e., they do not bear on any issue involving the elements of the charged offense”); *United States v. Fountain*, 2 F.3d 656 (6th Cir. 1993) (information on defendant’s criminal activity, offered not for its truth but rather to explain why the agents searched where they did, held improperly admitted because the “reason Agent Primak searched the back bedroom simply was not a matter of dispute and was not in issue in this case”: “Because the agents’ action needed no explanation, we can conclude only that Primak’s information was offered to prove the truth of the matter asserted — that guns and narcotics were in the bedroom.”).

[4] Other Not-for-Truth Purposes

UNITED STATES v. WICKS 995 F.2d 964 (10th Cir. 1993)

STEPHEN H. ANDERSON, CIRCUIT JUDGE. Defendant James T. Wicks appeals his conviction, after a jury trial, on eight counts relating to drug trafficking, resulting in a total sentence of 387 months imprisonment. * * * [Officers discovered evidence in a motel room tending to indicate that Wicks was involved in drug activity. The evidence was admitted at trial over the defendant’s hearsay objection].

* * *

II. Evidentiary Rulings.

We turn now to Wicks’ argument that the district court erred in overruling his objections to the admission of the papers containing a formula for making methamphetamine, a list of precursor chemicals, and a recipe to “cook” crack cocaine, all of which were found in one of the briefcases seized from Wicks’ motel rooms. Wicks objected to their admission at trial on the grounds that they were hearsay, and did not fall within any of the exceptions to the hearsay rule. We disagree. * * * Fed. R. Evid. 801(c) defines hearsay as “a statement,

other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A "statement" can include a written assertion. The district court overruled Wicks' objection to these papers "because of the inference that the Jury can draw that the possession of these matters connotes or implies knowledge of the preparation and possession of drugs." The government subsequently presented expert testimony identifying the papers as containing a methamphetamine recipe and a list of chemical ingredients.

We hold that the papers were not hearsay, because they were not admitted for the purpose of proving the truth of any matter asserted therein. They were admitted solely to permit the inference to be drawn that Wicks' was involved in drug trafficking. While some amount of "reading" or comprehending of the nature of the written material was required in order to identify them as drug-related, no further use was made of the contents of those materials. *See United States v. Peveto*, 881 F.2d 844, 853-54 (10th Cir. 1989) (traffic ticket admitted to tie defendant to van, not to prove truth of any matters asserted in the ticket; "[t]he existence of the ticket, not its assertions, was the point of its admission"); *United States v. Ashby*, 864 F.2d 690, 693 (10th Cir. 1988) (car title used to tie defendant to car, not to prove she was owner; work order documents admitted to inferentially tie defendant and co-defendant to drug running, not to prove truth of matters asserted therein; "[s]ince these documents were used to tie appellant to the car, they were not hearsay"); *United States v. Markopoulos*, 848 F.2d 1036, 1039 (10th Cir. 1988) (spiral notebook which was used to log travel expenses not hearsay when admitted only to link defendant circumstantially to conspiracy, whereas rental car contract, credit card voucher and receipts were hearsay when admitted to show identity of renter or fact of payment); *see also United States v. Jaramillo-Suarez*, 950 F.2d 1378, 1383 (9th Cir. 1991) ("pay/owe sheet * * * was admitted for the specific and limited purpose of showing the character and use of the * * * apartment" and was therefore not hearsay).

AFFIRMED

[The concurring opinion of Judge Ebel is omitted.]

NOTES

1. In what other circumstances can out-of-court statements be admitted for a purpose other than proving that the contents are true?

See United States v. Enriquez-Estrada, 999 F.2d 1355 (9th Cir. 1993) (drug ledgers admissible as not hearsay, where the court "admitted the ledgers for the limited purpose of showing the nature and use" of the residence where the ledgers were found); *United States v. Thorne*, 997 F.2d 1504 (D.C. Cir. 1993) (no error to admit drug records to show that the names listed were connected with each other and were also connected with amounts of money and beeper extensions; testimony did not indicate the amounts of money or the actual numbers listed); *United States v. McIntyre*, 997 F.2d 687 (10th Cir. 1993) (receipts admissible not for truth but "only to link various of the

defendants together by the circumstance that documents bearing the names of certain defendants and the location of certain drug transactions" were found in the possession of one of the conspirators).

2. Can a witness's testimony be hearsay when the witness does not specifically testify to any out-of-court statement having been made?

See *Pelster v. Ray*, 987 F.2d 514 (8th Cir. 1993): Plaintiffs sued for fraud when they discovered that the car they bought had a turned-back odometer. They called an investigator who testified that, based on his review of relevant documents, the odometer on the purchased car had been turned back when it was in the possession of the defendants. He also testified that his review of other documents indicated that the defendants had rolled back the odometers on many other cars. The Court held that the trial court erroneously admitted the testimony in violation of the hearsay rule. The witness based his conclusion on an assumption that the documents he had referred to were true, with respect to mileages, dates, etc. While those records were never introduced at trial, the hearsay rule applies where the probative value of a witness's in-court testimony is dependent on the truth of an out of court statement upon which the witness relies.

3. Is a statement offered to prove the state of mind of the declarant offered for its truth?

One problem type of case has spurred much commentary, but it is a problem in theory more than in practice. An example is when one spouse makes a statement such as "I hate you" to the other spouse in the presence of third parties. If this statement were offered in a case to prove that the declarant was no longer in love with the other spouse, it would appear to be hearsay. It could be argued, however, that the fact that such a statement was made in the presence of other people itself is evidence of an absence of love so that the making of the statement in these circumstances is circumstantial evidence of state of mind, not hearsay. This kind of case may produce differences of opinion as to the proper classification, but the existence of a state of mind exception to the hearsay rule in Rule 803(3) indicates that such statements will be admissible in any case, and that the theoretical debate has little practical significance. See, e.g., *Fundamental Too, Ltd. v. Gemmy Indus. Corp.*, 111 F.3d 993 (2d Cir. 1997) (evidence that retail customers complained about product confusion was admissible, either as non-hearsay under Rule 801, or under the Rule 803(3) exception for statements of the declarants' state of mind).

4. In determining whether a statement is offered for the truth of its content, do courts ever get it wrong?

See Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (9th ed. 2006):

It is not always easy to delineate the line between statements offered for their truth and those that are not. Indeed, Courts have sometimes erred in this task. An example is *United States v. Sadler*, 234 F.3d 368 (8th Cir. 2000). Sadler was charged with bank robbery. An officer testified that Sadler confessed his guilt to him without even being asked to do so. Sadler contended that the officer was lying. Sadler

proffered the testimony of the attorney who was representing him at the time of the alleged confession. The attorney would have testified that moments before allegedly confessing to the deputy, Sadler spoke to the attorney and unequivocally asserted his innocence. In response to a hearsay objection, the defendant argued that his statement to his former attorney was admissible for the nonhearsay purpose of impeaching the credibility of the officer who testified that the defendant confessed to him. The Trial Court excluded Sadler's statement as hearsay and the Court found no error. The Court stated that "the proffered testimony would only have its desired effect if in fact the statements [to the attorney] were true." In our view, this analysis is misguided. Sadler's protestation of innocence was relevant regardless of its truth. The police officer testified that Sadler went out of his way to volunteer a confession. Even if Sadler was not telling his attorney the truth, his declaration of innocence impeaches the police officer's testimony because it makes the officer's account less plausible. It seems unlikely that Sadler would be protesting innocence to his lawyer and then, a short time later, loudly volunteering his guilt to a police officer. *See also Ostad v. Oregon Health Sciences Univ.*, 327 F.3d 876 (9th Cir. 2003) (prior inconsistent statement was not hearsay because it was offered to impeach the witness's credibility and not for its truth).

PROBLEM 10-1

Slippery Sammy sues a grocery store on the theory that he slipped and fell on a banana peel in Aisle Two. The grocery store denies that it had sufficient notice of the peel's presence to remedy the situation; therefore, the store is not liable. It also claims contributory negligence and assumption of the risk.

Slippery Sammy also sues the grocery store for civil assault on the theory of respondent superior, alleging that an employee of the store said, "I'll lose my job if you tell anyone about the accident. I'll kill you if you tell."

The grocery store presents two affirmative defenses, alleging that Sammy assumed the risk and that the case was settled because the plaintiff said, "I agree to accept your offer of \$5,000." The grocery store brings a counterclaim against Slippery Sammy, alleging defamation when Slippery Sammy told his bartender, "Everyone at that grocery store is a lying cheat who would steal from your grandmother."

Slippery Sammy takes the stand:

Plaintiff:	State your name.
Slippery:	Slippery Sammy.
Plaintiff:	Were you at the grocery store?
Slippery:	Yes.
Plaintiff:	Did you slip and fall on a banana peel in Aisle Two?
Slippery:	I certainly did.

Plaintiff: How long had it been there?
Slippery: I overheard a store employee say to the manager, "I told you half an hour ago about that banana peel on the floor in Aisle Two."
Defendant: (1) Objection! _____
Plaintiff: (2) _____
The court: (3) _____
Plaintiff: Did you talk to another employee after the accident?
Slippery: Yes, I did.
Plaintiff: What did he say?
Slippery: "I'll lose my job if you tell anyone about this accident. I'll kill you if you tell."
Defendant: (4) Objection! _____
Plaintiff: (5) _____
The court: (6) _____
Plaintiff: Were you afraid after he said that?
Slippery: You bet, I haven't slept since.
Plaintiff: Why were you afraid?
Slippery: I sort of knew about the employee. My friend Bob had told me before all this happened that the employee had beat up some guys at the bar.
Defendant: (7) Objection! _____
Plaintiff: (8) _____
The court: (9) _____

Slippery Sammy rests, and the grocery store calls the store manager to the stand:

Defendant: State your name.
Manager: Miss Management.
Defendant: Are you the grocery store manager?
Manager: Yes.
Defendant: Did you talk to Slippery about settling this case?
Manager: Yes.
Defendant: What did he say?
Plaintiff: (10) Objection! _____
Defendant: (11) _____
The court: (12) _____
Defendant: I'll ask again. What did he say?
Manager: He said, "I'll agree to accept your offer of \$5,000."

The grocery store calls a customer to the stand:

Defendant: Do you know the plaintiff?
Customer: Yes.
Defendant: Were you in the grocery store on the day of his accident?
Customer: Yes.

Defendant: Did you speak with the plaintiff?
Customer: Yes.
Defendant: What was said between you?
Customer: A half hour before the accident I told him to watch out for a banana peel in Aisle Two. He said he would.
Plaintiff: (13) Objection. _____
The court: (14) _____
The grocery store calls the bartender to the stand:
Defendant: Do you know the plaintiff?
Bartender: Yes.
Defendant: Did you talk to him the next day after his alleged accident?
Bartender: Yes, I did.
Defendant: What did he say?
Bartender: He said, "Everyone at that grocery store is a lying, no-good S.O.B."
Plaintiff: (15) Objection! _____
Defendant: (16) _____
The court: (17) _____

C. STATEMENT

[1] Assertive Conduct

[a] Illustration

The defendant is charged with armed robbery. He was arrested two blocks from the crime scene and the store manager was brought to the arrest scene to identify the suspect. The police officer who accompanied the store manager to the scene is on the stand.

Prosecutor: Did you take the store manager to identify the perpetrator of the crime?
Officer: Yes, I did.
Prosecutor: What happened?
Officer: Well, I told the store manager to point out the criminal and he pointed at the defendant.
Defense: Objection! That's hearsay.
Prosecutor: But your honor, no statement was made.
Defense: _____

[b] Response to Question with Action**STEVENSON v. COMMONWEALTH**
237 S.E.2d 779 (Va. 1977)

IVANSON, CHIEF JUSTICE:

On July 16, 1976, a jury found the defendant, John Paul Stevenson, guilty of murder of the second degree and fixed his punishment at confinement in the state penitentiary for a period of 10 years. He was sentenced accordingly.

We granted defendant a writ of error limited to the question whether the trial court erred in admitting into evidence a bloodstained shirt allegedly worn by the defendant on the day of the homicide and in allowing testimony concerning scientific tests run on the shirt.

The evidence, briefly stated, shows that at approximately six o'clock in the afternoon of December 2, 1975, the partially clothed body of Lillian M. Keller was found on the bed in her apartment at the Holly Court Motel in Ashland. Her death resulted from multiple stab wounds. Mrs. Keller was manager of the motel, and she occupied an apartment adjoining the front office. Her apartment also adjoined another unit which was the residence of Howard Franklin Bittorf. There was a connecting door between the Keller apartment and the living quarters of Bittorf.

In the early morning hours of December 2, 1975, the defendant, who is Bittorf's brother-in-law and a resident of Baltimore, Maryland, entered Bittorf's apartment through an unlocked door and spent the rest of the night there. That day Stevenson, Bittorf, and Jeffrey A. Taylor, an occupant of another unit in the motel, spent the morning and early afternoon drinking and "riding around" in defendant's automobile.

Taylor testified that when they returned to Bittorf's apartment in the early afternoon, Mrs. Keller was engaged in cleaning the apartment. He left shortly thereafter and went to his room to rest. He said that he did not see the defendant and Bittorf anymore that day, but when he last saw the defendant he was wearing a long-sleeve buttoned shirt with the sleeves rolled up.

* * *

On December 5, 1975, Police Officer Schultze went to the address in Baltimore which was shown on Stevenson's operator's license. There he met two women who identified themselves as the wives of Bittorf and Stevenson. After identifying himself, he told the ladies the purpose of his visit. He asked them if John Stevenson had changed clothes when he arrived home on either the night of the second or the early morning of the third of December. As a result of the answer given by Mrs. Stevenson, Schultze requested her to give him the clothes worn by Stevenson when he returned home from Ashland. Mrs. Stevenson then took Officer Schultze to another Baltimore address and presented him with a knit-type pullover shirt. On December 8, 1975, Schultze took the shirt to the Consolidated Laboratory in Richmond and turned it over to Mary Jane Burton. Over the objection of the defendant, the shirt was admitted into evidence.

Mary Jane Burton testified that she examined the shirt and found a small stain which she chemically identified as human blood. * * * She said the blood on the shirt was the same type as the blood of the victim in the two systems she was able to type. She further said that 4.7 percent of the population have the same blood type as the victim.

Defendant argues that the trial court erred in admitting the shirt into evidence on the ground that the nonverbal conduct of Mrs. Stevenson was equivalent to a verbal assertion of the truth of the matter asserted and was thus inadmissible under the rule against hearsay.

* * *

Nonverbal conduct of a person intended by him as an assertion and offered in evidence to prove the truth of the matter asserted falls within the ban on hearsay evidence. * * * This type of conduct has the same infirmities of the more familiar oral form of hearsay and should likewise be excluded.

In the present case, the act by Mrs. Stevenson came in response to the question of the officer as to what the defendant was wearing when he returned home from Ashland as well as the officer's request to obtain that clothing. Thus, the conduct of Mrs. Stevenson was intended as a nonverbal assertion for the purpose of showing that the shirt not only belonged to Stevenson but was in fact worn by him on the day of the crime. Moreover, it formed the basis of the Commonwealth's argument that he was wearing the shirt at the time the crime was committed. Accordingly, the officer's testimony relating to the shirt was inadmissible as violative of the hearsay rule, and the introduction into evidence of the shirt and the result of the scientific tests conducted thereon was without proper foundation.

For the reasons stated, the judgment of the court below is reversed and the case remanded for a new trial.

Reversed and remanded.

NOTES

1. When a person points at something, is that person making a statement?

In *United States v. Caro*, 569 F.2d 411 (5th Cir. 1978), a heroin dealer pointed out the location of his drug source to DEA agents. The Court recognized "that assertive conduct, like an oral declaration, is subject to the hearsay rule" under Fed. R. Evid. 801(a)(2). The Court held that the heroin dealer's "pointing out" constitutes such assertive conduct.

2. When a person nods his head, is that person making a statement?

In *United States v. Katsougrakis*, 715 F.2d 769 (2d Cir. 1983), the Court affirmed convictions resulting from the arson of a diner. The government witness had visited his friend, who had been burned in the arson. The friend was heavily bandaged and unable to speak. The friend nodded affirmatively

when asked whether he had been paid by the defendant to burn the diner. The Court held that this testimony was hearsay, because the government plainly used the nod for the truth of an assertion. However, the affirmative nod was admissible under the hearsay exception for declarations against penal interest.

[2] Non-Assertive Conduct and Words

[a] Illustrations

In a will contest case, the plaintiff is trying to show that the testator was competent at the time the will was executed. After laying the proper foundation, the plaintiff offers into evidence a letter written to the testator the same day the will was executed.

Defendant:	Objection! Your honor, the letter is blatantly hearsay and should not be admitted.
Plaintiff:	Your honor, the letter is not being offered to prove anything in the letter is true. It is being offered only to show that it involved a complicated business transaction and was directed at the testator. From this, one can infer that the author of the letter believed that the testator was competent, but the truth of the letter itself is meaningless. It's not hearsay at all.

The court: _____.

Plaintiff sues defendant because cargo sent on defendant's ship did not arrive safely at its destination. To prevail, the plaintiff must show that the ship was not seaworthy. Defendant defends on the theory that the ship was seaworthy. The defendant calls a longshoreman to the stand.

Defendant:	State your name.
Longshoreman:	Dock Loader.
Defendant:	Were you on the dock the day that <i>Lost Souls</i> sailed?
Longshoreman:	Yes, I was.
Defendant:	Did you see the captain?
Longshoreman:	Yes.
Defendant:	What did he do?
Longshoreman:	He inspected the ship, took his entire family aboard, and then prepared to depart on the trip.
Plaintiff:	Objection! That's hearsay.
Defendant:	But your honor, the captain didn't say anything and didn't intend to convey any meaning by his actions.

The court: _____.

[b] Implied Assertions**UNITED STATES v. ZENNI**
492 F. Supp. 464 (E.D. Ky. 1980)

BERTELSMAN, DISTRICT JUDGE:

This prosecution for illegal bookmaking activities presents a classic problem in the law of evidence, namely, whether implied assertions are hearsay. The problem was a controversial one at common law, the discussion of which has filled many pages in the treatises and learned journals. Although the answer to the problem is clear under the Federal Rules of Evidence, there has been little judicial treatment of the matter, and many members of the bar are unfamiliar with the marked departure from the common law the Federal Rules have effected on this issue.

Facts

The relevant facts are simply stated. While conducting a search of the premises of the defendant, Ruby Humphrey, pursuant to a lawful search warrant which authorized a search for evidence of bookmaking activity, government agents answered the telephone several times. The unknown callers stated directions for the placing of bets on various sporting events. The government proposes to introduce this evidence to show that the callers believed that the premises were used in betting operations. The existence of such belief tends to prove that they were so used. The defendants object on the ground of hearsay.

Common Law Background

* * *

In the instant case, the utterances of the absent declarants are not offered for the truth of the words, and the mere fact that the words were uttered has no relevance of itself. Rather they are offered to show the declarants' belief in a fact sought to be proved. At common law this situation occupied a controversial no-man's land. It was argued on the one hand that the out-of-court utterance was not hearsay, because the evidence was not offered for any truth stated in it, but for the truth of some other proposition inferred from it. On the other hand, it was also argued that the reasons for excluding hearsay applied, in that the evidence was being offered to show declarant's belief in the implied proposition, and he was not available to be cross-examined. Thus, the latter argument was that there existed strong policy reasons for ruling that such utterances were hearsay.

The classic case, which is discussed in virtually every textbook on evidence, is *Wright v. Tatham*, 7 Adolph. & E. 313, 386, 112 Eng. Rep. 488 (Exch. Ch. 1837), and 5 Cl. & F. 670, 739, 47 Rev. Rep. 136 (H.L. 1838). Described as a "celebrated and hard-fought cause," *Wright v. Tatham* was a will contest, in which the will was sought to be set aside on the grounds of the incompetency of the testator at the time of its execution. The proponents of the will offered

to introduce into evidence letters to the testator from certain absent individuals on various business and social matters. The purpose of the offer was to show that the writers of the letters believed the testator was able to make intelligent decisions concerning such matters, and thus was competent.

One of the illustrations advanced in the judicial opinions in *Wright v. Tatham* is perhaps even more famous than the case itself. This is Baron Parke's famous sea captain example. Is it hearsay to offer as proof of the seaworthiness of a vessel that its captain, after thoroughly inspecting it, embarked on an ocean voyage upon it with his family?

The court in *Wright v. Tatham* held that implied assertions of this kind were hearsay. The rationale, as stated by Baron Parke, was as follows:

The conclusion at which I have arrived is, that proof of a particular fact which is not of itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such a statement or opinion not on oath would be of itself inadmissible; and, therefore, in this case the letters which are offered only to prove the competence of the testator, that is the truth of the implied statements therein contained, were properly rejected, as the mere statement or opinion of the writer would certainly have been inadmissible.

This was the prevailing common law view, where the hearsay issue was recognized. But frequently, it was not recognized. Thus, two federal appellate cases involving facts virtually identical to those in the case at bar did not even discuss the hearsay issue, although the evidence admitted in them would have been objectionable hearsay under the common law view.

The Federal Rules of Evidence

The common law rule that implied assertions were subject to hearsay treatment was criticized by respected commentators for several reasons.* * *

In a frequently cited article the following analysis appears:

But ought the hearsay rule be deemed applicable to evidence of conduct? As McCormick has observed, the problem 'has only once received any adequate discussion in any decided case,' *i.e.*, in *Wright v. Tatham*, already referred to. And even in that case the court did not pursue its inquiry beyond the point of concluding that evidence of an 'implied' assertion must necessarily be excluded wherever evidence of an 'express' assertion would be inadmissible. But as has been pointed out more than once (although I find no *judicial* recognition of the difference), the "implied" assertion is, from the hearsay standpoint, not nearly as vulnerable as an express assertion of the fact which the evidence is offered to establish.

This is on the assumption that the conduct was "nonassertive;" that the passers-by had their umbrellas up for the sake of keeping dry, not for the purpose of telling anyone it was raining; that the truck driver started up for the sake of resuming his journey, not for the purpose

of telling anyone that the light had changed; that the vicar wrote the letter to the testator for the purpose of settling the dispute with the latter, rather than with any idea of expressing his opinion of the testator's sanity. And in the typical 'conduct as hearsay' case this assumption will be quite justifiable.

On this assumption, it is clear that evidence of conduct must be taken as freed from at least one of the hearsay dangers, *i.e.*, mendacity. A man does not lie to himself. Put otherwise, if in doing what he does a man has no intention of asserting the existence or non-existence of a fact, it would appear that the trustworthiness of evidence of this conduct is the same whether he is an egregious liar or a paragon of veracity. Accordingly, the lack of opportunity for cross-examination in relation to his veracity or lack of it, would seem to be of no substantial importance. Accordingly, the usual judicial disposition to equate the "implied" to the "express" assertion is very questionable.

The drafters of the Federal Rules agreed with the criticisms of the common law rule that implied assertions should be treated as hearsay and expressly abolished it. They did this by providing that no oral or written expression was to be considered as hearsay, unless it was an "assertion" concerning the matter sought to be proved and that no nonverbal conduct should be considered as hearsay, unless it was intended to be an "assertion" concerning said matter.* * *

"Assertion" is not defined in the rules, but has the connotation of a forceful or positive declaration.

The Advisory Committee note concerning this problem states:

The definition of "statement" assumes importance because the term is used in the definition of hearsay in subdivision (c). *The effect of the definition of "statement" is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one.*

It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of "statement." Whether nonverbal conduct should be regarded as a statement for purposes of defining hearsay requires further consideration. Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement. Other nonverbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includable within the hearsay concept. * * * Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, *but the*

Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence. * * Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay by the language of subdivision (c). (Emphasis added).*

* * *

Applying the principles discussed above to the case at bar, this court holds that the utterances of the betters telephoning in their bets were nonassertive verbal conduct, offered as relevant for an implied assertion to be inferred from them, namely that bets could be placed at the premises being telephoned. The language is not an assertion on its face, and it is obvious these persons did not intend to make an assertion about the fact sought to be proved or anything else.

As an implied assertion, the proffered evidence is expressly excluded from the operation of the hearsay rule by Rule 801 of the Federal Rules of Evidence, and the objection thereto must be overruled. An order to that effect has previously been entered.

NOTE

When should an implied assertion be considered hearsay?

Professors Saltzburg, Martin, and Capra address the problem of implied assertions in the following passage from the *Federal Rules of Evidence Manual* (9th ed. 2006):

An out-of-court statement is hearsay only if the statement is offered to prove the truth of the "matter asserted." Does this mean that the hearsay rule excludes only statements offered for the truth of matters *expressly* asserted? If a statement is offered for the truth of a matter that is implied rather than expressed, does the utterance escape the hearsay prohibition? Professor Milich, in *Re-examining Hearsay Under the Federal Rules: Some Method for the Madness*, 39 Kan. L. Rev. 893 (1991), considers the following hypothetical illustration of the problem of implied assertions:

Assume, in a murder case, that the prosecution wants to prove that Joe is a sharpshooter. If a declarant makes a statement that

"Joe is a sharpshooter," this is an express assertion of fact and is excluded as hearsay. But there are a number of equivalent statements that make the same point without making an express assertion. Among them: (1) "Joe can shoot a tick off a running jaguar at 200 yards"; (2) "You ought to go hunting with Joe"; and (3) "Have you ever seen anyone shoot a rifle like Joe?"

If the hearsay rule excludes only out-of-court statements offered for the truth of matters *expressly* asserted, then none of these three statements are hearsay. The government is not offering the statement to show that Joe can actually shoot a tick off a jaguar at 200 yards; nor that anyone ought to go hunting with Joe; nor that anyone has seen anyone else shoot a rifle like Joe. A strong argument can be made, however, that there should be no difference between express and implied assertions, at least where the declarant is trying to make the same point by implication that he could otherwise make expressly. Given the subtlety of language, there is no reason to rest the hearsay rule on purely semantic distinctions. Certainly the hearsay dangers of an implied assertion are on a par with those attendant to an express assertion: The factfinder will be relying on the credibility of an uncross-examined declarant who may be lying or mistaken.

As Professor Milich states, a literalist approach to hearsay "guts the hearsay rule." See also Seidelson, *Implied Assertions and Federal Rule of Evidence 801: A Quandary for Federal Courts*, 24 Duq. L. Rev. 741 (1986) (arguing that hearsay rule should not rest on a semantic distinction between express and implied assertions). In the above hypothetical, it would lead to the bizarre result that a wild exaggeration (shooting the tick off a jaguar) could be heard by the jury, whereas a more careful attempt to approximate the truth (he is a good shot) could not. A literalist approach would also mean that the use of irony, aphorism, or metaphor could never be excluded as hearsay, even though everyone would know what the declarant intended to assert. Finally, Professor Milich makes the important point that "making the hearsay issue turn on the mere form of the out-of-court statement may tempt witnesses to 'recall' the statements in a nondeclarative form to circumvent the rule." See also *Park v. Huff*, 493 F.2d 923 (5th Cir. 1974) (noting that if the hearsay rule covered only express assertions of fact, the rule "could easily be circumvented through clever questioning and coaching of witnesses, so that answers were framed as implied rather than as direct assertions").

The Advisory Committee Note to Rule 801 states that "verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted" is "excluded from the definition of hearsay by the language of subdivision (c)." We think that the Advisory Committee's reading is not self-evident. The language "truth of the matter asserted" is flexible enough to cover "matters" that are implied as well as express.

Most Courts have been reluctant to adopt the implication of the Advisory Committee that the hearsay rule is completely inapplicable

to implied verbal assertions. One well-known example is *United States v. Reynolds*, 715 F.2d 99 (3d Cir. 1983). Parran and a codefendant, Reynolds, were charged with conspiring to possess and cash a social security check belonging to someone else. Reynolds was arrested after he attempted to cash the check. Parran was across the street observing the proceedings. Parran crossed the street and casually walked by Parran and the officers. As Parran walked by, Reynolds called out to Parran, "I didn't tell them anything about you." The Court analyzed the admissibility of that statement as follows:

As the government uses it, the statement's probative value depends on the truth of an assumed fact it implies. Unless the trier assumes that the statement implies that Reynolds did not tell the postal inspectors that Parran was involved in the conspiracy to defraud, even though Parran was in fact involved, the statement carries no probative weight for the government's case. * * * Consequently, we believe that, as the government uses it, the statement's relevance goes well beyond the fact that it was uttered. * * * [T]he government offers it to prove the truth of the assumed fact of defendant's guilt implied by its conduct. Accordingly, we reject the government's suggestion in this case that only a statement's express assertion should be considered in deciding whether it constitutes hearsay.

The problems of a literalist approach to the hearsay rule, excluding only express assertions, are well illustrated by the case of *United States v. Ybarra*, 70 F.3d 362 (5th Cir. 1995). To prove that the defendant lived in a house where a firearm was found, the government offered this statement from the defendant's wife to police officers: "[T]here is no way [Ybarra] is coming home as long as you police are here." The Court held that the statement was not hearsay because it was offered to prove something other than the fact that Ybarra would not come home. Rather, it was offered to prove that Ybarra lived in the house. This ignores the fact that the government did offer the statement for the truth of the assertion that was *implied* by the wife's statement — i.e., that Ybarra lived there. The Court's decision that the statement was not offered for the truth of the matter asserted rests on a constricted and highly semantic view of "the matter asserted," and creates problems if the statement is changed in any slight degree. If the wife had said, "Yeah, he lives here and he won't be coming back while police are here," the statement would undeniably be hearsay. There is no substantial distinction between that hypothetical statement and the statement actually made by the wife in *Ybarra*. Moreover, what would the Court have done if the wife had said, "This is Ybarra's castle," or more obliquely, "Don't you cops have any respect? A man's home is his castle." Would these statements not be hearsay because the government would not be offering them to prove that the place was Ybarra's castle? The "express assertion" view of the hearsay rule leads to absurd results. We believe that a statement should be treated as hearsay whenever it is offered to prove the truth of either an express or implied assertion, so long as the Trial Judge finds that

the declarant intended to communicate that assertion when he made the statement.

We note that most Federal Courts are in agreement agree with the view that implied assertions are hearsay if they are intentionally communicated by the speaker — and not hearsay if there is no intent to communicate the implication. An example is *United States v. Summers*, 414 F.3d 1287 (10th Cir. 2005), where the defendant's accomplice in a bank robbery was arrested and said to the officer, "How did you guys find us so fast?" The Court held that an implied assertion is hearsay if the speaker intended to communicate the implication that is sought to be used at trial. It also noted that the burden is on the opponent to show that the speaker had the intent to assert the implication in the statement. Applying this intent-based test to the facts, the Court held that the defendant satisfied his burden of demonstrating that by positing the question, "How did you guys find us so fast?", the declarant intended to make an assertion. It explained as follows:

It begs credulity to assume that in positing the question Mohammed was exclusively interested in modern methods of law enforcement, including surveillance, communication, and coordination. Rather, fairly construed the statement intimated both guilt and wonderment at the ability of the police to apprehend the perpetrators of the crime so quickly.

An intent-based approach to implied assertions has several virtues. First, at least where statements intentionally asserting one thing are being used to prove something else that the declarant was not trying to say, the hearsay risks are reduced. This is because the declarant is unlikely to have intended to mislead on matters that he had no intent to communicate in the first place. One of the major dangers of hearsay — the risk of insincerity — is thus minimized, and an intent-based test would allow such unintentional statements to be admitted.

Second, an intent-based approach provides a unitary test for non-assertive conduct and verbal communications. As discussed above, conduct is hearsay only if the actor intends to communicate by his action and the conduct is offered for the truth of that communication. An intent-based approach applies the same rule for verbal communications.

Third, an intent-based approach toward implied assertions is favored by most modern commentators. *See, e.g., Milich, supra*, at 907 ("[I]ntent to communicate is the key to distinguishing between hearsay and non-hearsay under the federal definition."); Callen, *Hearsay and Informal Reasoning*, 47 Vand. L. Rev. 43, 113 (1994) ("When deciding whether a statement is hearsay for a particular purpose, courts should recognize that propositions the speaker generally intends the hearer to understand from the communication should be part of an assertion for purposes of the hearsay rule. Classifying assertions implied from communicative conduct as hearsay facilitates factfinders' use of their experience in informal reasoning at trial.").

Fourth, an intent-based test allows the hearsay rule to apply and exclude statements that are exaggerations (such as “Joe can shoot a tick off a jaguar”), or metaphor or sarcasm. All such statements are basically the equivalent of an express assertion. If offered to prove the truth of the implied *and intended* meaning, the evidence is hearsay under an intent-based approach. This is clearly the appropriate result, even though the statement is not being offered to prove the literal truth of the matter *expressly* asserted; reserving the hearsay rule to express assertions only will deprive the rule of almost all practical effect. There are many examples of implied but intentional assertions that should be treated as hearsay. A declarant’s statement that “the sky is on fire” is hearsay when offered to show that the speaker witnessed a sunset. A declarant’s statement, “Well, at least I never forged a will!” is hearsay when offered to prove the implication that the person to whom the statement was made is a forger. A declarant’s statement, “The automobile was going faster than a speeding bullet,” is hearsay when offered to prove that the car was exceeding the speed limit. These statements are hearsay because the “matter asserted” includes what the declarant reasonably intended to assert. Given the subtlety of language, there is no reason to rest the hearsay rule on purely semantic distinctions between express and implied assertions.

This is not to say that an intent-based approach to implied assertions is free from difficulty. There is some indeterminacy in the application of any intent-based test. As Professor Milich puts it, “the quest for the declarant’s intent in cases of verbal conduct involves a search for what the declarant truly had in mind.” But any problem, we think, can be adequately handled by an objective, rather than subjective, test of intent. The question should be whether a reasonable person making a statement such as the declarant made would have intended to communicate the implied assertion that the proponent is offering for its truth. As with conduct, the burden should be placed on the nonoffering party to show that the declarant had the intent to communicate the implied assertion.

A good example of the intent-based approach to implied assertions is *United States v. Weeks*, 919 F.2d 248 (5th Cir. 1990). Weeks was charged with kidnapping. The victims testified that their abductors used the names “Jimmy” and “Gato” in addressing each other. To establish that Weeks was “Gato,” the government called a witness who testified that he had heard others refer to Weeks as “Gato” when they addressed him, e.g., “How ya doin’ Gato?” The Court held that the out-of-court statements addressed to “Gato” were properly admitted. It found that Weeks had not satisfied his burden of showing that declarants who referred to him as “Gato” were intending to communicate an implied assertion, i.e., “Weeks is nicknamed ‘Gato.’” Rather, it was more likely that they were trying to communicate other ideas, and were simply using the term “Gato” as they would any other name: as a means of introduction or reference. As the declarants probably had other things in mind than simply to advertise their belief about Weeks’ nickname, the statements were not hearsay. *See also United*

States v. Jackson, 88 F.3d 845 (10th Cir. 1996): The defendant, whose name was Kenny, was charged with narcotics violations. The police officer who arrested him testified that he seized the defendant's pager and called the telephone number displayed on the pager; the person who answered said "Is this Kenny?" This testimony was held properly admitted as non-hearsay. The Court stated that "the important question is whether the assertion is intended" and found it "hard to believe that the declarant intended to assert that Mr. Jackson was in possession of the pager and that he was responding to her call."

In contrast, in *United States v. Berrios*, 132 F.3d 834 (1st Cir. 1998), the government had proof that a man named "Pablo" was a drug dealer, and sought to prove that the defendant went by the nickname "Pablo." The defendant called a witness who would have testified that she was present at a drug deal with her husband, and her husband introduced her to the seller, saying "This is Pablo." The witness would have testified that the person introduced as "Pablo" was not the defendant. The Court held that the out-of-court statement of the witness's husband, "This is Pablo", was properly excluded as hearsay. That is the correct result under an intent-based test. The intent of the husband was to assert to his wife that the person before her went by the name "Pablo." If the husband had said to his wife privately, "watch out for Pablo, he is dangerous", this would not be an intentional assertion that the person identified went by the name Pablo. Rather, the intent of the speaker would be to warn his wife to stay away from the identified person.

D. OUT-OF-COURT STATEMENTS OF DECLARANTS WHO TESTIFY AT TRIAL

UNITED STATES v. CHECK

582 F.2d 668 (2d Cir. 1978)

WATERMAN, CIRCUIT JUDGE:

[Check was convicted on charges of drug distribution.] In contending that his convictions should be overturned, Check raises troublesome arguments concerning the introduction into evidence of certain portions of the testimony of the undercover police officer who was the government's principal witness against Check. * * *

The government's evidence at trial was primarily presented through the testimony of Stephen Spinelli, a detective in the New York City Police Department who had been assigned to investigate allegations that a fellow New York City police officer, Patrolman Sandy Check, was engaging in illegal narcotics trafficking. Operating in an undercover capacity and using the pseudonym "Danny Gennaro," Spinelli was initially introduced to one William Joseph Cali, a confidential informant who knew Check and who agreed to introduce Spinelli to Check so that Spinelli, in his assumed role of a prospective purchaser of narcotics, could either substantiate or disprove the serious allegations of criminal conduct which had been made against Check.

Fourth, an intent-based test allows the hearsay rule to apply and exclude statements that are exaggerations (such as “Joe can shoot a tick off a jaguar”), or metaphor or sarcasm. All such statements are basically the equivalent of an express assertion. If offered to prove the truth of the implied *and intended* meaning, the evidence is hearsay under an intent-based approach. This is clearly the appropriate result, even though the statement is not being offered to prove the literal truth of the matter *expressly* asserted; reserving the hearsay rule to express assertions only will deprive the rule of almost all practical effect. There are many examples of implied but intentional assertions that should be treated as hearsay. A declarant’s statement that “the sky is on fire” is hearsay when offered to show that the speaker witnessed a sunset. A declarant’s statement, “Well, at least I never forged a will!” is hearsay when offered to prove the implication that the person to whom the statement was made is a forger. A declarant’s statement, “The automobile was going faster than a speeding bullet,” is hearsay when offered to prove that the car was exceeding the speed limit. These statements are hearsay because the “matter asserted” includes what the declarant reasonably intended to assert. Given the subtlety of language, there is no reason to rest the hearsay rule on purely semantic distinctions between express and implied assertions.

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Spinelli testified that, as anticipated, Cali arranged for a meeting with Check which was to take place on August 8, 1974 at Dave's Corner Restaurant, located at the corner of Canal Street and Broadway in lower Manhattan. Shortly after Spinelli and Cali had entered the restaurant Check appeared outside the front window of the building and motioned to have Cali meet with him outside. This Cali did and, after a conversation with Check, Cali rejoined Spinelli who was still seated in the restaurant. Cali refused to testify at the trial. So, in view of the potential hearsay problems connected with any attempt to elicit the content of Spinelli's conversations with him, and after an objection on hearsay grounds had already been voiced, the prosecutor employed a method of questioning which he argued circumvented any hearsay problems. The prosecutor, after establishing that Check and Cali had conversed and that Cali had thereafter returned to speak to Spinelli, inquired of Spinelli (as he would ultimately inquire of him at least twelve additional times): "Without telling us what Mr. Cali said to you, what did you say to him?" In response, Spinelli told the prosecutor, and also, of course, the jury, what he had purportedly said to Cali:

I — after we had the conversation, I instructed William Cali that by no means did I intend to front any sum of money to Sandy Check, I didn't particularly care for the fact that — initially he was supposed to come with an ounce of cocaine, and the taste which he had, which I was supposed to get prior to making the ounce buy of cocaine, was at his house, and due to the fact that it wasn't of good quality, I wasn't particularly concerned, as good faith wasn't being shown to me, especially for the fact I also told William Cali I had no intentions of giving Sandy Check \$300 which William Cali owed to him from a previous narcotics deal.

Spinelli next testified that, following the conversation he had with Cali, Cali again departed the restaurant and spoke with Check. Cali then reentered the restaurant and "again (Spinelli and Cali) had a conversation." As before, Spinelli now related what he had supposedly "told William Cali":

At that time I told William Cali I didn't particularly care whether or not Check was concerned about rats and not wanting to meet anyone new or about being busted by the man, and I had again still no intention of fronting any money or the \$300 which Cali owed him.

Leaving the restaurant for a third time and having his third powwow with Check, Cali, as before, returned, talked to Spinelli and, again, Spinelli now testified as to what this third time he had "told William Cali":

I told William Cali at the time I didn't particularly care whether or not the cocaine which I was supposed to get was 70 percent pure, nor the fact that it was supposed to come from a captain of detectives; I had again still no intention of fronting any money to him, the \$1,200 for the ounce of cocaine or the \$300 which William Cali owed to him.

[Eventually, Spinelli received a "taste" of drugs from Cali for a payment of \$50. Subsequently, Spinelli testified that received a half ounce of heroin from Cali for a payment of \$1,350. During some later negotiations, Check purportedly stated directly to Spinelli that he could provide Spinelli with drugs.]

Testifying in his own defense at his trial, Check did not deny that he had met with Cali on August 8, 1974, at Dave's Corner Restaurant. According to Check, however, he had agreed to meet with Cali on that occasion only because Cali had previously proposed helping Check make "a good drug arrest" and shortly before their rendezvous Cali had called Check to tell him that he might "have something for" him and that "it was important that [Check] meet him." He testified that when he learned from Cali that Spinelli was interested in purchasing narcotics rather than in selling them, he was no longer interested in pursuing the matter. He denied meeting with Spinelli on August 9, 1974, and, accordingly, denied that he had agreed at that time to sell narcotics to Spinelli or that he had received \$1,350 from Spinelli on that occasion. While admitting that he had met and talked with Spinelli at the ROK Bar on August 22, 1974, Check testified that he had not filed a report of the incident, as departmental regulations required, because he had regarded Spinelli as a "crackpot" inasmuch as Spinelli "was talking quite openly at the bar about drugs, and he didn't impress [Check] at all as being anything, being a smart person, because a person that deals in drugs doesn't let everybody know their business."

* * *

At trial the government took the position * * * that Spinelli's testimony regarding his conversations with Cali could not constitute hearsay because Spinelli carefully limited that testimony to what he said to Cali and he scrupulously avoided relating any statements which Cali had made to him. Check argues, however, that, notwithstanding the artful phrasing of the prosecutor's questions and Spinelli's equally adroit responses to them, Spinelli actually was on numerous occasions throughout his testimony in essence conveying to the jury the precise substance of the out-of-court statements Cali made to him. Check further contends that, even if Spinelli's testimony were not excludable on the ground that he was merely serving as an improper conduit for Cali's hearsay statements, there is an additional reason why Spinelli's testimony of what he told Cali would nonetheless still be inadmissible hearsay. Specifically, Check contends that, notwithstanding the government's position at trial and the district court's holding, the federal courts do not recognize any exception to the hearsay rule, or, except in the limited circumstances set forth in Fed. R. Evid. 801(d), any exclusion from the definition of hearsay, which would permit testimony in court relating to the prior out-of-court statements of a witness merely because the witness is available at trial for cross-examination and subject to cross-examination concerning those statements. On either of the grounds he advances, Check is clearly correct.

* * *

* * * [W]e agree with Check that for much of his testimony Spinelli was serving as a transparent conduit for the introduction of inadmissible hearsay information obviously supplied by and emanating from the informant Cali. * * * There is * * * no doubt that the out-of-court statements uttered by Cali, audaciously introduced through the artifice of having Spinelli supposedly restrict his testimony to his half of his conversations with Cali, were being ~~offered to prove the truth of the matters asserted in them.~~ * * * We thus conclude that, in substance, significant portions of Spinelli's testimony regarding his conversations with Cali were indeed hearsay, for that testimony was a transparent attempt to incorporate into the officer's testimony information supplied by the informant who did not testify at trial. Such a device is improper and cannot miraculously transform inadmissible hearsay into admissible evidence. * * *

Even if we were inclined to accept the government's contention that Spinelli's testimony at trial was an honest narration of various out-of-court statements he himself had made, and we were thereby to exalt form over substance to the extent of blinding ourselves to the true character of Spinelli's answers, we would nonetheless continue to hold that substantial portions of Spinelli's testimony were inadmissible hearsay. Throughout the trial the government adamantly maintained, and Judge Motley unfortunately agreed, that, if the out-of-court statements which Spinelli was relating during his in-court testimony could properly be regarded as his very own statements, and not merely as a subterfuge for the indirect introduction of Cali's hearsay, those statements were admissible under some exclusion from the definition of hearsay or under some exception to the hearsay rule which would permit them to be admitted as the out-of-court statements of a person who testifies at trial and who can therefore be subjected to the rigors of cross-examination as to them. * * * In response, Check argues that under the law of evidence presently in force in the federal courts there is no such exception to the hearsay rule. We agree. * * * To be sure, Fed. R. Evid. 801(d)(1)(B), by excluding from the definition of hearsay, see Fed. R. Evid. 801(c), certain prior consistent statements which otherwise would be so included, does potentially permit some of a witness's prior consistent statements to be used as substantive evidence to prove the truth of the matters asserted. But the class of such prior statements which can potentially be so utilized as substantive evidence because of their exclusion from the definition of hearsay is carefully confined to those "[p]rior consistent statements [which] traditionally have been admissible [but only for the rehabilitative purpose of] rebut[ting] charges of recent fabrication or improper influence or motive." Note to Rule 801, Notes of the Advisory Committee on Proposed Rules of Evidence, 56 F.R.D. at 296. Such prior statements are, of course, those which are "offered to rebut an express or implied charge against [the witness] of recent fabrication or improper influence or motive," Fed. R. Evid. 801(d)(1)(B), and which were made prior to the time the supposed motive to falsify arose. To repeat, aside from the relatively small number of prior statements that are admissible as being within the dispensation conferred by Fed. R. Evid. 801(d)(1)(B), a witness's prior statements offered to prove the truth of the matters asserted therein

are not immunized from the proscriptive effect of the hearsay rule. We therefore conclude that the challenged portions of Spinelli's testimony were inadmissible hearsay even if they could be regarded as being a literal recitation of Spinelli's own prior out-of-court statements.

[The Court rejected the government's argument that the erroneous admission of hearsay was harmless error.]

Judgment of conviction reversed and case remanded for a new trial on all counts of the indictment.

Chapter 11

HEARSAY EXCLUSIONS

A. STATEMENTS THAT ARE “NOT HEARSAY” UNDER FEDERAL RULE 801(d)

Rule 801(d) technically provides an exemption from, rather than an exception to, the hearsay rule. The statements covered by subdivision (d) are categorized as “not hearsay” rather than as “hearsay subject to an exception” because the basis for admitting these statements is different from that supporting the other standard hearsay exceptions (such as excited utterances and dying declarations) which are found in Rules 803, 804, and 807. Statements falling within these latter exceptions are admitted because they are made pursuant to circumstantial guarantees of reliability that substitute for the in-court guarantees of oath, cross-examination, etc. For example, excited utterances are made while the declarant is under the influence of a startling event and for that reason is less likely to be able to lie.

In contrast, prior statements of testifying witnesses (subdivision (d)(1)) are admitted not because they were reliable when made, but because the person who made them is testifying at the trial or hearing under oath and subject to cross-examination. And admissions (subdivision (d)(2)) are permitted not because they are reliable, but because the adversary or his agents made them — if a party happens to make an unreliable statement, it is not up to the judge to protect him from use of the statement by the adversary; it is up to the party to try to explain the statement or to diminish its importance.

The drafters of the Federal Rules thought that it would be confusing to lump prior statements of testifying witnesses and admissions together with reliability-based exceptions under a single label of “hearsay exceptions.” In fact, however, the Federal Rules regime is more confusing in the end because statements that clearly fit the definition of hearsay are labeled, *ipse dixit*, “not hearsay.”

There is no practical difference between an exception to the hearsay rule and an exclusion or exemption from that rule. (We use the terms “exclusion” and “exemption” interchangeably throughout this chapter.) If a statement fits either exemption or an exception, it is not excluded by the hearsay rule, and it can be considered as substantive evidence if it is not excluded by any other Rule (e.g., Rule 403).

B. PRIOR STATEMENTS BY A WITNESS

[1] Inconsistent Statements Under Oath

[a] Common Law

At common law, prior inconsistent statements were considered hearsay and could be used to impeach a witness' truthfulness, but could not be used to prove the prior inconsistent statement was true.

A classic example of the effect of this rule is the criminal case where the prosecution's star witness told the police that the defendant committed the crime, but then at trial testifies: "I don't think I've ever seen that guy before." At common law, the prosecution could use the prior inconsistent statement only to show that the witness is lying at trial. The prosecution could not use the statement as substantive proof that the defendant actually committed the crime. Result? If the government presents no evidence other than the prior inconsistent statement, there is no substantive proof that the defendant committed the crime, and a directed verdict must be granted in the defendant's favor. If, however, the prior statement were admissible under a hearsay exception, the statement could be counted in the substantive evidence necessary to create a jury question.

[b] Federal Rule of Evidence 801(d)(1)(A)

Rule 801. Definitions

* * *

(d) Statements which are not hearsay. A statement is not hearsay if—

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

* * *

[c] Illustrations

The Sheriff of Metropolis sues Robin Rich for slander, alleging that Robin Rich told Marty Manners that "the Sheriff of Metropolis took a bribe." Marty Manners was the only witness and relayed the conversation to the Sheriff the next day. The Sheriff calls Marty Manners to the stand.

Example 1

Plaintiff:	State your name.
Marty Manners:	Marty Manners.
Plaintiff:	Do you know the defendant, Robin Rich?
Marty Manners:	Yes.

Plaintiff: Did you have a conversation with the defendant on the date in question about the plaintiff, the Sheriff of Metropolis?

Marty Manners: Yes, I did.

Plaintiff: Was anyone else there?

Marty Manners: No, just the two of us.

Plaintiff: (Dramatically) And what did Robin Rich say about the Sheriff?

Marty Manners: Ah, well, nothing much. Just that "the Sheriff has a new bride."

Plaintiff: (Extensive coughing) Well, didn't you tell the Sheriff the next day that Robin Rich said "the Sheriff took a bribe?"

Defendant: Objection! That's not substantive proof. I move for a directed verdict.

Court: _____.

Example 2

Plaintiff: State your name.

Marty Manners: Marty Manners.

Plaintiff: Do you know the defendant, Robin Rich?

Marty Manners: Yes.

Plaintiff: Did you have a conversation with the defendant on the date in question about the plaintiff, the Sheriff of Metropolis?

Marty Manners: Yes, I did.

Plaintiff: Was anyone else there?

Marty Manners: No, just the two of us.

Plaintiff: (Dramatically) And what did Robin Rich say about the Sheriff?

Marty Manners: Ah, well, nothing much. Just that "the Sheriff has a new bride."

Plaintiff: Isn't it true that you gave a deposition in my office?

Marty Manners: Yes.

Plaintiff: I'd like you to look at a copy of that deposition (handing a document to the witness). Didn't you say at the deposition that the defendant said "the Sheriff took a bribe?"

Defendant: Objection! That's not substantive proof. I move for a directed verdict.

Court: _____.

[d] Other Proceeding**UNITED STATES v. LIVINGSTON**
661 F.2d 239 (D.C. Cir. 1981)

J. SKELLY WRIGHT, CIRCUIT JUDGE:

Appellants, who were tried jointly for armed robbery of a post office, challenge their convictions on several evidentiary and procedural grounds. Because we agree that the trial court improperly instructed the jury regarding the use of prior inconsistent statements, we reverse the convictions and remand for a new trial. We do not reach any of the other issues raised by appellants.

I. Background

On March 5, 1980 two men robbed the Brookland Station Post Office in Washington, D.C. The pair had approached the last employee leaving the office and forced him at gunpoint to let them into the post office and open the safes. The men took about \$550 in cash, a money order writing machine, a validating plate, and 97 money orders.

On June 3, 1980 appellants John T. Livingston and David Coyle were indicted on two counts: armed robbery of a post office and possession of stolen United States money orders. At trial the Government introduced several witnesses to testify about the events on the day of the robbery and about property stolen from the post office. Several witnesses also testified about the cashing and attempted cashing of a number of stolen money orders in Philadelphia and Trenton. These two lines of evidence were linked by testimony of three women, acquaintances of Livingston and Coyle, who accompanied them on a trip to Philadelphia and Trenton one week after the robbery. The defense presented no evidence. The jury returned verdicts of guilty as to both appellants on the armed robbery count. Appellants were sentenced to 25 years' incarceration, and they subsequently brought this appeal.

II. Use of Prior Inconsistent Statements

Prior to trial each of the women accompanying appellants to Philadelphia and Trenton was questioned by, and gave at least one sworn statement to, postal inspectors. In particular, the statement of Yvonne Hester indicated that the appellants had discussed and joked about several aspects of the robbery. At trial Ms. Hester appeared as a Government witness. When she denied or failed to recall conversations mentioned in the statement to the postal inspector, the prosecutor read damaging excerpts from it. On cross-examination Ms. Hester stated that when she signed the statement she did not know what she was signing and that she did not remember the conversations mentioned in the statement.

In his instructions to the jury the trial judge noted the confrontation with prior statements. He then gave guidance as to how the prior inconsistent statements could be used. The pertinent instruction, based in part on language in Rule 801(d)(1)(A) of the Federal Rules of Evidence, read as follows:

However, if the prior statement was given by the witness while under oath, subject to the penalty of perjury, at a prior trial, hearing, or other proceeding, or in a deposition, and if you find that such prior statement under oath is inconsistent with the present statement in court, you may accept either the prior statement or the present testimony in court as reflecting the truth of any matter contained therein.

Defense counsel objected to this instruction, and appellants contend that the trial court erred in giving it. They argue that Hester's prior statements did not meet the requirements of Rule 801(d)(1)(A) and that they therefore should never have been considered as substantive evidence.

A. *Prior Statements as Substantive Evidence*

Under the Federal Rules a prior inconsistent statement by a witness is not hearsay if "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition * * * ." Fed. R. Evid. 801(d)(1)(A) (emphasis added). Here, a postal inspector went to Ms. Hester's residence, asked her questions, took notes, wrote a statement based on her responses, asked her to read a typewritten copy and to make any necessary changes, and then obtained her signature swearing to the accuracy of the statement [i.e., under oath and subject to the penalty of perjury]. We do not think that these circumstances satisfy the Rule's requirement of "a trial, hearing, or other proceeding."

In order to assure authenticity and reliability, "the Rule seems to contemplate situations in which an official verbatim record is routinely kept, whether stenographically or by electronic means, under legal authority." The Rule's requirements were designed "to limit substantive use of prior inconsistent statements to those situations in which there is likely to be *overwhelming* proof that the witness did in fact make the prior inconsistent statement." Blakey, *Substantive Use of Prior Inconsistent Statements Under the Federal Rules of Evidence*, 64 Ky. L.J. 3, 10 (1975) (emphasis added). In this case no official verbatim record was routinely kept by postal inspectors. The formalities used "provide less assurance that a statement was in fact made and sworn to than the formalities which surround a firsthand appearance at an on-the-record proceeding."

Courts of Appeals have generally found that statements made to investigating officials fail to qualify as made at a proceeding under Rule 801(d)(1)(A). *United States v. Ragghianti*, 560 F.2d 1376, 1381 (9th Cir. 1977) (prior statement obtained by Federal Bureau of Investigation in the course of a criminal investigation not admissible for substantive purposes); *Martin v. United States*, 528 F.2d 1157, 1161 (4th Cir. 1975) (statement before two investigating officers was not made at a proceeding and therefore does not qualify as substantive evidence). These cases provide the clearest analogy to the present case; they suggest that Hester's statement was hearsay inadmissible to prove the truth of matters contained within it.

The one exception to the line of cases in this area is *United States v. Castro-Ayon*, 537 F.2d 1055 (9th Cir. 1976). There the court found that statements

made to a federal agent during an interrogation at a Border Patrol station fell within the Rule's requirements. However, the court noted that "the immigration proceeding before Agent Pearce bears many similarities to a grand jury proceeding: both are investigatory, *ex parte*, inquisitive, sworn, basically prosecutorial, held before an officer other than the arresting officer, recorded, and held in circumstances of some legal formality. Indeed, this immigration proceeding provides more legal rights for the witnesses than does a grand jury: the right to remain totally silent, the right to counsel, and the right to have the interrogator inform the witness of these rights."

Hester's statement to the postal inspector lacks many of the circumstantial guarantees of reliability identified in *Castro-Ayon*. The questioning was not held before an independent officer; no recordings were made; the interrogation occurred at Hester's home; and no rights were afforded to her. Indeed, the circumstances fall far short of those in a grand jury proceeding, the paradigmatic "other proceeding" under the Rule.

Accordingly, Hester's statement should have been admitted only for the purpose of impeaching her credibility. It should not have been treated as having any potential substantive or independent testimonial value. While some commentators doubt that juries can distinguish between the use of prior statements for impeachment as opposed to substantive purposes, the distinction remains an important one if the Rules as drafted are to retain their vitality.

B. Reversible Error

The prior inconsistent statements were important to the Government's case and might well have influenced the jury's verdict. The Government itself recognized that Hester's statement "was clearly probative of the identity of the robbers." Hester's statement to the postal inspector included a comment allegedly made by one defendant about the division of the proceeds from the robbery and a detailed exchange between both appellants about several aspects of the robbery. These statements provided the most direct evidence linking the defendants to the thefts and the stolen money orders. Not only were they read into the record on direct examination, but the prosecutor also read the statements twice in his closing argument and then summarized them at the end of his argument. The repeated emphasis on Hester's prior statement surely must have made an impression on the jurors. Moreover, the prosecutor's reliance on the statement suggests its importance to the Government's entire case.

Under these circumstances we can hardly say that the judge's error in allowing the prior statement to be considered for its substantive value "did not influence the jury, or had but very slight effect * * * ." *Kotteakos v. United States*, 328 U.S. 750, 764 (1946) (discussing harmless error standard). Thus the error in this case was sufficiently grave to warrant reversal.

REVERSED

NOTES

1. How should the term "other proceedings" in Federal Rule 801(d)(1)(A) be interpreted?

See *United States v. Day*, 789 F.2d 1217 (6th Cir. 1986), where the Court held that statements made to investigative agents did not qualify as statements from an "other proceeding" even though they had been made under oath; *United States v. Perez*, 870 F.2d 1222 (7th Cir. 1989) (pretrial interview with an adverse witness, even though transcribed by a court reporter, was not admissible under Rule 801(d)(1)(A) since it was not a trial-like proceeding); Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (9th ed. 2006) ("In our view, 'other proceedings' must be routine and formal proceedings conducted by a legal officer or under her supervision, and of a type that would lead a declarant to believe that the duty to tell the truth was the same, or nearly the same, as at a trial.").

2. Must the prior statement be diametrically opposed to the trial testimony to be "inconsistent"?

In *United States v. Dennis*, 625 F.2d 782, 795 (8th Cir. 1980), the Court stated that an inconsistency "may be found in evasive answers, inability to recall, silence, or changes of position." See also *United States v. Williams*, 737 F.2d 594 (7th Cir. 1984) (no error in admitting grand jury testimony of witness whose testimony at trial was "limited, vague and not inculpatory"; a statement, to be inconsistent, need not be diametrically opposed or logically incompatible).

3. Is a witness's inability to recall the event or the prior statement at trial inconsistent with the prior statement?

The case results, at first glance, appear conflicting. In *United States v. Bigham*, 812 F.2d 943 (5th Cir. 1987), the court held that the inconsistency requirement of Rule 801(d)(1)(A) was met when the witness claimed no memory of the events that were the subject of the trial. In *United States v. Palumbo*, 639 F.2d 123 (3d Cir. 1981), the court indicated that a prior statement of a government witness who suffered a memory lapse at trial was not admissible under Rule 801(d)(1)(A). The *Palumbo* Court reasoned that the witness's current lack of memory was not necessarily inconsistent with her positive declaration to police as to the source of her drugs. Upon closer inspection, the cases are reconcilable on the following ground: if the witness really does lack memory of the underlying facts, then the trial testimony as to lack of memory is not inconsistent with the witness' prior positive statement. However, if the witness is feigning lack of memory, an inconsistency can be found, because the witness is trying to use lack of memory as a lame excuse to distance himself from his previous statement. This is sufficient repudiation of the prior statement to be considered inconsistent. As noted in *United States v. Thompson*, 708 F.2d 1294 (8th Cir. 1983), the trial court has considerable discretion in determining whether the witness' memory loss is sincere or feigned and thus inconsistent with an earlier statement.

4. If a prior inconsistent statement is admissible as substantive proof under Federal Rule 801(d)(1)(A), is the statement alone sufficient to support a verdict in favor of the one who offered the inconsistent statement?

It is important to recognize the difference between admissibility of evidence and sufficiency. In *United States v. Orrico*, 599 F.2d 113 (6th Cir. 1979), the Court noted that prior inconsistent statements admissible as substantive proof under 801(d)(1)(A) may not be sufficient as the sole proof of an allegation central to the litigation.

5. May a prior inconsistent statement that is not admissible as substantive proof under Federal Rule 801(d)(1)(A) nonetheless be used to impeach the witness?

With some limitations it is generally settled that a prior inconsistent statement may be used to impeach even though it is not admissible as substantive proof. The major limitation is that a party may not call a witness solely to impeach them with a prior inconsistent statement that would not be admissible under Rule 801(d)(1)(A) or any other hearsay exception — to permit such an action would allow a party to end-run the strictures of the hearsay rule.

When a prior inconsistent statement is admissible only for impeachment purposes and not for its truth, a judge should, upon request, instruct the jury accordingly.

[2] Consistent Statements

[a] Federal Rule of Evidence 801(d)(1)(B)

Rule 801. Definitions

* * *

(d) Statements which are not hearsay. A statement is not hearsay if—

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

* * *

[b] Illustration

The defendant is charged with armed robbery. The only witness that can identify the defendant is Dirty Rat, who allegedly drove the get-away car. Dirty Rat has testified on direct that the defendant walked into the store with a gun and came out with a bag of cash. The defendant cross-examines.

Defendant:

Now, Mr. Rat, you just testified that the defendant went into the store, isn't that true?

Dirty Rat: Yes.
 Defendant: But you didn't tell that to the police the day you were arrested, did you? In fact, didn't you deny that you were even in town?

Dirty Rat: Yes, I said I was in New Jersey.
 Defendant: But now you've been granted immunity from these charges, haven't you?

Dirty Rat: Yes.
 Defendant: And the D.A. has cut a deal on some other charges pending against you, hasn't he?

Dirty Rat: Yes.
 Defendant: No further questions.

The State calls Top Cop.

Prosecution: State your name.
 Top Cop: Top Cop.
 Prosecution: Did you interview Dirty Rat about this case?
 Top Cop: Yes.
 Prosecution: Was that before he was arrested on the new charges and before immunity was granted on the other charges?

Top Cop: Yes.
 Prosecution: What did he tell you then?
 Defendant: Objection! Prior consistent statements are inadmissible.

Prosecution: _____

[c] Allegations of Recent Fabrication

TOME v. UNITED STATES

513 U.S. 150 (1995)

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part IIB.

Various federal Courts of Appeals are divided over the evidence question presented by this case. At issue is the interpretation of a provision in the Federal Rules of Evidence bearing upon the admissibility of statements, made by a declarant who testifies as a witness, that are consistent with the testimony and are offered to rebut a charge of a "recent fabrication or improper influence or motive." Fed. Rule Evid. 801(d)(1)(B). ~~The question is whether out-of-court consistent statements made after the alleged fabrication, or after the alleged improper influence or motive arose, are admissible under the Rule.~~

I

Petitioner Tome was charged in a one-count indictment with the felony of sexual abuse of a child, his own daughter, aged four at the time of the alleged crime. The case having arisen on the Navajo Indian Reservation, Tome was tried by a jury in the United States District Court for the District of New Mexico, where he was found guilty of violating 18 U.S.C. §§ 1153, 2241(c), and 2245(2)(A) and (B).

Tome and the child's mother had been divorced in 1988. A tribal court awarded joint custody of the daughter, A.T., to both parents, but Tome had primary physical custody. * * * On August 27, 1990, the mother contacted Colorado authorities with allegations that Tome had committed sexual abuse against A.T.

The prosecution's theory was that Tome committed sexual assaults upon the child while she was in his custody and that the crime was disclosed when the child was spending vacation time with her mother. The defense argued that the allegations were concocted so the child would not be returned to her father. At trial A.T., then six and one half years old, was the Government's first witness. For the most part, her direct testimony consisted of one-and two-word answers to a series of leading questions. * * * Defense counsel then began questioning her about the allegations of abuse, and it appears she was reluctant at many points to answer. * * *

After A.T. testified, the Government produced six witnesses who testified about a total of seven statements made by A.T. describing the alleged sexual assaults: A.T.'s babysitter recited A.T.'s statement to her on August 22, 1990, that she did not want to return to her father because he "gets drunk and he thinks I'm his wife"; the babysitter related further details given by A.T. on August 27, 1990, while A.T.'s mother stood outside the room and listened after the mother had been unsuccessful in questioning A.T. herself; the mother recounted what she had heard A.T. tell the babysitter; a social worker recounted details A.T. told her on August 29, 1990 about the assaults; and three pediatricians, Drs. Kuper, Reich and Spiegel, related A.T.'s statements to them describing how and where she had been touched by Tome. All but A.T.'s statement to Dr. Spiegel implicated Tome. (The physicians also testified that their clinical examinations of the child indicated that she had been subjected to vaginal penetrations. That part of the testimony is not at issue here.)

A.T.'s out-of-court statements, recounted by the six witnesses, were offered by the Government under Rule 801(d)(1)(B). The trial court admitted all of the statements over defense counsel's objection, accepting the Government's argument that they rebutted the implicit charge that A.T.'s testimony was motivated by a desire to live with her mother. * * *

On appeal, the Court of Appeals for the Tenth Circuit affirmed, adopting the Government's argument that all of A.T.'s out-of-court statements were admissible under Rule 801(d)(1)(B) even though they had been made after A.T.'s alleged motive to fabricate arose. The court reasoned that "the pre-motive requirement is a function of the relevancy rules, not the hearsay rules" and that as a "function of relevance, the pre-motive rule is clearly too broad * * * because it is simply not true that an individual with a motive to lie always will do so." "Rather, the relevance of the prior consistent statement is more accurately determined by evaluating the strength of the motive to lie, the circumstances in which the statement is made, and the declarant's demonstrated propensity to lie." * * *

We granted certiorari, and now reverse.

II

The prevailing common-law rule for more than a century before adoption of the Federal Rules of Evidence was that a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement had been made before the alleged fabrication, influence, or motive came into being, but it was inadmissible if made afterwards. As Justice Story explained: "[W]here the testimony is assailed as a fabrication of a recent date * * * in order to repel such imputation, proof of the antecedent declaration of the party may be admitted." *Ellicott v. Pearl*, 35 U.S. (10 Pet.) 412, 439 (1836) (emphasis supplied).

McCormick and Wigmore stated the rule in a more categorical manner: "[T]he applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated." E. Cleary, *McCormick on Evidence* § 49, p. 105 (2d ed. 1972) (hereafter McCormick). See also 4 J. Wigmore, *Evidence* § 1128, p. 268 (J. Chadbourn rev. 1972) (hereafter Wigmore) ("A consistent statement, at a time prior to the existence of a fact said to indicate bias * * * will effectively explain away the force of the impeaching evidence" (emphasis in original)). The question is whether Rule 801(d)(1)(B) embodies this temporal requirement. We hold that it does.

A

* * *

Rule 801 defines prior consistent statements as nonhearsay only if they are offered to rebut a charge of "recent fabrication or improper influence or motive." Fed. Rule Evid. 801(d)(1)(B). Noting the "troublesome" logic of treating a witness' prior consistent statements as hearsay at all (because the declarant is present in court and subject to cross-examination), the Advisory Committee decided to treat those consistent statements, once the preconditions of the Rule were satisfied, as nonhearsay and admissible as substantive evidence, not just to rebut an attack on the witness' credibility. A consistent statement meeting the requirements of the Rule is thus placed in the same category as a declarant's inconsistent statement made under oath in another proceeding, or prior identification testimony, or admissions by a party opponent. See Fed. Rule Evid. 801.

The Rules do not accord this weighty, nonhearsay status to all prior consistent statements. To the contrary, admissibility under the Rules is confined to those statements offered to rebut a charge of "recent fabrication or improper influence or motive," the same phrase used by the Advisory Committee in its description of the "traditional" common law of evidence, which was the background against which the Rules were drafted. Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited. In the present context, the question is whether A.T.'s out-of-court statements rebutted the alleged link between her desire to be with her mother and her testimony, not whether they suggested that A.T.'s in-court testimony was true. The Rule

speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told.

This limitation is instructive, not only to establish the preconditions of admissibility but also to reinforce the significance of the requirement that the consistent statements must have been made before the alleged influence, or motive to fabricate arose. That is to say, the forms of impeachment within the Rule's coverage are the ones in which the temporal requirement makes the most sense. Impeachment by charging that the testimony is a recent fabrication or results from an improper influence or motive is, as a general matter, capable of direct and forceful refutation through introduction of out-of-court consistent statements that predate the alleged fabrication, influence or motive. A consistent statement that predates the motive is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive. By contrast, prior consistent statements carry little rebuttal force when most other types of impeachment are involved. McCormick § 49, p. 105 ("When the attack takes the form of impeachment of character, by showing misconduct, convictions or bad reputation, it is generally agreed that there is no color for sustaining by consistent statements. The defense does not meet the assault.") * * *

There may arise instances when out-of-court statements that postdate the alleged fabrication have some probative force in rebutting a charge of fabrication or improper influence or motive, but those statements refute the charged fabrication in a less direct and forceful way. Evidence that a witness made consistent statements after the alleged motive to fabricate arose may suggest in some degree that the in-court testimony is truthful, and thus suggest in some degree that that testimony did not result from some improper influence; but if the drafters of Rule 801(d)(1)(B) intended to countenance rebuttal along that indirect inferential chain, the purpose of confining the types of impeachment that open the door to rebuttal by introducing consistent statements becomes unclear. If consistent statements are admissible without reference to the time frame we find imbedded in the Rule, there appears no sound reason not to admit consistent statements to rebut other forms of impeachment as well. Whatever objections can be leveled against limiting the Rule to this designated form of impeachment and confining the rebuttal to those statements made before the fabrication or improper influence or motive arose, it is clear to us that the drafters of Rule 801(d)(1)(B) were relying upon the common-law temporal requirement.

The underlying theory of the Government's position is that an out-of-court consistent statement, whenever it was made, tends to bolster the testimony of a witness and so tends also to rebut an express or implied charge that the testimony has been the product of an improper influence. Congress could have adopted that rule with ease, providing, for instance, that "a witness' prior consistent statements are admissible whenever relevant to assess the witness's truthfulness or accuracy." The theory would be that, in a broad sense, any prior statement by a witness concerning the disputed issues at trial would have some relevance in assessing the accuracy or truthfulness of the witness's in-court testimony on the same subject. The narrow Rule enacted by Congress, however, cannot be understood to incorporate the Government's theory. * * *

The language of the Rule, in its concentration on rebutting charges of recent fabrication, improper influence and motive to the exclusion of other forms of impeachment, as well as in its use of wording which follows the language of the common-law cases, ~~suggests that it was intended to carry over the common-law pre-motive rule.~~

B

Our conclusion that Rule 801(d)(1)(B) embodies the common-law pre motive requirement is confirmed by an examination of the Advisory Committee Notes to the Federal Rules of Evidence. We have relied on those well-considered Notes as a useful guide in ascertaining the meaning of the Rules. Where, as with Rule 801(d)(1)(B), "Congress did not amend the Advisory Committee's draft in any way * * * the Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, at 165-166, n. 9 (1988). The Notes are also a respected source of scholarly commentary. Professor Cleary was a distinguished commentator on the law of evidence, and he and members of the Committee consulted and considered the views, criticisms, and suggestions of the academic community in preparing the Notes.

The Notes disclose a purpose to adhere to the common law in the application of evidentiary principles, absent express provisions to the contrary. Where the Rules did depart from their common-law antecedents, in general the Committee said so. * * * ~~The Notes give no indication, however, that Rule 801(d)(1)(B) abandoned the pre motive requirement.~~ * * *

Throughout their discussion of the Rules, the Advisory Committee Notes rely on Wigmore and McCormick as authority for the common-law approach. In light of the categorical manner in which those authors state the pre motive requirement, it is difficult to imagine that the drafters, who noted the new substantive use of prior consistent statements, would have remained silent if they intended to modify the pre motive requirement. As we observed with respect to another provision of the Rules, "[w]ith this state of unanimity confronting the drafters of the Federal Rules of Evidence, we think it unlikely that they intended to scuttle entirely [the common-law requirement]." *United States v. Abel*, 469 U.S. 45, 50 (1984). Here, we do not think the drafters of the Rule intended to scuttle the whole pre motive requirement and rationale without so much as a whisper of explanation.

* * *

Our conclusion is bolstered by the Advisory Committee's stated "unwillingness to countenance the general use of prior prepared statements as substantive evidence." Rule 801(d), which "enumerates three situations in which the statement is excepted from the category of hearsay," was expressly contrasted by the Committee with Uniform Rule of Evidence 63(1) (1953), "which allows any out-of-court statement of a declarant who is present at the trial and available for cross-examination." When a witness presents important testimony damaging to a party, the party will often counter with at least an implicit charge that the witness has been under some influence or motive to

fabricate. If Rule 801 were read so that the charge opened the floodgates to any prior consistent statement that satisfied Rule 403, as the Tenth Circuit concluded, the distinction between rejected Uniform Rule 63(1) and Rule 801(d)(1)(B) would all but disappear. * * * Nothing in the Advisory Committee's Notes suggests that it intended to alter the common-law premotive requirement.

C

The Government's final argument in favor of affirmance is that the common-law premotive rule advocated by petitioner is inconsistent with the Federal Rules' liberal approach to relevancy and with strong academic criticism, beginning in the 1940's, directed at the exclusion of out-of-court statements made by a declarant who is present in court and subject to cross-examination. This argument misconceives the design of the Rules' hearsay provisions.

Hearsay evidence is often relevant. "The only way in which the probative force of hearsay differs from the probative force of other testimony is in the absence of oath, demeanor, and cross-examination as aids in determining credibility." Advisory Committee's Introduction to Article VIII, 28 U.S.C. App., p. 771. That does not resolve the matter, however. Relevance is not the sole criterion of admissibility. Otherwise, it would be difficult to account for the Rules' general proscription of hearsay testimony (absent a specific exception), see Fed. Rule Evid. 802, let alone the traditional analysis of hearsay that the Rules, for the most part, reflect. * * *

The Government's reliance on academic commentators critical of excluding out-of-court statements by a witness * * * is subject to like criticism. To be sure, certain commentators in the years preceding the adoption of the Rules had been critical of the common-law approach to hearsay, particularly its categorical exclusion of out-of-court statements offered for substantive purposes. See, e.g., Weinstein, *The Probative Force of Hearsay*, 46 Iowa L. Rev. 331, 344-345 (1961) (gathering sources). General criticism was directed to the exclusion of a declarant's out-of-court statements where the declarant testified at trial. See, e.g., Weinstein, *supra*, at 333 ("treating the out of court statement of the witness himself as hearsay" is a "practical absurdity in many instances"); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 192-196 (1948). As an alternative, they suggested moving away from the categorical exclusion of hearsay and toward a case-by-case balancing of the probative value of particular statements against their likely prejudicial effect. The Advisory Committee, however, was explicit in rejecting this balancing approach to hearsay: "The Advisory Committee has rejected this approach to hearsay as involving too great a measure of judicial discretion, minimizing the predictability of rulings, [and] enhancing the difficulties of preparation for trial."

The statement-by-statement balancing approach advocated by the Government and adopted by the Tenth Circuit creates the precise dangers the Advisory Committee noted and sought to avoid: It involves considerable judicial discretion; it reduces predictability; and it enhances the difficulties of trial preparation because parties will have difficulty knowing in advance whether or not particular out-of-court statements will be admitted.

D

The case before us illustrates some of the important considerations supporting the Rule as we interpret it, especially in criminal cases. If the Rule were to permit the introduction of prior statements as substantive evidence to rebut every implicit charge that a witness' in-court testimony results from recent fabrication or improper influence or motive, the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones. The present case illustrates the point. In response to a rather weak charge that A.T.'s testimony was a fabrication created so the child could remain with her mother, the Government was permitted to present a parade of sympathetic and credible witnesses who did no more than recount A.T.'s detailed out-of-court statements to them. Although those statements might have been probative on the question whether the alleged conduct had occurred, they shed but minimal light on whether A.T. had the charged motive to fabricate. At closing argument before the jury, the Government placed great reliance on the prior statements for substantive purposes but did not once seek to use them to rebut the impact of the alleged motive.

We are aware that in some cases it may be difficult to ascertain when a particular fabrication, influence, or motive arose. Yet, as the Government concedes, a majority of common-law courts were performing this task for well over a century * * * and the Government has presented us with no evidence that those courts, or the judicial circuits that adhere to the rule today, have been unable to make the determination. Even under the Government's hypothesis, moreover, the thing to be rebutted must be identified, so the date of its origin cannot be that much more difficult to ascertain. By contrast, the Government's approach, which would require the trial court to weigh all of the circumstances surrounding a statement that suggest its probativeness against the court's assessment of the strength of the alleged motive, would entail more of a burden, with no guidance to attorneys in preparing a case or to appellate courts in reviewing a judgment.

III

Courts must be sensitive to the difficulties attendant upon the prosecution of alleged child abusers. In almost all cases a youth is the prosecution's only eye witness. But "[t]his Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases." When a party seeks to introduce out-of-court statements that contain strong circumstantial indicia of reliability, that are highly probative on the material questions at trial, and that are better than other evidence otherwise available, there is no need to distort the requirements of Rule 801(d)(1)(B). If its requirements are met, Rule 803(24) [now Rule 807] exists for that eventuality. We intimate no view, however, concerning the admissibility of any of A.T.'s out-of-court statements under that section, or any other evidentiary principle. These matters, and others, are for the Court of Appeals to decide in the first instance.

Our holding is confined to the requirements for admission under Rule 801(d)(1)(B). The Rule permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper

influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive. These conditions of admissibility were not established here.

The judgment of the Court of Appeals for the Tenth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[Concurring opinion of JUSTICE SCALIA omitted.]

JUSTICE BREYER, with whom the CHIEF JUSTICE, JUSTICE O'CONNOR and JUSTICE THOMAS join, dissenting.

The basic issue in this case concerns, not hearsay, but relevance. As the majority points out, the common law permitted a lawyer to rehabilitate a witness (after a charge of improper motive) by pointing to the fact that the witness had said the same thing earlier — but only if the witness made the earlier statement *before* the motive to lie arose. The reason for the time limitation was that, otherwise, the prior consistent statement had no *relevance* to rebut the charge that the in-court testimony was the product of the motive to lie. * * *

The majority believes that a hearsay-related rule, Federal Rule of Evidence 801(d)(1)(B), codifies this absolute timing requirement. I do not. Rule 801(d)(1)(B) has nothing to do with relevance. Rather, that Rule carves out a subset of prior consistent statements that were formerly admissible only to rehabilitate a witness (a nonhearsay use that relies upon the fact that the statement was made). It then says that members of that subset are “not hearsay.” This means that, *if* such a statement is admissible for a particular rehabilitative purpose (to rebut a charge of recent fabrication, improper influence or motive), its proponent now may use it substantively, for a hearsay purpose (*i.e.*, as evidence of its truth), as well.

* * *

Assuming Rule 801(d)(1)(B) does not codify the absolute timing requirement, I must still answer the question whether, as a *relevance* matter, the common-law statement of the premotive rule stands as an absolute bar to a trial court's admission of a postmotive prior consistent statement for the purpose of rebutting a charge of recent fabrication or improper influence or motive. The majority points to statements of the timing rule that do suggest that, for reasons of relevance, the law of evidence *never* permits their admission. Yet, absolute-sounding rules often allow exceptions. And, there are sound reasons here for permitting an exception to the timing rule where circumstances warrant.

For one thing, one can find examples where the timing rule's claim of “no relevancy” is simply untrue. A postmotive statement *is* relevant to rebut, for example, a charge of recent fabrication based on improper motive, say, when the speaker made the prior statement while affected by a far more powerful motive to tell the truth. A speaker might be moved to lie to help an acquaintance. But, suppose the circumstances *also* make clear to the speaker that only the truth will save his child's life. Or, suppose the postmotive statement was

made spontaneously, or when the speaker's motive to lie was much weaker than it was at trial. In these and similar situations, special circumstances may indicate that the prior statement was made for some reason other than the alleged improper motivation; it may have been made not *because of*, but *despite*, the improper motivation. Hence, postmotive statements can, *in appropriate circumstances*, directly refute the charge of fabrication based on improper motive, not because they bolster in a general way the witness' trial testimony, but because the circumstances indicate that the statements are not causally connected to the alleged motive to lie.

* * *

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

In this case, the Court of Appeals, applying an approach consistent with what I have described above, decided that A.T.'s prior consistent statements were probative on the question of whether her story as a witness reflected a motive to lie. There is no reason to reevaluate this factbound conclusion. Accordingly, I would affirm the judgment of the Court of Appeals.

NOTES

1. Under what circumstances may a charge of recent fabrication or improper motive be implied?

A typical example of such an implied attack occurred in *United States v. Montague*, 958 F.2d 1094 (D.C. Cir. 1992), where, on cross-examination, the defendant inquired of a government witness whether the witness hoped to secure clemency by testifying against the defendant. The Court held the question constituted an implied charge of improper motive, making prior consistent statements admissible. Extensive and intense cross-examination can sometimes cross the line from simply challenging the witness's account to a charge of fabrication. *See also United States v. Cherry*, 938 F.2d 748 (7th Cir. 1991) (extensive cross-examination challenging the core of the victim's testimony in a sex abuse case constituted an implied charge of fabrication justifying admissibility of prior consistent statements).

2. Can a prior consistent statement be introduced through a witness other than the person who made the statement?

In *United States v. Hebeke*, 25 F.3d 287 (6th Cir. 1994), a food stamp fraud prosecution, defense counsel attacked the credibility of the government's star witness, Dennis Alfred, implying that Alfred fabricated his testimony to avoid prosecution. The Government sought to rehabilitate Alfred by introducing his prior consistent statement; but instead of introducing the statement through Alfred himself, the Government called another witness who testified to what Alfred told him. The Court held that the "literal requirements of Rule 801 can be met even when a third party testifies as to someone else's prior statement." The Court noted that Alfred was in court, subject to cross-examination, and could easily have been recalled after the third party's testimony. While recognizing that the Seventh Circuit has ruled that prior statements may be admitted through the declarant only — see *United States v. West*, 670 F.2d 675 (7th Cir. 1982) — the *Hebeke* Court stated that "the Seventh Circuit appears to be a minority of one" on this question. Note that the result in *Hebeke* was contingent upon Alfred being present at trial and subject to cross-examination; this is a predicate for all statements offered under Rule 801(d)(1).

3. Can a criminal defendant's prior consistent statement ever be admissible under Rule 801(d)(1)(B)?

In *United States v. Lewis*, 987 F.2d 1349 (8th Cir. 1993), the defendant's defense to a drug charge was that he was luring drug dealers to Florida in order to turn them in to the authorities. At trial, the Government argued that the defense was an afterthought. The defendant had made a statement prior to his arrest that was consistent with his defense. The trial court excluded the statement, but the Court of Appeals found this to be error; the statement was admissible as a prior consistent statement to rebut a charge of recent fabrication. But the Court found the error to be harmless, because the jury had already heard the defendant testify concerning his defense.

4. Can prior consistent statements be used to rehabilitate the credibility of a witness, even if they are not admissible under Rule 801(d)(1)(B)?

Professor Capra, in *Prior Consistent Statements and the Supreme Court*, N.Y.L.J., July 9, 1995, p.3, had this to say about the law concerning prior consistent statements after *Tome*:

It is important to remember that the Court in *Tome* did not hold that the pre-motive requirement must always be satisfied before prior consistent statements may even be heard by the factfinder. Prior consistent statements can be introduced for *credibility* purposes, to rehabilitate a witness, whenever they are responsive to an attack on credibility. One such situation is where the consistent statement is offered to explain or to clarify an inconsistent statement introduced by the adversary. If the witness claims for example that the apparently inconsistent statement was taken out of context, he can explain the context, which may include statements consistent with his testimony. Rule 801 is not needed to justify such an explanation. The evidence

is relevant under Rule 401 and admissible under Rule 402. As the Court stated in *United States v. Harris*, 761 F.2d 394 (7th Cir. 1985), the general principle set forth in Rule 801(d)(1)(B) — *i.e.*, “the motive to fabricate must not have existed at the time the statements were made or they are inadmissible” — “need not be met to admit into evidence prior consistent statements which are offered solely to rehabilitate a witness rather than as evidence of the matters asserted in those statements.”

However, to be admitted *substantively*, in the absence of some other hearsay exception, a prior consistent statement must be relevant to rebut (and therefore must pre-date) a charge of recent fabrication or improper influence or motive. Where a consistent statement is admissible for other, rehabilitation purposes such as to explain an inconsistency or to rebut a charge of bad memory, and yet is not admissible as substantive evidence under Rule 801(d)(1)(B), the adversary is entitled to a limiting instruction as to the appropriate use of the evidence.

Perhaps the distinction just made — between consistent statements offered solely for rehabilitation and those offered under the Rule as substantive evidence to rebut a charge of recent fabrication or improper influence or motive — is an insubstantial one. Since consistent statements are identical to trial testimony, an instruction that some of them should not be considered for their truth is unlikely to be understood by a jury. A line between substantive and rehabilitative use of these statements may well be of little use. Yet this is the line drawn by the Rule, which carves out only certain prior consistent statements for substantive use: those that rebut a charge of recent fabrication or improper influence or motive. And most importantly, the *Tome* pre-motive requirement assures that many prior consistent statements — those offered to rebut a charge of fabrication or motive and yet which post-date the motive — will not be admissible at all, neither substantively nor for impeachment purposes. This will help to ensure that the jury decides the case on the basis of testimony at the trial rather than on prior statements of witnesses.

[3] Prior Identifications

[a] Federal Rule of Evidence 801(d)(1)(C)

Rule 801. Definitions

* * *

(d) **Statements which are not hearsay.** A statement is not hearsay if —

(1) **Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * ~~(C) one of identification of a person made after perceiving the person.~~

* * *

[b] Illustration

Defendant is charged with murder. The only evidence that the defendant is guilty is highly circumstantial evidence and the testimony from one eyewitness, Scared Witless. The prosecution calls Witless to the stand.

Prosecution: State your name.
 Witless: Scared Witless.
 Prosecution: Where were you at 3:00 p.m. on June 8?
 Witless: At the victim's house.
 Prosecution: What did you see?
 Witless: A man came in the door with a shotgun, laughed, then blew my friend's brains out.
 Prosecution: Can you identify the killer in the courtroom today (said with great confidence)?
 Witless: No, I don't think so.
 Prosecution: What!?
 Witless: No, I can't identify the killer.
 Prosecution: No further questions.
 Defendant: No cross, your honor.

The prosecution calls Top Cop to the stand.

Prosecution: State your name.
 Top Cop: Top Cop.
 Prosecution: Did you interview Scared Witless the day of the murder?
 Top Cop: Yes.
 Prosecution: Did you take him to a line-up that day?
 Top Cop: Yes.
 Prosecution: Was the defendant in the line-up?
 Top Cop: Yes.
 Prosecution: Did Scared Witless identify the defendant as the murderer?
 Top Cop: Yes, he said * * *
 Defendant: Objection! Prior statements aren't admissible. That's hearsay.
 Prosecution: _____. (What additional steps must the prosecutor take?)

[c] Subject to Cross-Examination

UNITED STATES v. OWENS
 484 U.S. 554 (1988)

JUSTICE SCALIA delivered the opinion of the Court.

This case requires us to determine whether either the Confrontation Clause of the Sixth Amendment or Rule 802 of the Federal Rules of Evidence bars testimony concerning a prior, out-of-court identification when the identifying

witness is unable, because of memory loss, to explain the basis for the identification.

I

On April 12, 1982, John Foster, a correctional counselor at the federal prison in Lompoc, California, was attacked and brutally beaten with a metal pipe. His skull was fractured, and he remained hospitalized for almost a month. As a result of his injuries, Foster's memory was severely impaired. When Thomas Mansfield, an FBI agent investigating the assault, first attempted to interview Foster, on April 19, he found Foster lethargic and unable to remember his attacker's name. On May 5, Mansfield again spoke to Foster, who was much improved and able to describe the attack. Foster named respondent as ~~his attacker and identified respondent from an array of photographs.~~

Respondent was tried in Federal District Court for assault with intent to commit murder under 18 U.S.C. § 113(a). At trial, Foster recounted his activities just before the attack, and described feeling the blows to his head and seeing blood on the floor. He testified that he clearly remembered identifying respondent as his assailant during his May 5th interview with Mansfield. On cross-examination, he admitted that he could not remember seeing his assailant. He also admitted that, although there was evidence that he had received numerous visitors in the hospital, he was unable to remember any of them except Mansfield, and could not remember whether any of these visitors had suggested that respondent was the assailant. Defense counsel unsuccessfully sought to refresh his recollection with hospital records, including one indicating that Foster had attributed the assault to someone other than respondent. Respondent was convicted and sentenced to 20 years' imprisonment to be served consecutively to a previous sentence.

On appeal, the United States Court of Appeals for the Ninth Circuit considered challenges based on the Confrontation Clause and Rule 802 of the Federal Rules of Evidence.¹

By divided vote it upheld both challenges (though finding the Rule 802 violation harmless error), and reversed the judgment of the District Court. We granted certiorari * * * to resolve the conflict with other Circuits on the significance of a hearsay declarant's memory loss both with respect to the Confrontation Clause.

II

~~The Confrontation Clause of the Sixth Amendment gives the accused the right "to be confronted with the witnesses against him." This has long been read as securing an adequate opportunity to cross-examine adverse witnesses.~~

¹ This case has been argued, both here and below, as though Federal Rule of Evidence 801(d)(1)(C) were the basis of the challenge. That is substantially but not technically correct. If respondent's arguments are accepted, it is Rule 802 that would render the out-of-court statement inadmissible as hearsay; but as explained in Part III, it is ultimately Rule 801(d)(1)(C) that determines whether Rule 802 is applicable.

See, e.g., *Mattox v. United States*, 156 U.S. 237, 242-243 (1895); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965).

* * *

In *Delaware v. Fensterer*, 474 U.S. 15 (1985) (*per curiam*), we determined that there was no Confrontation Clause violation when an expert witness testified as to what opinion he had formed, but could not recollect the basis on which he had formed it. We said:

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. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.

Our opinion noted that a defendant seeking to discredit a forgetful expert witness is not without ammunition, since the jury may be persuaded that "his opinion is as unreliable as his memory." * * *

* * * [T]he Confrontation Clause guarantees only "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987); as *Fensterer* demonstrates, that opportunity is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief. It is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination) the very fact that he has a bad memory. If the ability to inquire into these matters suffices to establish the constitutionally requisite opportunity for cross-examination when a witness testifies as to his current belief, the basis for which he cannot recall, we see no reason why it should not suffice when the witness' past belief is introduced and he is unable to recollect the reason for that past belief. In both cases the foundation for the belief (current or past) cannot effectively be elicited, but other means of impugning the belief are available. Indeed, if there is any difference in persuasive impact between the statement "I believe this to be the man who assaulted me, but can't remember why" and the statement "I don't know whether this is the man who assaulted me, but I told the police I believed so earlier," the former would seem, if anything, more damaging and hence give rise to a greater need for memory-testing, if that is to be considered essential to an opportunity for effective cross-examination. We conclude with respect to this latter example, as we did in *Fensterer* with respect to the former, that it is not. The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee. They are, however, realistic weapons, as is demonstrated by defense counsel's summation in this very case, which emphasized Foster's memory loss and argued that

his identification of respondent was the result of the suggestions of people who visited him in the hospital.

* * *

III

Respondent urges as an alternative basis for affirmance a violation of Federal Rule of Evidence 802, which generally excludes hearsay. Rule 801(d)(1)(C) defines as not hearsay a prior statement "of identification of a person made after perceiving the person," if the declarant "testifies at the trial or hearing and is subject to cross-examination concerning the statement." The Court of Appeals found that Foster's identification statement did not come within this exclusion because his memory loss prevented his being "subject to cross-examination concerning the statement." * * *

It seems to us that the more natural reading of "subject to cross-examination concerning the statement" includes what was available here. Ordinarily a witness is regarded as "subject to cross-examination" when he is placed on the stand, under oath, and responds willingly to questions. Just as with the constitutional prohibition, limitations on the scope of examination by the trial court or assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination within the intent of the Rule no longer exists. But that effect is not produced by the witness' assertion of memory loss — which, as discussed earlier, is often the very result sought to be produced by cross-examination, and can be effective in destroying the force of the prior statement. Rule 801(d)(1)(C), which specifies that the cross-examination need only "concer[n] the statement," does not on its face require more.

This reading seems even more compelling when the Rule is compared with Rule 804(a)(3), which defines "[u]navailability as a witness" to include situations in which a declarant "testifies to a lack of memory of the subject matter of the declarant's statement." Congress plainly was aware of the recurrent evidentiary problem at issue here — witness forgetfulness of an underlying event — but chose not to make it an exception to Rule 801(d)(1)(C).

The reasons for that choice are apparent from the Advisory Committee's Notes on Rule 801 and its legislative history. The premise for Rule 801(d)(1)(C) was that, given adequate safeguards against suggestiveness, out-of-court identifications were generally preferable to courtroom identifications. Thus, despite the traditional view that such statements were hearsay, the Advisory Committee believed that their use was to be fostered rather than discouraged. Similarly, the House Report on the Rule noted that since, "[a]s time goes by, a witness' memory will fade and his identification will become less reliable," minimizing the barriers to admission of more contemporaneous identification is fairer to defendants and prevents "cases falling through because the witness can no longer recall the identity of the person he saw commit the crime." H.R. Rep. No. 94-355, p. 3 (1975). To judge from the House and Senate Reports, Rule 801(d)(1)(C) was in part directed to the very problem here at issue: a memory loss that makes it impossible for the witness to provide an in-court

identification or testify about details of the events underlying an earlier identification.

Respondent argues that this reading is impermissible because it creates an internal inconsistency in the Rules, since the forgetful witness who is deemed "subject to cross-examination" under 801(d)(1)(C) is simultaneously deemed "unavailable" under 804(a)(3). * * * It seems to us, however, that this is not a substantive inconsistency, but only a semantic oddity resulting from the fact that Rule 804(a) has for convenience of reference in Rule 804(b) chosen to describe the circumstances necessary in order to admit certain categories of hearsay testimony under the rubric "Unavailability as a witness." These circumstances include not only absence from the hearing, but also claims of privilege, refusals to obey a court's order to testify, and inability to testify based on physical or mental illness or memory loss. Had the rubric instead been "unavailability as a witness, memory loss, and other special circumstances" there would be no apparent inconsistency with Rule 801, which is a definition section excluding certain statements entirely from the category of "hearsay." The semantic inconsistency exists not only with respect to Rule 801(d)(1)(C), but also with respect to the other subparagraphs of Rule 801(d)(1). It would seem strange, for example, to assert that a witness can avoid introduction of testimony from a prior proceeding that is inconsistent with his trial testimony, *see* Rule 801(d)(1)(A), by simply asserting lack of memory of the facts to which the prior testimony related. But that situation, like this one, presents the verbal curiosity that the witness is "subject to cross-examination" under Rule 801 while at the same time "unavailable" under Rule 804(a)(3). Quite obviously, the two characterizations are made for two entirely different purposes and there is no requirement or expectation that they should coincide.

For the reasons stated, we hold that neither the Confrontation Clause nor Federal Rule of Evidence 802 is violated by admission of an identification statement of a witness who is unable, because of a memory loss, to testify concerning the basis for the identification. The decision of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

So ordered.

[Dissenting opinion of JUSTICE BRENNAN omitted.]

NOTES

1. Is an identification based on a police artist's sketch admissible as a statement of prior identification?

In *United States v. Moskowitz*, 581 F.2d 14 (2d Cir. 1978), the Court gave a sketch the same treatment as it would have given a photograph and ruled that the statements of a witness making an identification based on a police artist's sketch and the sketch itself were both admissible.

2. Is a pre-trial identification admissible if the witness who made the identification cannot identify the defendant at trial?

In *United States v. Blackman*, 66 F.3d 1572 (11th Cir. 1995), a bank teller was unable to identify the defendant at trial as the robber. An FBI agent then took the stand and testified that the teller had previously identified the defendant from a photospread. The Court found this testimony properly admitted. The teller was available for cross-examination, even though she could not identify the defendant at trial. Indeed, the fact that she could not make an identification at trial was fertile ground for cross-examination.

3. Is the witness "subject to cross-examination" if she makes an identification but later refuses to testify?

Professors Saltzburg, Martin, and Capra, in *Federal Rules of Evidence Manual* (9th ed. 2006), advise:

A witness who refuses to testify cannot be found "subject to cross-examination" within the meaning of Rule 801(d)(1). Thus, in *United States v. Torres-Ortega*, 148 F.3d 1128 (10th Cir. 1999), the Court found reversible error when a prosecution witness refused to testify and the government introduced his prior grand jury statement under Rule 801(d)(1)(A). The Court distinguished *Owens* as a case in which the witness who made the prior statement answered all questions on cross-examination; obtaining a concession of lack of memory might well be effective cross-examination, whereas no cross-examination is possible if the witness simply refuses to answer all questions.

C. ADMISSIONS BY A PARTY

[1] Federal Rule of Evidence 801(d)(2)

Rule 801. Definitions

* * *

(d) **Statements which are not hearsay.** A statement is not hearsay if—

* * *

(2) **Admission by party-opponent.** — The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof

under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

[2] Own Statement

Illustration

The defendant is charged with failing to pay withholding taxes. The defendant is an employee of XYZ, Inc. and defends on the theory that he did not control the corporate fund that should have paid the withholdings. The prosecution calls the defendant's barber to the stand.

Prosecution:	Did you have a conversation with the defendant on April 14, 2000?
Barber:	Yes.
Prosecution:	Did you talk about the withholding of taxes by XYZ, Inc.?
Barber:	Yes.
Prosecution:	What did he say? (seeking: the defendant told me he didn't pay withholding taxes)
Defense:	(1) Objection _____.
The Court:	(2) _____.
Barber:	The defendant said he didn't pay the withholding taxes.

The state has no further questions and the defense cross-examines.

Defense:	Did you have a conversation with the defendant two days later?
Barber:	Yes.
Defense:	What did the defendant say?
Prosecution:	Objection. Calls for hearsay.
Defense:	Your honor, if the prosecutor is allowed to introduce my client's statements to incriminate him, I should be allowed to admit my client's statements to exculpate him.
Court:	(3) _____.

STATE v. JOHNSON 245 N.W.2d 687 (Wisc. 1976)

CONNOR T. HANSEN, JUSTICE.

Johnson was the incorporator of Midwestern Pacific Corporation, with offices in Appleton, Wisconsin. He served as president and director of the company from July of 1970, through September of 1972. He was charged with eleven counts of willfully failing to deposit with the State, certain withholding taxes * * *.

Midwestern was engaged in the business of subcontracting right-of-way clearance work. The corporation operated mainly in the State of Wisconsin,

with occasional jobs out of state, and "altogether" had approximately 40-45 employees. The corporation was financed through an arrangement with the First National Bank of Menasha and a guarantee of George Banta of the George Banta Company. * * * Testimony was in conflict as to the actual amount of control over funds possessed by Johnson, First National and George Banta, and thus, the responsibility of Johnson for failure to make the required withholding tax deposits was in issue.

The parties stipulated that the amounts alleged in the complaint were withheld from the employees during the periods alleged and that such sums were not deposited with the State of Wisconsin. The defendant did not stipulate that the failure to deposit such sums was a willful act on his part; therefore, at trial, the principal issue became the willfulness of Johnson in failing to deposit the sums required.

* * *

Exclusion of Testimony as Hearsay

The prosecution called accountant, John Myron, as a witness. On direct examination, Myron testified extensively concerning accounting work which he had done for Johnson and Midwestern in 1971 and 1972. He stated that late in October, 1971, John Weber (of the Wisconsin Department of Revenue) assisted Johnson in filling out and filing new WT-6 forms (forms which reflected the total amount of income tax withheld from employees and due to the state) because the original WT-6 forms filled out by Myron had never been filed. In response to the question, "Did Mr. Johnson pay any amount at that time?" Myron answered, "Well, I know he didn't because later on he told me he hadn't." Defense counsel did not object to Myron's testimony.

On cross-examination, defense counsel asked Myron if he specifically remembered any conversations with Mr. Johnson about his financial condition. The prosecution objected that to the extent that Myron's answers would involve statements of the defendant, they would be hearsay. The trial court sustained the objection. Defense counsel acknowledged that the statements, if made by the defendant, would be self-serving and stated in his offer of proof:

Well, Your Honor, we would show that this man — that the statements were that he did instruct Mr. Johnson to pay these taxes and that Mr. Johnson indicated that he did not * * *. But he indicated and expressed he did not control the funds. And he could not pay them and he was very disturbed about it.

The trial court subsequently ruled that there would be no valid objection if Myron testified that based on his observations of the defendant during discussions of the question of the tax liability, and in his opinion, the defendant was concerned about making payments; but that Myron could not testify as to what was said by the defendant in that such statements that were self-serving would be inadmissible.

* * *

Johnson argues that since admissions * * * were admitted [against him], there should be a correlative right to introduce beneficial admissions on cross-examination. The Rules of Evidence do not allow for such symmetry in this case.

* * *

The testimony of Myron on direct examination constituted evidence of an "admission" of the defendant, a party to this action, which was offered against the defendant, and it was admissible on this basis * * * .

It appears that both the prosecution and the defense have confused "admission[s]" * * * , with "STATEMENTS AGAINST INTEREST" * * * .

In Wisconsin Rules of Evidence, * * * the judicial council committee's notes, * * * point out the problems of confusing the two:

A type of evidence with which admissions may be confused is evidence of Declarations against Interest. Such declarations, coming in under a separate exception to the hearsay rule, to be admissible must have been against the declarant's interest when made. No such requirement applies to admissions * * * . Of course, most admissions are actually against interest when made, but there is no such requirement. Hence the common phrase in judicial opinions, "admissions against interest" is an invitation to confuse two separate exceptions to the hearsay rule. Other apparent distinctions are that admissions must be statements of a party to a lawsuit (or his predecessor or representative) and must be offered, not for, but against him, whereas the Declaration against Interest need not be and usually is not made by a party or his predecessor or representative, but by some third person. Finally the Declaration against Interest exception admits the declaration only when the declarant, by death or otherwise, has become unavailable as a witness, whereas obviously no such requirement is applied to admissions of a party.

* * *

The testimony sought to be elicited from the witness-Myron on cross-examination concerning self-serving statements made by the defendant was clearly hearsay and was properly excluded by the trial court.

* * *

Order affirmed.

NOTES

1. Does the admission exclusion to the hearsay rule require that the defendant have personal knowledge of the truth of the statement made?

As a general rule, the constraints of Federal Rule 602, which require personal knowledge, do not apply to admissions. Thus, a statement by the keeper of a wolf that the wolf bit a child was admissible against the keeper even though he had not witnessed the event. *Mahlandt v. Wild Canid Survival & Research Ctr., Inc.*, 588 F.2d 626 (8th Cir. 1978).

2. Must an admission be incriminatory when made?

It is well-established that a statement need not have been incriminatory at the time it was made for the statement to qualify as an admission. Thus, in *United States v. Turner*, 995 F.2d 1357 (6th Cir. 1993), the defendant made statements to government agents in a misguided attempt to exculpate himself. These statements proved false, and the government admitted them at trial as evidence of the defendant's consciousness of guilt. The Court found that these statements were properly admitted under Rule 801(d)(2)(A). On its face, the rule is not limited to statements against interest when made. All that is required under this rule is that the statement was made by the party-opponent and offered against him at trial.

3. If a statement is admissible as an admission, is further analysis required?

Further analysis may be required under other evidence rules, because qualifying a statement under an exemption or exception to the hearsay rule simply means that it will not be excluded as hearsay. For example, a statement otherwise admissible as a party-admission might be excluded under Rule 404(b) or Rule 403 if it is an admission of uncharged misconduct. See, e.g., *United States v. Manafzadeh*, 592 F.2d 81 (2d Cir. 1979).

4. In a multiple-defendant trial, can one defendant offer a statement made by the other as an admission?

In *United States v. Harwood*, 998 F.2d 91 (2d Cir. 1993), the Court held that a statement made by a co-defendant, in which the co-defendant admitted sole responsibility for the crime, could not be admitted in favor of the other defendant under Rule 801(d)(2)(A). This exemption covers only admissions by a party-opponent. A co-defendant is not a party-opponent. The government is the opponent of both co-defendants. Thus, the government could have offered the statement against the defendant who made it, but it chose not to.

[3] Adoptive Admissions

[a] Federal Rule of Evidence 801(d)(2)(B)

Rule 801. Definitions

* * *

(d) Statements which are not hearsay. A statement is not hearsay if—

* * *

(2) Admission by party-opponent. The statement is offered against a party and is * * *. (B) a statement of which the party has manifested an adoption or belief in its truth

[b] By Conduct or Silence

CARR v. DEEDS 453 F.3d 593 (4th Cir. 2006)

TRAXLER, CIRCUIT JUDGE:

Plaintiff Sharon Carr, individually and as administratrix of the estate of her son Joshua Morgan, brought this action under 42 U.S.C.A. § 1983 (West 2003), and various state law provisions, against the State of West Virginia, the Superintendent of the West Virginia State Police, and two of its troopers. Plaintiff's § 1983 claims allege that Trooper V.S. Deeds unconstitutionally employed excessive force against Morgan following Morgan's arrest on June 20, 2001, and that Trooper Deeds and Trooper T.D. Bradley unconstitutionally employed deadly force during an attempted arrest of Morgan on July 10, 2001. On appeal, plaintiff challenges the district court's orders excluding her independent expert, and granting summary judgment to defendants on the § 1983 claims. We affirm both orders.

I.

Because this is an appeal from the grant of summary judgment to the defendants, we review the facts in the light most favorable to the plaintiff.

On June 20, 2001, Trooper Deeds and at least two other law enforcement officers arrested Morgan at the home of Dale Arbaugh pursuant to an outstanding arrest warrant for suspected arson of Arbaugh's home. Morgan was transported to the State Police Barracks in Lewisburg, and then to the Southern Regional Jail in Beckley, by one or more of these officers. Upon his arrival at the Regional Jail, Morgan was medically evaluated and found to have a cut on his lip, also described as a "busted lip," and an abrasion on his right flank or abdomen. No other injuries were noted, and there was no report or complaint of a physical altercation.

Morgan's mother, stepfather, and brother visited Morgan at the police station later that day. Morgan's mother testified that Morgan was bleeding

from his mouth and had abrasions to his shoulder and rib area. Morgan's stepfather testified that Morgan had a swollen lip, "blood coming out of his mouth when he would spit," and abrasions to his shoulders and abdomen area. Morgan's brother testified that Morgan had a swollen eye and "a couple [of] cuts and bruises." None of the witnesses observed any use of force by any officer. However, they testified that, when Morgan was asked about the injuries, he either pointed to or verbally indicated that Deeds had inflicted them.

Two days later, after Morgan had been released from custody, ~~he saw Dr. Craig Bookout~~ at the Greenbrier Valley Medical Center emergency room. According to Dr. Bookout, Morgan had a small cut on his lip and abrasions to his right shoulder and elbows, which Morgan reported to be from "an altercation with a state police officer" on June 20. Morgan also complained of pain in his ribs and a bruised temple, but indicated these were not the result of the altercation. No other injuries were noted. Dr. Bookout was given no information regarding the circumstances of the alleged altercation, nor was the identity of the officer revealed to him. Arbaugh, who had been present when Morgan was arrested, testified that he also saw Morgan after he was released from custody. He testified that Morgan had a black eye, a couple of "places" on the side of his face, and bruises on his arms and legs. Morgan filed no complaint with the West Virginia State Police for any alleged wrongful conduct by its officers.

* * *

On July 1, 2004, defendants also filed a motion for summary judgment. with regard to the June 20 arrest, defendants asserted that plaintiff had failed to produce sufficient evidence that Morgan was injured in an altercation with Deeds and, in the alternative, that the claim should be dismissed because Morgan's injuries were *de minimis*. * * *

* * * The district court found that Deeds was entitled to qualified immunity from the assault claim because Morgan's injuries were *de minimis* * * *.

III.

We now turn to plaintiff's appeal from the district court's order granting summary judgment on her claim that Deeds employed excessive force against Morgan following the June 20 arrest. * * *

* * *

[I]n order to avoid summary judgment * * * it was incumbent upon plaintiff to produce sufficient admissible evidence from which a jury could conclude that Deeds employed at least some force against Morgan in a malicious or sadistic manner, and that the injuries resulting from such force were more than *de minimis*. Deeds is entitled to qualified immunity because, regardless of the severity of Morgan's alleged injuries, the record is devoid of any facts to prove that Deeds employed the force that inflicted those injuries.

* * *

No witness observed any altercation between Morgan and any state police officer. Although Dr. Bookout testified that Morgan told him that some of the injuries were the result of an altercation with a state police officer, Morgan did not identify Deeds as the officer involved or provide any facts as to the circumstances of the alleged altercation. Thus, the only evidence that plaintiff can point to in an effort to implicate Deeds is the testimony of the three family members and Arbaugh to the effect that Morgan either told them or indicated by pointing that Deeds had inflicted the injuries. ~~These statements by Morgan are hearsay and not admissible to create a genuine issue of material fact on the question of whether Deeds inflicted those injuries.~~

Plaintiff's attempt to demonstrate that Deeds made an "adoptive admission" to assaulting Morgan because he was present in the room when Morgan made the statements to his family members also fails. Under the Federal Rules of Evidence, "[a] statement is not hearsay if * * * [t]he statement is offered against a party and is * * * a statement of which the party has manifested an adoption or belief in its truth." Fed. R. Evid. 801(d)(2)(B). "A party may manifest adoption of a statement in any number of ways, including through words, conduct, or silence." *United States v. Robinson*, 275 F.3d 371, 383 (4th Cir. 2001). However, "[w]hen a statement is offered as an adoptive admission, ~~the primary inquiry is whether the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond, and whether there are sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement.~~" *United States v. Williams*, 445 F.3d 724, 735 (4th Cir. 2006) (internal quotation marks omitted).

In this case, there is testimony that Deeds was in the room when the family was visiting, but plaintiff has not demonstrated sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement. Nor has plaintiff offered an argument that a police officer, conducting his official duties in the presence of a detainee and his family, "would normally be induced to respond" to the detainee's claim, made solely to his family, that the officer had assaulted him. Indeed, ~~we think it more likely that the officer would ignore the statement rather than risk antagonizing or inciting the detainee or his family by disputing it.~~

* * *

UNITED STATES v. HOOSIER

661 F.2d 239 (6th Cir. 1976)

PER CURIAM:

Appellant seeks to overturn his jury conviction on one count of armed robbery of a federally insured bank. Four witnesses identified him, three of them positively, as the person who robbed the bank in Clarksville, Tennessee. Another witness, Robert E. Rogers, testified that he had been with the robbery defendant before and after the bank robbery, that before the bank robbery defendant told him that he was going to rob a bank, and that three weeks

after the bank robbery, he saw defendant with money and wearing what he thought were diamond rings, and that in the presence of defendant, the defendant's girl friend said concerning defendant's affluence at that point, "That ain't nothing, you should have seen the money we had in the hotel room," and that she spoke of "sacks of money." Although both defendant and his girl friend disputed these facts in their testimony, obviously the resolution of that fact dispute was for the jury, and we must assume the jury resolved it in favor of the government by its verdict of "guilty."

Appellant's sole appellate argument to this court * * * is that the testimony * * * concerning appellant's girl friend's statement was inadmissible hearsay, and that it was reversible error for the District Judge to fail to grant the objection to its admission. Relevant to this issue is Rule 801(d)(2)(B) of the Federal Rules of Evidence * * *. The Advisory Committee's note concerning this rule is as follows:

(B) Under established principles an admission may be made by adopting or acquiescing in the statement of another. While knowledge of contents would ordinarily be essential, this is not inevitably so: "X is a reliable person and knows what he is talking about." See McCormick § 246, p. 527, n. 15. Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior. In civil cases, the results have generally been satisfactory. In criminal cases, however, troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with; silence may be motivated by advice of counsel or realization that "anything you say may be used against you"; unusual opportunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimination seems inescapably to be involved. However, recent decisions of the Supreme Court relating to custodial interrogation and the right to counsel appear to resolve these difficulties. Hence the rule contains no special provisions concerning failure to deny in criminal cases.

Our analysis of our present problem is made in the context of the Advisory Committee note which is an appropriately guarded one. First, we note that the statement was made in appellant's presence, with only his girl friend and Rogers present. Since appellant had previously trusted Rogers sufficiently to tell him his plan to rob a bank, we see little likelihood that his silence in the face of these statements was due to "advice of counsel" or fear that anything he said might "be used against him." Under the total circumstances, we believe that probable human behavior would have been for appellant promptly to deny his girl friend's statement if it had not been true — particularly when it was said to a person to whom he had previously related a plan to rob a bank. While we agree with appellant's counsel that more is needed to justify admission of this statement than the mere presence and silence of the appellant, we observe that there was more in this record. Finding no reversible error, the judgment of conviction is affirmed.

NOTES

1. What kinds of actions will constitute an adoption?

In *United States v. Ordonez*, 737 F.2d 793 (9th Cir. 1983), the Court ruled that the defendant had not adopted the contents of ledgers seized during a search warrant executed at the defendant's residence. The Court rejected the state's argument that mere possession of the document was enough to establish that the defendant had adopted the statements, which would make them admissible under Rule 801(d)(2)(B). In contrast, in *United States v. Gil*, 58 F.3d 1414 (9th Cir. 1995), the Court held that a drug ledger was properly admitted for its truth as an adoptive admission. The government established an adequate foundation under Rule 104(b) to support a finding that the defendant adopted the ledger. The ledger was found on the defendant's coffee table; the transactions described in the ledger corresponded with the defendant's activities that were observed by police; and the entries corresponded with a separate ledger that had been prepared by the defendant. In *Southern Stone Co. v. Singer*, 665 F.2d 698 (5th Cir. 1982), the Court stated that "the mere failure to respond to a letter does not indicate an adoption unless it was reasonable under the circumstances for the sender to expect the recipient to respond to and to correct erroneous assertions." In *United States v. Hove*, 52 F.3d 233 (9th Cir. 1995), the Court held that "declining an invitation to testify in front of the grand jury simply does not constitute" an adoptive admission of the prosecutor's accusations.

2. Are there any foundation requirements that must be satisfied before a statement can be admitted as an adoptive admission?

As shown in *Carr*, admitting a statement as a party's adoptive admission is dependent upon a showing that the party heard the statement and understood it. This is a question of conditional relevance governed by Rule 104(b). Thus, "before admitting a statement as an adoptive admission, the trial court must determine whether a jury could find that the defendant comprehended and acquiesced in the statement." *United States v. Joshi*, 896 F.2d 1303, 1312 (11th Cir. 1990) (sufficient foundation was laid where the defendant responded with comprehension to other inquiries at the same time).

[4] Authorized Admissions and Admissions by Agent

[a] Federal Rule of Evidence 801(d)(2)(C), (D)

Rule 801. Definitions

* * *

(d) **Statements which are not hearsay.** A statement is not hearsay if—

* * *

(2) **Admission by party-opponent.** The statement is offered against a party and is * * * (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's

agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship * * * The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D) * * *.

**[b] Applying the Rules on Personal Admissions,
Admissions by Speaking Agents, and Admissions by
Agents Acting within the Scope of Their Authority**

**MAHLANDT v. WILD CANID SURVIVAL & RESEARCH
CENTER, INC.
588 F.2d 626 (8th Cir. 1978)**

VAN SICKLE, DISTRICT JUDGE:

This is a civil action for damages arising out of an alleged attack by a wolf on a child. The sole issues on appeal are as to the correctness of three rulings which excluded conclusionary statements against interest. Two of them were made by a defendant, who was also an employee of the corporate defendant; and the third was in the form of a statement appearing in the records of a board meeting of the corporate defendant.

On March 23, 1973, Daniel Mahlandt, then 3 years, 10 months, and 8 days old, was sent by his mother to a neighbor's home on an adjoining street to get his older brother, Donald. Daniel's mother watched him cross the street, and then turned into the house to get her car keys. Daniel's path took him along a walkway adjacent to the Poos' residence. Next to the walkway was a five foot chain link fence to which Sophie had been chained with a six foot chain. In other words, Sophie was free to move in a half circle having a six foot radius on the side of the fence opposite from Daniel.

Sophie was a bitch wolf, 11 months and 28 days old, who had been born at the St. Louis Zoo, and kept there until she reached 6 months of age, at which time she was given to the Wild Canid Survival and Research Center, Inc. It was the policy of the Zoo to remove wolves from the Children's Zoo after they reached the age of 5 or 6 months. Sophie was supposed to be kept at the Tyson Research Center, but Kenneth Poos, as Director of Education for the Wild Canid Survival and Research Center, Inc., had been keeping her at his home because he was taking Sophie to schools and institutions where he showed films and gave programs with respect to the nature of wolves. Sophie was known as a very gentle wolf who had proved herself to be good natured and stable during her contacts with thousands of children, while she was in the St. Louis Children's Zoo.

Sophie was chained because the evening before she had jumped the fence and attacked a beagle who was running along the fence and yapping at her.

A neighbor who was ill in bed in the second floor of his home heard a child's screams and went to his window, where he saw a boy lying on his back within the enclosure, with a wolf straddling him. The wolf's face was near Daniel's face, but the distance was so great that he could not see what the wolf was

doing, and did not see any biting. Within about 15 seconds the neighbor saw Clarke Poos, about seventeen, run around the house, get the wolf off of the boy, and disappear with the child in his arms to the back of the house. Clarke took the boy in and laid him on the kitchen floor.

Clarke had been returning from his friend's home immediately west when he heard a child's cries and ran around to the enclosure. He found Daniel lying within the enclosure, about three feet from the fence, and Sophie standing back from the boy the length of her chain, and wailing. An expert in the behavior of wolves stated that when a wolf licks a child's face that it is a sign of care, and not a sign of attack; that a wolf's wail is a sign of compassion, and an effort to get attention, not a sign of attack. No witness saw or knew how Daniel was injured. Clarke and his sister ran over to get Daniel's mother. She says that Clarke told her, "a wolf got Danny and he is dying." Clarke denies that statement. The defendant, Mr. Poos, arrived home while Daniel and his mother were in the kitchen. After Daniel was taken in an ambulance, Mr. Poos talked to everyone present, including a neighbor who came in. Within an hour after he arrived home, Mr. Poos went to Washington University to inform Owen Sexton, President of Wild Canid Survival and Research Center, Inc., of the incident. Mr. Sexton was not in his office so Mr. Poos left the following note on his door: "Owen, would you call me at home, 727-5080? Sophie bit a child that came in our back yard. All has been taken care of. I need to convey what happened to you."

Denial of admission of this note is one of the issues on appeal.

Later that day, Mr. Poos found Mr. Sexton at the Tyson Research Center and told him what had happened. Denial of plaintiff's offer to prove that Mr. Poos told Mr. Sexton that, "Sophie had bit a child that day," is the second issue on appeal.

A meeting of the Directors of the Wild Canid Survival and Research Center, Inc., was held on April 4, 1973. Mr. Poos was not present at that meeting. The minutes of that meeting reflect that there was a "great deal of discussion * * * about the legal aspects of the incident of Sophie biting the child." Plaintiff offered an abstract of the minutes containing that reference. Denial of the offer of that abstract is the third issue on appeal.

Daniel had lacerations of the face, left thigh, left calf, and right thigh, and abrasions and bruises of the abdomen and chest. Mr. Mahlandt was permitted to state that Daniel had indicated that he had gone under the fence. Mr. Mahlandt and Mr. Poos, about a month after the incident, examined the fence to determine what caused Daniel's lacerations. Mr. Mahlandt felt that they did not look like animal bites. The parallel scars on Daniel's thigh appeared to match the configuration of the barbs or tines on the fence. The expert as to the behavior of wolves opined that the lacerations were not wolf bites or wounds caused by wolf claws. Wolves have powerful jaws and a wolf bite will result in massive crushing or severing of a limb. He stated that if Sophie had bitten Daniel there would have been clear apposition of teeth and massive crushing of Daniel's hands and arms which were not injured. Also, if Sophie had pulled Daniel under the fence, tooth marks on the foot or leg would have been present, although Sophie possessed enough strength to pull the boy under the fence.

The jury brought in a verdict for the defense.

The trial judge's rationale for excluding the note, the statement, and the corporate minutes, was the same in each case. He reasoned that Mr. Poos did not have any personal knowledge of the facts, and accordingly, the first two admissions were based on hearsay; and the third admission contained in the minutes of the board meeting was subject to the same objection of hearsay, and unreliability because of lack of personal knowledge.

* * *

The statement in the note pinned on the door is * * * admissible against Mr. Poos. It was his own statement, and as such was clearly different from the reported statement of another. Example, "I was told that * * * ." * * * It was also a statement of which he had manifested his adoption or belief in its truth. And the same observations may be made of the statement made later in the day to Mr. Sexton that, "Sophie had bit a child."

Are these statements admissible against Wild Canid Survival and Research Center, Inc.? They were made by Mr. Poos when he was an agent or servant of the Wild Canid Survival and Research Center, Inc., and they concerned a matter within the scope of his agency, or employment, *i.e.*, his custody of Sophie, and were made during the existence of that relationship.

* * *

[W]e conclude that the two statements made by Mr. Poos were admissible under 801(d)(2)(D) against Wild Canid Survival and Research Center, Inc.

As to the entry in the records of a corporate meeting, the directors as primary officers of the corporation had the authority to include their conclusions in the record of the meeting. So the evidence would fall within 801(d)(2)(C) as to Wild Canid Survival and Research Center, Inc., and be admissible. * * *

But there was no servant, or agency, relationship which justified admitting the evidence of the board minutes as against Mr. Poos.

None of the conditions of 801(d)(2) cover the claim that minutes of a corporate board meeting can be used against a non-attending, non-participating employee of that corporation. The evidence was not admissible as against Mr. Poos.

* * *

The judgment of the District Court is reversed and the matter remanded to the District Court for a new trial consistent with this opinion.

NOTES

1. The court in *Mahlandt* held that some of the agent's statements could be admitted under Rule 801(d)(2)(C) and others under 801(d)(2)(D). What is the distinction between the two provisions?

The Fourth Circuit Court of Appeals in *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 321 (4th Cir. 1982), addressed the issue as follows:

Clause (C) provides that a statement offered against a party is not hearsay if it is "a statement by a person authorized by him to make a statement concerning the subject." This provision states the "orthodox" rule, and demands as a prerequisite to admissibility a showing based on evidence independent of the alleged hearsay that the declarant is an agent of the party with authority to speak on the subject. Ordinarily, under this rule, an employee's admissions damaging to his employer would be inadmissible on the grounds that the employee was not authorized to make damaging admissions. * * *

Clause (D) broadens the narrower "orthodox" rule embodied in Clause (C). Clause (D) excludes from the definition of hearsay when offered against a party a statement "by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." Here, too, independent evidence establishing the existence of the agency must be adduced, but specific authorization to speak need not be shown. That the statement is made about a matter within the scope of the agency is sufficient.

2. Must an agent make a statement to a third party before there is an admission?

In *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1307 n. 25 (9th Cir. 1983), the Court ruled that the common law requirement that an agent make a statement to a third party had been overruled by Rule 801. Therefore, the Court admitted a report on the defendant's business that had been prepared by an agent at the request of the defendant, despite the fact that the report had not been delivered to anyone other than executives in the defendant's business or the business's shareholders.

3. Can the statement of an expert witness retained by a party be admissible against that party as an agency-admission?

In *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147 (3rd Cir. 1995), an asbestos case, the court held that the testimony of an expert called by the defendant in an unrelated asbestos case could not be used in the instant case against the defendant as an admission by an authorized agent. The court noted that the expert witness was not one of the defendant's employees, and that an agency could not be found simply because the expert testified at the previous trial on the defendant's behalf. The court stated: "Because an expert witness is charged with the duty of giving his or her expert opinion regarding the matter before the court, we fail to comprehend how an expert witness, who is not an agent of the party who called him, can be authorized to make an admission for that party."

[c] Within the Scope of the Agency or Employment**HILL v. SPIEGEL, INC.**
708 F.2d 233 (6th Cir. 1983)

BAILEY BROWN, SENIOR CIRCUIT JUDGE:

* * * Plaintiff-appellee Emery J. Hill brought this action against defendant-appellant Spiegel, Inc., a Delaware corporation, alleging that Spiegel terminated his employment on the basis of age. The case was tried before a jury which returned a verdict in favor of Hill. The jury awarded Hill \$230,000.00 actual and compensatory damages for the loss of wages and income, \$80,000.00 damages for pain and suffering, moving and related expenses, and found Spiegel's conduct to be "willful." The district court thereafter ordered a remittitur reducing the amount of actual and compensatory damages to \$115,000.00, awarding liquidated damages in an equal amount, and awarding \$80,000.00 for pain and suffering and moving costs. The court further awarded Hill attorneys' fees, costs and expenses. Spiegel brings this appeal claiming numerous errors below, including the award of damages for pain and suffering. We find merit in some of Spiegel's claims, and thus vacate the judgment of the district court and remand for further proceedings consistent with this opinion.

Background

On February 26, 1976, Emery Hill was terminated from his job as an executive with Spiegel, Inc., a well known mail-order business. Hill was 57 years old at the time and had been in the employ of Spiegel for more than 26 years, most recently as a regional manager in the company's catalog order store (COS) division. Hill's termination came at a time when Spiegel was suffering from a serious decline both in revenues and sales.

Faced with Spiegel's declining profitability, the Beneficial Corporation, Spiegel's parent company, retained a management consulting firm, Booz, Allen & Hamilton, to study the Spiegel organization. The consulting firm concluded that Spiegel's management was "old, inbred, [and] overpaid," and recommended that the entire COS division be liquidated. Beginning sometime in 1975, Spiegel effected a reorganization of the COS division. At that time there were four regional managers in the COS division, one of whom was Hill. In 1976, Hill's employment was terminated and shortly thereafter his position was eliminated. In March 1978, Spiegel abolished the entire COS division.

* * *

III

We now address the district court's admission of testimony pursuant to Rule 801(d)(2)(D) of the Federal Rules of Evidence. This Rule provides that a statement is not hearsay if it is offered against a party and is "a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship * * * ."

Spiegel argues on appeal, as it did at trial, that the testimony of Matthew Baker constituted hearsay in that it fell outside the coverage of Rule 801(d)(2)(D). We agree. Baker, a former Spiegel district manager employed under Hill's supervision, testified in behalf of Hill to conversations he had with several other Spiegel employees concerning Hill's discharge. The essence of Baker's testimony was that he was told by Spiegel employees Ed Williams, Danny Seligman, and George Phillips, that Hill had been discharged because of his age and income. Baker further testified as to how these men relayed to him the terrible and traumatic experience of Hill's discharge, and its effect on incumbent management.

Spiegel submits that there was no evidence that these declarants, as to whose comments Baker testified, were involved in the decision to discharge Emery Hill. Spiegel argues, and we agree, that since there was no evidence that either Williams, Seligman, or Phillips had any involvement in the decision to discharge Hill, there was no basis for finding that the statements of these declarants concerned "a matter within the scope of [their] agency." Rule 801(d)(2)(D). We recognize that under this Rule, as is pointed out in the Notes of the Advisory Committee, it is not necessary to show that the declarant had authority to make the statement. But it is necessary, we repeat, to show, to support admissibility, that the content of the declarant's statement concerned a matter within the scope of his agency. The evidence of record tends to establish that Williams was an "operations manager" at Spiegel, about whose duties and responsibilities Baker testified he was uncertain. Baker further testified that Seligman was employed as a "catalog distribution manager," involved in the requisition and circulation of catalogs. Finally, Baker testified that George Phillips became a regional manager of the COS division upon Hill's discharge. The mere fact that each of these men was a "manager" within the expansive Spiegel organization is clearly insufficient to establish that matters bearing upon Hill's discharge were within the scope of their employment. Their statements to Baker concerning Hill's discharge cannot, on this record, be considered as vicarious admissions by Spiegel * * * We conclude that the admission of this evidence on this record was reversible error.

* * *

Accordingly, for the reasons stated herein, we vacate the judgment of the district court and remand for a new trial and such other proceedings as may be required.

NOTES

1. Must there be proof independent of the statement to establish the agency relationship?

In *United States v. Bensinger Co.*, 430 F.2d 584 (8th Cir. 1970), the court ruled that for purposes of the party admission exception to the hearsay rule the existence or extent of an agency relationship cannot be established solely

by the content of the out-of-court statement. There must be at least some other evidence of agency that can be considered with the hearsay statement itself, before a statement can be admitted as an exception based on the agency relationship. A 1997 amendment to the Federal Rules of Evidence codified the result in *Bensinger*. Rule 801(d)(2) now provides: "The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E)."

2. Can the agency relationship be established through circumstantial evidence?

In *Pappas v. Middle Earth Condominium Ass'n*, 963 F.2d 534 (2d Cir. 1992), the plaintiff brought suit for injuries he suffered when he slipped and fell on an icy walkway leading to his condominium. When the plaintiff fell, he called the condominium office to complain. Shortly thereafter, a person came to fix the walkway, and remarked that the walkway was frequently icy and poorly maintained. The trial court held that the plaintiff had not established a sufficient foundation of agency to admit the statement against the condominium association. But the Court of Appeals held that adequate foundation was shown and that the declarant's statements were erroneously excluded. To provide a sufficient foundation to admit vicarious admissions, a party need only establish: "(1) the existence of the agency relationship, (2) that the statement was made during the course of the relationship, and (3) that it relates to a matter within the scope of the agency. The authority granted in the agency relationship need not include authority to make damaging statements, but simply the authority to take action about which the statements relate."

The Court accepted the generally held notion that the proffered hearsay statement does not itself suffice to establish the agency relationship — a notion that was subsequently codified by the 1997 amendment to Rule 801(d)(2). That is, it would not have been enough for the man with the shovel to simply say, "the condominium management sent me to clean up the ice." But the plaintiff did not simply rely on the declarant's own statement of his agency. Here, circumstantial evidence existed to demonstrate that the declarant was an agent and that the agency relationship extended to maintaining the walkway. The declarant responded immediately to the plaintiff's complaint to the defendant, and came prepared with materials to repair the icy conditions. It was unlikely under the circumstances that he was a passing bystander, or that he was an employee acting beyond the scope of the employment relationship. Considering the circumstantial evidence together with the declarant's own statements indicating knowledge of the continuing icy condition, the Court held that the plaintiff had established the existence and scope of the agency.

3. Can the statement of one employee be admitted against another as an agency admission?

In *Zaken v. Boerer*, 964 F.2d 1319 (2d Cir. 1992), the Court held that a statement of one employee could be offered against another as an agency

admission, if the relationship between the two was tantamount to a principal/agent relationship. When a *de facto* agency relationship is present, the testimony should not be excluded merely because it is offered against a corporate employee rather than the company itself. In this case, the declarant was answerable to the defendant; the defendant was the company's principal owner, who directed its operations and made all final decisions. Therefore the statement, which concerned a matter within the scope of the declarant's employment and which was made while he was still an employee, was admissible against the defendant. See also *United States v. Agne*, 214 F.3d 47 (1st Cir. 2000) (the statements of a corporate employee may be admitted against an officer when "the factors which normally make up an agency relationship are present"; in this case, the employee was specifically designated by the defendant to handle and report on the business matter at issue in the case, and was directly responsible to the defendant on those matters). *Lippay v. Christos*, 996 F.2d 1490 (3d Cir. 1993) (agency is determined by whether the declarant is continually supervised by the party-opponent; the statements of a government informant were not admissible as vicarious admissions against a law enforcement official, where the informant operated more as a "partner" than as a subordinate).

4. Can a lawyer's statements be admissible against the client as agency admissions?

Professors Saltzburg, Martin, and Capra, in *Federal Rules of Evidence Manual* (9th ed. 2006), have this to say about the use of counsel's statements as agency-admissions:

A statement of an attorney is, subject to certain conditions, admissible against the client under either Federal Rule 801(d)(2)(C) or (D). The leading case on this subject is *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984), where the defendant was charged with conspiracy to export firearms. A crucial piece of evidence against him was a copy of a document that the government argued was made from a copier in McKeon's wife's office. In his opening argument, defense counsel stated that a defense expert would show that the copy was not, in fact, made on the copier in Mrs. McKeon's office. The case was subsequently terminated by mistrial. Before the retrial, defense counsel was informed that the prosecution would call an expert to testify that the copy was made on the copier in Mrs. McKeon's office, and that the expert to be called was the teacher of the expert retained by the defense. Given his now-dim prospects in a battle of the experts, defense counsel at the new trial argued that McKeon had been duped into having the crucial documents copied on the copying machine at his wife's office. The government moved to introduce defense counsel's opening statement at the prior trial as an admission by an agent, to prove McKeon's consciousness of guilt.

The Court in *McKeon* recognized that statements by an attorney are generally admissible as agency admissions against the client. It observed, however, that caution should be exercised before admitting statement made by counsel in prior criminal cases. The Court noted

five concerns, some of them in the nature of those considered under Rule 403:

(1) Free use of prior jury argument might consume substantial time to explore marginal matters, because the probative value of a change in strategy may only be evident after an in-depth consideration of such matters as whether new evidence has been found.

(2) The jury might draw unfair inferences from a prior jury argument. The defendant has the right to choose the weak spots in the government's case, and choosing a different weak spot in the second trial does not necessarily mean that the defendant admits the strength of other aspects of the prosecution's case.

(3) The free admissibility of prior jury argument may deter counsel from vigorous advocacy. Unless the truth-seeking process demands it, counsel should not have to pull her punches at one trial due to apprehension about arguments to be made at a second trial.

(4) In order to explain the inconsistency between the two arguments of counsel, the defendant may have to testify, thus risking impeachment and the waiver of the attorney-client privilege.

(5) Introduction of the attorney's statement may mean that the attorney would become one who "ought to be called as a witness" by the defendant. Where that is the case, admission of the prior jury argument will result in disqualification of the defense counsel.

For all these reasons, the *McKeon* Court imposed three limitations before an argument of counsel in a prior trial could be offered against a criminal defendant.

First, there must be a true inconsistency between the arguments. Speculations of counsel, arguments about the credibility of witnesses, and general attacks on the prosecution's case should not be admitted against the defendant at a different trial, because these arguments are too ambiguous to be inconsistent with a later factual assertion.

Second, the Court must determine that the statements of counsel "were such as to be the equivalent of testimonial statements by the defendant"; in other words, the Trial Court must find that the defendant authorized the attorney to make the statements. The mere fact of an attorney-client relationship is insufficient proof on this point, because "considerable delegation is normally involved and such delegation tends to drain the evidentiary value" from the attorney's statement. Therefore, there must be evidence of the client's participatory role, either directly or inferentially. An example of a sufficient showing is where the attorney's statement must have been derived from factual input supplied by the client.

Third, the Court should, after a hearing, determine by a preponderance of the evidence that the prosecution seeks to draw a fair inference from the inconsistency and that an innocent explanation does not exist.

On the facts, the *McKeon* Court found that the attorney's prior opening statement was admissible. The Court reasoned that the opening argument in the later trial was facially inconsistent with the previous one: the copy was either made on the copier at Mrs. McKeon's office or it was not. Also, there was every reason to believe, given the points argued by counsel, that McKeon participated in forming the strategy at both trials. Moreover, McKeon "did not stand mute and put the government to its proof at the last trial." Rather, he took a completely inconsistent stance. Finally, McKeon could give no innocent explanation for the inconsistency, even though the Trial Judge offered to consider such an explanation *in camera* to prevent disclosure of privileged communications or work product. See also *United States v. Harris*, 914 F.2d 927 (7th Cir. 1990) (statements made by defense counsel to an eyewitness concerning the possibility of mistaken identification, were held admissible as agency admissions where the mistaken identity defense was abandoned at trial); *Purgess v. Sharrock*, 33 F.3d 134 (2d Cir. 1994) (a footnote in a brief filed on the defendant's behalf by counsel in a related case was admissible as an agency admission).

It therefore appears, on the basis of *McKeon* and like cases, that statements by counsel will be admitted as agency admissions, so long as there is some evidence to indicate that the attorney was authorized to make the statements. This means that it behooves counsel to get his or her story straight at the outset. While some may argue that the free use of attorney's statements as admissions will chill counsel from vigorous advocacy, it can be argued with equal force that such free admissibility will encourage counsel "to be more careful in verifying the accuracy of information offered by the client." *United States v. Valencia*, 826 F.2d 169, 175 (2d Cir. 1987) (Meskill, J., dissenting). The Court in *Valencia* refused to find an agency admission where defense counsel allegedly made a statement to the prosecutor at an informal bail conference. The Court was concerned that proving that the attorney even made the statement would result in mutual disqualification of prosecutor and defense counsel, a process that would not be worth the benefit of admitting the evidence. There was no such concern in *McKeon*, where the defense attorney made the statement in open court.

While *McKeon* concerns statements made by criminal defense counsel, the principles of agency-admission are applicable to statements by other counsel as well. For example, in *United States v. Salerno*, 937 F.2d 797 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 317 (1992), the government in one megatrial sought to show that Auletta was an extortion victim — a "puppet on a string" as the government put it. In a different megatrial involving similar as well as overlapping facts, the government indicted Auletta and sought to prove at trial that he was a voluntary bid-rigger, a major player. Auletta sought to introduce the indictment from the previous megatrial that referred to him as a victim of extortion. The Court held that statements made by government counsel at the prior megatrial concerning Auletta's

minimal role, were admissible under Rules 801(d)(2)(C) and (D). As the Court put it, "the government has taken the same evidentiary clay that they used in the [first] case and, for purposes of this trial, resculpted Auletta from a puppet on a string to a bid-rigger." The Court recognized that the government was free to characterize the actors in the prior trial as it wished, but concluded that the jury "is at least entitled to know that the government at one time believed, and stated, that its proof established something different from what it currently claims."

Similarly, attorney-as-agent admissions are often found in civil cases where pleadings are superseded, or inconsistent positions are taken in separate litigations. A typical case is *Andrews v. Metro North Commuter R. Co.*, 882 F.2d 705 (2d Cir. 1989), where the plaintiff's initial complaint alleged that he was struck by a train while walking along the tracks in a train yard. There was substantial evidence that the plaintiff was highly intoxicated at the time. The plaintiff's counsel filed an amended pleading that purported to explain how the plaintiff found himself walking in a train yard: He was waiting on a commuter platform and slipped and fell because of a defective condition consisting of ice and snow; unable to get back on the platform, he wandered along the track bed in a daze until he was struck by the train. The Court of Appeals held that the Trial Court had abused its discretion in refusing to allow the jury to consider the superseded complaint as an admission. The Court relied on *McKeon* for the proposition that "a party cannot advance one version of the facts in his pleadings, conclude that his interests would be better served by a different version, and amend his pleadings to incorporate that version, safe in the belief that the trier of fact will never learn of the change in stories."

5. Must an agent have personal knowledge of the events in order to make a statement that qualifies as an admission?

In *Brookover v. Mary Hitchcock Mem. Hosp.*, 893 F.2d 411 (1st Cir. 1990), some nurses' statements that it would have been advisable to use bed restraints on the plaintiff because of his epilepsy were admitted to show that the hospital's negligence caused the plaintiff's fall from his bed. The Court held that the nurses' statements were admissible as agency-admissions, even though they did not have personal knowledge of the plaintiff's case. See also *Mahlandt v. Wild Canid Survival & Research Ctr., Inc.*, 588 F.2d 626 (8th Cir. 1978) (statement that a wolf bit a child, made by corporate agent, held admissible against the corporation even though the agent had no personal knowledge).

[5] Coconspirators

[a] Federal Rule of Evidence 801(d)(2)(E)

Rule 801. Definitions

* * *

(d) **Statements which are not hearsay.** A statement is not hearsay if—

* * *

(2) **Admission by party-opponent.** The statement is offered against a party and is * * * (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

[b] Existence of Conspiracy

BOURJAILY v. UNITED STATES

483 U.S. 171 (1987)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Federal Rule of Evidence 801(d)(2)(E) provides: "A statement is not hearsay if * * * [t]he statement is offered against a party and is * * * a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." We granted *certiorari* to answer three questions regarding the admission of statements under Rule 801(d)(2)(E): (1) whether the court must determine by independent evidence that the conspiracy existed and that the defendant and the declarant were members of this conspiracy; (2) the quantum of proof on which such determinations must be based; and (3) whether a court must in each case examine the circumstances of such a statement to determine its reliability.* * *

In May 1984, Clarence Greathouse, an informant working for the Federal Bureau of Investigation (FBI), arranged to sell a kilogram of cocaine to Angelo Lonardo. Lonardo agreed that he would find individuals to distribute the drug. When the sale became imminent, Lonardo stated in a tape-recorded telephone conversation that he had a "gentleman friend" who had some questions to ask about the cocaine. In a subsequent telephone call, Greathouse spoke to the "friend" about the quality of the drug and the price. Greathouse then spoke again with Lonardo, and the two arranged the details of the purchase. They agreed that the sale would take place in a designated hotel parking lot, and Lonardo would transfer the drug from Greathouse's car to the "friend," who would be waiting in the parking lot in his own car. Greathouse proceeded with the transaction as planned, and FBI agents arrested Lonardo and petitioner

immediately after Lonardo placed a kilogram of cocaine into petitioner's car in the hotel parking lot. In petitioner's car, the agents found over \$20,000 in cash.

Petitioner was charged with conspiring to distribute cocaine, in violation of 21 U.S.C. § 846, and possession of cocaine with intent to distribute, a violation of 21 U.S.C. § 841(a)(1). The Government introduced, over petitioner's objection, Angelo Lonardo's telephone statements regarding the participation of the "friend" in the transaction. The District Court found that, considering the events in the parking lot and Lonardo's statements over the telephone, the Government had established by a preponderance of the evidence that a conspiracy involving Lonardo and petitioner existed, and that Lonardo's statements over the telephone had been made in the course of and in furtherance of the conspiracy. Accordingly, the trial court held that Lonardo's out-of-court statements satisfied Rule 801(d)(2)(E) and were not hearsay. Petitioner was convicted on both counts and sentenced to 15 years. The United States Court of Appeals for the Sixth Circuit affirmed. The Court of Appeals agreed with the District Court's analysis and conclusion that Lonardo's out-of-court statements were admissible under the Federal Rules of Evidence. The court also rejected petitioner's contention that because he could not cross-examine Lonardo, the admission of these statements violated his constitutional right to confront the witnesses against him. We affirm.

Before admitting a co-conspirator's statement over an objection that it does not qualify under Rule 801(d)(2)(E), a court must be satisfied that the statement actually falls within the definition of the Rule. There must be evidence that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made "during the course and in furtherance of the conspiracy." Federal Rule of Evidence 104(a) provides: "Preliminary questions concerning * * * the admissibility of evidence shall be determined by the court." Petitioner and the Government agree that the existence of a conspiracy and petitioner's involvement in it are preliminary questions of fact that, under Rule 104, must be resolved by the court. The Federal Rules, however, nowhere define the standard of proof the court must observe in resolving these questions.

We are therefore guided by our prior decisions regarding admissibility determinations that hinge on preliminary factual questions. We have traditionally required that these matters be established by a preponderance of proof. Evidence is placed before the jury when it satisfies the technical requirements of the evidentiary Rules, which embody certain legal and policy determinations. The inquiry made by a court concerned with these matters is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied. Thus, the evidentiary standard is unrelated to the burden of proof on the substantive issues, be it a criminal case or a civil case. The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration. As in *Lego v. Twomey*, 404 U.S. 477, 488 (1972), we find "nothing to suggest that admissibility rulings have been unreliable or otherwise wanting in quality

because not based on some higher standard." We think that our previous decisions in this area resolve the matter. Therefore, we hold that when the preliminary facts relevant to Rule 801(d)(2)(E) are disputed, the offering party ~~must prove them by a preponderance of the evidence.~~

~~Even though petitioner agrees that the courts below applied the proper standard of proof with regard to the preliminary facts relevant to Rule 801(d)(2)(E), he nevertheless challenges the admission of Lonardo's statements. Petitioner argues that in determining whether a conspiracy exists and whether the defendant was a member of it, the court must look only to independent evidence — that is, evidence other than the statements sought to be admitted. Petitioner relies on *Glasser v. United States*, 315 U.S. 60 (1942), in which this Court first mentioned the so-called "bootstrapping rule." The relevant issue in *Glasser* was whether Glasser's counsel, who also represented another defendant, faced such a conflict of interest that Glasser received ineffective assistance. Glasser contended that conflicting loyalties led his lawyer not to object to statements made by one of Glasser's co-conspirators. The Government argued that any objection would have been fruitless because the statements were admissible. The Court rejected this proposition:~~

"[S]uch declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence."

* * * Read in the light most favorable to petitioner, *Glasser* could mean that a court should not consider hearsay statements at all in determining preliminary facts under Rule 801(d)(2)(E). Petitioner, of course, adopts this view of the bootstrapping rule. *Glasser*, however, could also mean that a court must have *some* proof *aliunde*, but may look at the hearsay statements themselves in light of this independent evidence to determine whether a conspiracy has been shown by a preponderance of the evidence. The Courts of Appeals have widely adopted the former view and held that in determining the preliminary facts relevant to co-conspirators' out-of-court statements, a court may not look at the hearsay statements themselves for their evidentiary value.

[*Glasser* was] decided before Congress enacted the Federal Rules of Evidence in 1975. These Rules now govern the treatment of evidentiary questions in federal courts. Rule 104(a) provides: "Preliminary questions concerning * * * the admissibility of evidence shall be determined by the court * * * . In making its determination it is not bound by the rules of evidence except those with respect to privileges." Similarly, Rule 1101(d)(1) states that the Rules of Evidence (other than with respect to privileges) shall not apply to "[t]he determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104." The question thus presented is whether any aspect of *Glasser*'s bootstrapping rule remains viable after the enactment of the Federal Rules of Evidence.

Petitioner concedes that Rule 104, on its face, appears to allow the court to make the preliminary factual determinations relevant to Rule 801(d)(2)(E)

by considering any evidence it wishes, unhindered by considerations of admissibility. * * * That would seem to many to be the end of the matter. Congress has decided that courts may consider hearsay in making these factual determinations. Out-of-court statements made by anyone, including putative co-conspirators, are often hearsay. Even if they are, they may be considered, *Glasser* and the bootstrapping rule notwithstanding. But petitioner nevertheless argues that the bootstrapping rule, as most Courts of Appeals have construed it, survived this apparently unequivocal change in the law unscathed and that Rule 104, as applied to the admission of co-conspirator's statements, does not mean what it says. We disagree.

Petitioner claims that Congress evidenced no intent to disturb the bootstrapping rule, which was embedded in the previous approach, and we should not find that Congress altered the rule without affirmative evidence so indicating. It would be extraordinary to require legislative history to *confirm* the plain meaning of Rule 104. The Rule on its face allows the trial judge to consider any evidence whatsoever, bound only by the rules of privilege. We think that the Rule is sufficiently clear that to the extent that it is inconsistent with petitioner's interpretation of *Glasser* * * *, the Rule prevails.

Nor do we agree with petitioner that this construction of Rule 104(a) will allow courts to admit hearsay statements without any credible proof of the conspiracy, thus fundamentally changing the nature of the co-conspirator exception. Petitioner starts with the proposition that co-conspirators' out-of-court statements are deemed unreliable and are inadmissible, at least until a conspiracy is shown. Since these statements are unreliable, petitioner contends that they should not form any part of the basis for establishing a conspiracy, the very antecedent that renders them admissible.

Petitioner's theory ignores two simple facts of evidentiary life. First, out-of-court statements are only *presumed* unreliable. The presumption may be rebutted by appropriate proof. *See* Fed. Rule Evid. 803(24) [now Rule 807] (otherwise inadmissible hearsay may be admitted if circumstantial guarantees of trustworthiness demonstrated). Second, individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts. Taken together, these two propositions demonstrate that a piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence. A *per se* rule barring consideration of these hearsay statements during preliminary factfinding is not therefore required. Even if out-of-court declarations by co-conspirators are presumptively unreliable, trial courts must be permitted to evaluate these statements for their evidentiary worth as revealed by the particular circumstances of the case. Courts often act as factfinders, and there is no reason to believe that courts are any less able to properly recognize the probative value of evidence in this particular area. The party opposing admission has an adequate incentive to point out the shortcomings in such evidence before the trial court finds the preliminary facts. If the opposing party is unsuccessful in keeping the evidence from the factfinder, he still has the opportunity to attack the probative value of the evidence as it relates to the substantive issue in the case. * * *

We think that there is little doubt that a co-conspirator's statements could themselves be probative of the existence of a conspiracy and the participation of both the defendant and the declarant in the conspiracy. Petitioner's case presents a paradigm. The out-of-court statements of Lonardo indicated that Lonardo was involved in a conspiracy with a "friend." The statements indicated that the friend had agreed with Lonardo to buy a kilogram of cocaine and to distribute it. The statements also revealed that the friend would be at the hotel parking lot, in his car, and would accept the cocaine from Greathouse's car after Greathouse gave Lonardo the keys. Each one of Lonardo's statements may itself be unreliable, but taken as a whole, the entire conversation between Lonardo and Greathouse was corroborated by independent evidence. The friend, who turned out to be petitioner, showed up at the prearranged spot at the prearranged time. He picked up the cocaine, and a significant sum of money was found in his car. On these facts, the trial court concluded, in our view correctly, that the Government had established the existence of a conspiracy and petitioner's participation in it.

We need not decide in this case whether the courts below could have relied solely upon Lonardo's hearsay statements to determine that a conspiracy had been established by a preponderance of the evidence. To the extent that *Glasser* meant that courts could not look to the hearsay statements themselves for any purpose, it has clearly been superseded by Rule 104(a). It is sufficient for today to hold that a court, in making a preliminary factual determination under Rule 801(d)(2)(E), may examine the hearsay statements sought to be admitted. As we have held in other cases concerning admissibility determinations, "the judge should receive the evidence and give it such weight as his judgment and experience counsel." The courts below properly considered the statements of Lonardo and the subsequent events in finding that the Government had established by a preponderance of the evidence that Lonardo was involved in a conspiracy with petitioner. We have no reason to believe that the District Court's factfinding of this point was clearly erroneous. We hold that Lonardo's out-of-court statements were properly admitted against petitioner.

* * *

The judgment of the Court of Appeals is *Affirmed*.

[Concurring and dissenting opinions omitted.]

NOTES

1. In making a Rule 801(d)(2)(E) determination, can a court find conspiracy by a preponderance of the evidence solely on the basis of the hearsay statement itself?

Courts making the admissibility determination do require some independent evidence of the existence of the conspiracy, apart from the hearsay statement. See *United States v. Tellier*, 83 F.3d 578 (2d Cir. 1996) (RICO

conviction reversed because the sole evidence for one of the predicate acts — conspiracy to distribute marijuana — was a hearsay statement from the defendant's alleged coconspirator; coconspirator hearsay is "presumptively unreliable, and, for such statements to be admissible, there must be some independent corroborating evidence of the defendant's participation in the conspiracy."). The 1997 amendment to Rule 801(d)(2) requires some evidence of conspiracy independent of the statement itself. Note that the amendment also provides that the trial court *must* consider the hearsay statement itself as part of the proof of conspiracy — the court does not have the discretion to reject the statement as proof.

2. Must a conspiracy be charged in the case before a hearsay statement can be admitted under Rule 801(d)(2)(E)?

"[I]t is not necessary that the Government charge a conspiracy to take advantage of Fed. R. Evid. 801(d)(2)(E). The Government merely needs to demonstrate that the declarant and the defendants against whom the statements are offered are members of a conspiracy in furtherance of which the statements are made." *United States v. Stratton*, 779 F.2d 820, 829 (2d Cir. 1985).

3. Can a declarant's statement be admissible even if the declarant has been acquitted of conspiracy?

The mere fact that the declarant has been acquitted of criminal conspiracy charges does not render statements by that declarant inadmissible under the coconspirator exemption of Rule 801(d)(2)(E). The fact that the Government failed to prove the conspiracy beyond a reasonable doubt does not mean that it cannot prove a conspiracy under the *Bourjaily* preponderance standard. *United States v. Peralta*, 941 F.2d 1003 (9th Cir. 1991).

4. How much independent evidence is needed to satisfy the preponderance of the evidence requirement set forth in *Bourjaily*?

See Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (9th ed. 2006):

Courts after *Bourjaily* have held that the independent evidence must be at least "fairly incriminating" on its own before that evidence together with the hearsay statement can satisfy the *Bourjaily* preponderance requirement. As the Ninth Circuit put it in *United States v. Silverman*, 861 F.2d 571, 578 (9th Cir. 1988):

Evidence of wholly innocuous conduct or statements by the defendant will rarely be sufficiently corroborative of the co-conspirator's statement to constitute proof, by a preponderance of the evidence, that the defendant knew of and participated in the conspiracy. Evidence of innocent conduct does little, if anything, to enhance the reliability of the co-conspirator's statement. A co-conspirator's statement, which is presumptively unreliable hence inadmissible standing alone, is no more reliable when coupled with evidence of conduct that is completely consistent with defendant's unawareness of the conspiracy.

In *Silverman*, the Court held that statements of the defendant's sister identifying the defendant as her drug supplier were

inadmissible under the coconspirator exception. The only independent evidence of a conspiratorial connection put forth by the government was that the sister would travel to the town where the defendant lived; that the defendant would pick her up at the airport; that when the sister returned to her home, she would have drugs; and that the defendant subsequently concealed his identity from a DEA agent. The Court held that the brother-sister association was “too innocent” to connect the defendant to any conspiracy, and that the subsequent concealment of identity was not sufficiently related to the brother-sister connection to render it sufficiently probative of a conspiracy between them. The Court concluded that the independent evidence proffered by the government “was so marginally corroborative that it failed to overcome the presumptive unreliability” of the sister’s hearsay statements.

We agree with the *Silverman* Court that the independent evidence must at least establish a reasonable suspicion of conspiracy before the jury can be permitted to consider the declarant’s statement. Otherwise there is an unacceptable risk that the defendant will be convicted solely from the mouths of self-appointed coconspirators who are not produced for trial.

We suggest that the Courts, in evaluating the independent evidence presented, use a standard analogous to the reasonable suspicion test that is used to determine the legality of a *Terry* stop under the Fourth Amendment. That test, as applied to coconspirator hearsay, would be: whether the independent evidence, standing alone, presents a fair possibility that the defendant and the declarant are coconspirators. (For a discussion of the reasonable suspicion standard, with examples, see S. Saltzburg & D. Capra, *American Criminal Procedure* ch. 2 (8th ed. 2007)). The government need not overcome every possible innocent explanation of the facts presented. But, on the other hand, independent evidence that is not at all suggestive of criminal association (such as the brother-sister evidence in *Silverman*) should not suffice. We believe that if the independent evidence is reasonably suspicious, and if that evidence combined with the hearsay statement itself establishes a conspiracy by a preponderance of the evidence, then the defendant will be sufficiently protected from unfair conviction out of the mouths of self-appointed coconspirators.

4. At what point must the trial court make a determination as to whether the government has shown a conspiracy by a preponderance of the evidence, so as to meet the foundation requirement for Rule 801(d)(2)(E)?

Trial judges have several procedural options when deciding whether the prosecution has satisfied the foundation requirements of Rule 801(d)(2)(E). One option is to hold a pretrial hearing and make a ruling on admissibility following the hearing, as the judge does with an ordinary evidence problem. Appellate courts have expressed a preference for this procedure, but they also recognize that in many complex conspiracy cases, this would be tantamount to trying a case twice: the prosecution would introduce evidence of conspiracy to establish the foundation requirements for the admissibility of the hearsay,

and then proffer the same evidence again at trial. So trial judges also have the option to allow coconspirator hearsay to be admitted at trial, subject to a condition — i.e., the government must satisfy the preponderance of the evidence standard as the case progresses. *See, e.g., United States v. McCarthy*, 961 F.2d 972 (1st Cir. 1992) (there was no error in admitting coconspirator statements conditionally, where previous trials of other alleged coconspirators indicated it was likely that the foundation would be established; at the close of evidence, the trial judge reviewed only the evidence adduced at the defendant's trial and found that the prosecution had met its burden of showing the existence of the conspiracy and the participation of the declarant and the defendant therein); *United States v. Ferra*, 900 F.2d 1057 (7th Cir. 1990) (admitting coconspirator hearsay statements subject to connection is not a routine but, rather, an exceptional procedure, appropriate only when the evidence on the question of conspiracy is extensive; most of the time it is better, especially because of double jeopardy problems, to make a preliminary determination rather than to decide the admissibility question on a mistrial motion).

If the judge defers the admissibility question and subsequently finds that the government has not met its burden of establishing the Rule 801(d)(2)(E) requirements, then a mistrial should be declared unless it is clear that a limiting instruction will suffice to protect the defendant from the obvious prejudice arising from the jury's having already heard the inadmissible hearsay. *See, e.g., United States v. Wood*, 851 F.2d 185 (8th Cir. 1988) (the judge may admit coconspirator hearsay subject to connection, but the government is on notice that at the conclusion of all the evidence, the judge will make an explicit determination on the record of whether, in its view, the government has proved a conspiracy by a preponderance of the evidence; if the judge determines that the government has failed to carry its burden, a mistrial should be declared unless an instruction to the jury to disregard the evidence would suffice to cure any prejudice). Compare *United States v. Freeman*, 208 F.3d 332 (1st Cir. 2000) (coconspirator hearsay was admitted subject to establishing a conspiratorial connection between the defendant and the declarant; when the government failed to make that connection at trial, the judge struck the statement and issued a curative instruction; this was held a sufficient remedy, the court noting that the hearsay statement was only a small part of the evidence in a seven-day trial and had little relevance to the only charge on which the defendant was convicted).

If the judge is thinking about deferring the question of admissibility of coconspirator hearsay until trial, it is prudent practice to require the government to provide a summary of its foundation evidence. If the summary indicates that the government will have trouble providing a foundation, then the judge should either require a hearing on the admissibility of the hearsay, or else structure the order of proof at trial so that a ruling can be made before the hearsay is admitted. By these methods, a subsequent mistrial can perhaps be avoided. *See, e.g., United States v. Shoffner*, 826 F.2d 619 (7th Cir. 1987) (the court upheld the trial judge's finding that statements were in furtherance of conspiracy, but it observed that it might have been preferable for the judge to preview the government's evidence that would support its Rule 801(d)(2)(E)

ruling rather than admit statements upon a representation that the government would prove at trial they were made in furtherance of conspiracy).

[c] In Furtherance of the Conspiracy

UNITED STATES v. HARRIS

546 F.2d 234 (8th Cir. 1976)

STEPHENSON, CIRCUIT JUDGE:

Walter B. Harris appeals his conviction by jury on one count of conspiracy to commit mail fraud in violation of 18 U.S.C. § 371. Appellant Harris alleges that the district court * * * erred in admitting hearsay statements of the alleged coconspirator which were not "in furtherance of" the conspiracy.* * * We affirm the conviction.

The indictment charged that appellant Harris, Edward Williams and Vernon French conspired to defraud insurance companies and to use the United States mails for the purpose of executing the scheme. More specifically the indictment alleged that the three coconspirators staged and contrived an accident in which a vehicle driven by Vernon French collided with the rear of a car owned by Harris and supposedly occupied by Harris and Williams. It was further alleged that Harris and Williams had multiple insurance policies on the date of the staged accident and submitted fraudulent claims as a result of the accident.

* * *

The government called as a witness A. J. Rupe, who was in the hospital during the same period as Harris and Williams. Rupe was in the hospital after staging an accident as part of his own scheme to defraud insurance companies. While in the hospital Rupe had conversations with both Harris and Williams. At trial he was allowed to testify over Harris' objection that coconspirator Williams made statements to him to the effect that the collision involving Harris, Williams and French was staged. Although Harris readily admits that the statements made by Williams were during the course of the conspiracy, Harris contends the statements were not "in furtherance of" the conspiracy and therefore were erroneously admitted.

The "in furtherance of" requirement arises from Rule 801(d)(2)(E) which makes admissible against a party a statement by a coconspirator during the course of and in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E). The inclusion of the "in furtherance of" requirement appears to have been a considered decision by Congress. Before the present Rule 801(d)(2)(E) was promulgated, Senator John L. McClellan of Arkansas strenuously advocated the abolishment of the "in furtherance of" requirement, substituting in its place a more relaxed standard and thereby enlarging the existing hearsay exception. This suggestion was rejected, however, by Congress.

The Fifth Circuit has stated that although the phrase "in furtherance of the conspiracy" has a talismanic ring to it, the standard should not be applied too strictly, lest the purpose of the exception be defeated. *United States v.*

James, 510 F.2d 546, 549 (5th Cir. 1975). We are also mindful that several commentators have noted that the courts have tended to construe broadly the requirement that the coconspirator's statement be made in furtherance of the conspiracy. See discussion *United States v. Overshon*, 494 F.2d 894, 899 (8th Cir. 1974). Nevertheless, Congress has expressly retained the "in furtherance of" requirement. Furthermore, the Supreme Court continues to include this requirement in its statement of the coconspirator's rule. Therefore we conclude that the "in furtherance of" requirement remains viable in the federal courts.

In the instant case, whether Williams' statements to Rupe were in the furtherance of the conspiracy is a close question. Both Rupe and Williams were actively engaged in parallel schemes to defraud insurance companies. In this light their conversations can be viewed as mutual attempts to gather useful information to further each other's conspiracy. On the other hand appellant argues that the statements were nothing more than casual admissions of culpability by Williams to someone he had individually decided to trust. [The court finds that the statement was probably in furtherance, but that even if not, any error in admitting the hearsay was harmless.]

* * *

AFFIRMED.

NOTES

1. What types of statements will be considered in furtherance of a conspiracy?

The statement must be made with the intent to further the conspiracy. If the statement was simply idle chatter by a conspirator, or simply serves to blame or "finger" people as conspirators, it will not be admissible under this exemption. See, e.g., *United States v. LiCausi*, 167 F.3d 36 (1st Cir. 1999) (statements made by one conspirator to his girlfriend should not have been admitted under the coconspirator hearsay exemption; the declarant was simply venting his anxiety and blowing off steam in reaction to developments in the conspiracy); *United States v. Cornett*, 195 F.3d 776 (5th Cir. 1999) (statements by coconspirator did not further the conspiracy, when they were made by the declarant to her former boyfriend as a "casual aside"). However, statements that on their face seem only to inculcate members of the conspiracy may in fact further the conspiracy by keeping other members apprised of conspiratorial developments, or by encouraging others to join, assist or deal with the conspiracy. See, e.g., *United States v. Jefferson*, 215 F.3d 820 (8th Cir. 2000) (statements made by one conspirator to another were in furtherance of the conspiracy where the declarant was reporting a botched murder attempt to keep the other conspirators apprised of developments: "Statements that describe past events are in furtherance of the conspiracy if they are made simply to keep coconspirators abreast of current developments and problems facing the group."); *United States v. Bowman*, 215 F.3d 951 (9th Cir. 2000) (narrations of past events are sometimes inadmissible as coconspirator

statements, but in this case the coconspirator's statements to his girlfriend were in furtherance of the conspiracy because the declarant was seeking his girlfriend's assistance in criminal acts). *United States v. Tom*, 330 F.3d 83 (1st Cir. 2003) (coconspirator's statement to a drug buyer that he had dealt with the defendant for a year was a statement of reassurance and so in furtherance of the conspiracy). In *United States v. Arambula-Ruiz*, 987 F.2d 599 (9th Cir. 1993), the defendant's coconspirator, in preparation for a drug transaction, told a putative buyer that the defendant owned the drugs and would follow the buyer to the delivery site and would be present when the sale was made. The buyer turned out to be an undercover agent. The Court held that the statements to the undercover agent were admissible under Rule 801(d)(2)(E). The statement furthered the objectives of the conspiracy because it gave necessary information to the putative buyer on the details of the forthcoming drug transaction.

2. When does a conspiracy end so that statements made thereafter are not made within the course of the conspiracy?

The conspiracy must be in operation at the time the statement was made. Generally speaking, a conspiracy is terminated when its central criminal goal has been achieved or abandoned. *See, e.g., United States v. Tse*, 135 F.3d 200 (1st Cir. 1998) (gang members' statements made eight months after attempted murders were not made in the course of the conspiracy, because at that time it was clear that the murder plans had been abandoned). For monetary crimes, the central criminal goal is achieved when the money is divided up among the coconspirators. Courts have held that actions designed to evade detection, after money has been divided up, are not in the course of the original conspiracy. *See, e.g., United States v. Mojica-Baez*, 229 F.3d 292 (1st Cir. 2000) (no error to admit hearsay statement made by a conspirator shortly after a bank robbery occurred: "there is a distinction, for purposes of the conspirator statement exception to the hearsay rule, between an initial conspiracy to commit a crime and later actions to conceal a crime"; however, in this case the statement was made during the course of the bank robbery conspiracy because the proceeds had not yet been divided). Statements made to evade detection might well be part of a subsequent conspiracy, however.

In *United States v. Ibern-Maldonado*, 823 F.2d 698 (1st Cir. 1987), the court held that a statement made at the time a pilot was being paid for transporting marijuana was admissible under Rule 801(d)(2)(E), since the conspiracy continues until the proceeds are divided. In *United States v. Perez-Garcia*, 904 F.2d 1534 (11th Cir. 1990), the court held that it was error to admit a statement made after the defendant and all of his coconspirators had been arrested, as by that time the conspiracy had terminated. In *United States v. Serrano*, 870 F.2d 1 (1st Cir. 1989), the court declared that "when the acts of concealment are done after the central objectives have been attained, for the purpose only of covering up after the crime, they are inadmissible." Any other rule "would, for all practical purposes, wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind coconspirators." *Grunewald v. United States*, 353 U.S. 391 (1957).

3. Can the statement of an unidentified conspirator be admitted under Rule 801(d)(2)(E)?

In *United States v. Squillacote*, 221 F.3d 542 (4th Cir. 2000), the Court upheld the admission of written statements under Rule 801(d)(2)(E) despite the government's failure to identify the author of the statements. The defendants in *Squillacote* were accused of performing acts of espionage for the former German Democratic Republic during the Cold War. The court held that "while the identity of the declarant of the unsigned documents may not be known, the only conclusion that can be drawn from the information included in the documents — information that was corroborated in many respects by [witness] testimony and by Squillacote's own statements to the undercover agent — is that the documents were created by or at the direction of East German agents who had knowledge of and were involved in the conspiracy with the Appellants."

**[6] Relationship between Agency Admissions and
Coconspirator Admissions**

CITY OF TUSCALOOSA v. HARCROS CHEMICALS, INC.
158 F.3d 548 (11th Cir. 1998)

TJOFLAT, CIRCUIT JUDGE:

In the instant case, thirty-nine Alabama municipal entities brought suit in the United States District Court for the Northern District of Alabama, alleging that five defendant chemical companies engaged in a conspiracy to fix prices for repackaged chlorine in Alabama in violation of both federal and state antitrust law. The plaintiffs also asserted claims for fraud under Alabama law. In a memorandum opinion, the district court ruled much of the plaintiffs' evidence inadmissible and granted summary judgment to all five defendants on the antitrust claims and the fraud claims. * * *

I.

A.

The plaintiffs and plaintiffs-intervenors in this case are thirty-nine Alabama municipal entities that purchase repackaged chlorine for the treatment of drinking water, sewage, and swimming pools. Repackaged chlorine is liquid chlorine that has been pressurized and stored in containers for delivery to, and use by, chlorine consumers. The five defendant corporations are chemical companies that repackage or distribute chlorine in Alabama.

At the core of the plaintiffs' claims are their allegations that the defendants colluded with each other to set prices for repackaged chlorine distribution contracts. During the period of the alleged collusion, many Alabama municipal entities purchased chlorine by auction. An entity seeking to purchase chlorine would solicit sealed bids from companies that had submitted bids in the past. Once the bids were received, the buyer would publicly open the bids and announce what each competitor had bid. The buyer would then award its

contract to the lowest bidder. The plaintiffs allege that the defendants submitted sealed bids based on "list prices" previously determined amongst themselves, and in this way allocated the repackaged chlorine contracts as they wished.

* * * After discovery, the defendants moved to exclude * * * several pieces of evidence that they asserted were inadmissible hearsay. The district court * * * excluded the purported hearsay testimony, and * * * granted summary judgment for the defendants on all claims. The plaintiffs now appeal, asserting that the district court improperly excluded their proffered evidence and that summary judgment was erroneously entered.

* * *

B.

* * *

1.

The plaintiffs proffered testimony regarding an alleged admission by the late Robert Jones ("Jones"), the former chairman, chief executive officer, and president of defendant Jones Chemicals. Loraine and Peter Cassassa, friends of Jones during the period of the alleged conspiracy, testified in depositions that on several occasions in the mid-1980s, Jones admitted to them that he was at that time involved in fixing chlorine prices in the Southeast. Loraine Cassassa testified that Jones told her that he "got together with the people [who were] submitting the bids and they knew what each other were going to bid before that bid was ever submitted." She also testified that Jones told her that he knew such conduct was illegal, but that "[t]hat's how big business goes." Peter Cassassa gave substantially identical testimony.

The district court excluded the testimony of the Cassassas as "hearsay." We conclude that the court erred as a matter of law by making this determination and therefore abused its discretion. Accordingly, we reverse the ruling excluding that testimony.

Under the Federal Rules of Evidence, "[h]earsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). In general, "[h]earsay is not admissible except as provided by [the federal] rules * * * ." Fed. R. Evid. 802. A "statement by [a] party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship," however, is deemed an admission by a party opponent and is excluded from the definition of hearsay. Fed. R. Evid. 801(d)(2)(D); see *Zaben v. Air Prods. & Chems., Inc.*, 129 F.3d 1453, 1456 (11th Cir.1997).

Robert Jones, as president of Jones Chemicals from 1986 to 1989, and as the chairman and CEO of the company from 1986 to 1993, clearly was an "agent or servant" of the company. Moreover, the record on appeal establishes that Jones set chlorine prices for Jones Chemicals throughout the period of

the alleged conspiracy. His purported statements regarding Jones Chemical's chlorine pricing practices thus "concern[ed] a matter within the scope of [his] agency or employment, made during the existence of the relationship." Jones' purported statements to the Cassassas are therefore admissible as non-hearsay party admissions under Fed. R. Evid. 801(d)(2)(D).

The appellants argue that the Cassassas' testimony ought also to be admitted against the other defendants, on the ground that Jones' purported statements were made "during the course and in furtherance of the conspiracy" and therefore fall within the exemption contained in Rule 801(d)(2)(E). Declarations by one defendant in a conspiracy case may be admissible against other defendants as non-hearsay upon sufficient showing that the statement was made by a co-conspirator during the course and in furtherance of the conspiracy. * * * This circuit applies "a liberal standard in determining whether a statement is made in furtherance of a conspiracy." *United States v. Santiago*, 837 F.2d 1545, 1549 (11th Cir.1988). The statement need not be necessary to the conspiracy, but must only further the interests of the conspiracy in some way. Statements made to solicit membership or participation in the conspiracy, for example, or statements explaining the conspiracy to a new member, are made in furtherance of the conspiracy.

Jones' purported statements do not satisfy even this liberal standard. The purported statements were made to friends, who were neither involved in the alleged conspiracy nor invited to participate therein, over drinks or on the golf course. The statements could not have furthered the interests of the alleged conspiracy in any way. A statement that merely discloses the existence of a conspiracy to a non-conspirator, that merely "spills the beans," with no intention of recruiting the auditor into the conspiracy does not further the conspiracy. * * * We conclude that the district court did not err in finding that Jones' purported statements were not made in furtherance of the alleged conspiracy, and that the Cassassas' testimony is therefore not admissible against the alleged co-conspirators. Because Jones' purported statements were non-hearsay party admissions, however, we conclude that the statements do fall within the exception contained in Rule 801(d)(2)(D), and that the Cassassas' testimony is therefore admissible against Jones Chemicals.

2.

* * *

3.

The district court also excluded the testimony of Barbara Krysti, who offered testimony against Harcros. Barbara Krysti is the widow of Lloyd Krysti, who was a sales manager at Harcros. Barbara Krysti stated in an affidavit that

[i]n 1987 or 1988, Lloyd found out that Joe Ragusa [(Harcros' vice-president for the Southeast)] was getting together with his competitors and fixing the price of chlorine before bids were submitted. Lloyd's reaction to me was that Joe was crazy for doing this and that it was illegal and that he could go to jail * * * . Lloyd first told me about the price fixing in 1988. We talked about it several times after that.

The proffered testimony is double hearsay; Barbara Krysti relates Lloyd Krysti's account of what Joe Ragusa said. Such "hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Fed. R. Evid. 805; *see, e.g.,* Mahlandt v. Wild Canid Survival and Research Ctr., Inc., 588 F.2d 626, 630 (8th Cir.1978). Because chlorine pricing and sales were within the scope of Joe Ragusa's employment with Harcros, Ragusa's statements to Lloyd Krysti clearly fall within the party admission exception to the hearsay rule.

Lloyd Krysti's statements to Barbara Krysti, however, do not fall within any exception to the hearsay rule. The record establishes that chlorine pricing was not substantially within the scope of Lloyd Krysti's employment. Lloyd Krysti was involved in the pricing and sales of other chemicals and was rarely and only ministerially involved in chlorine sales. Lloyd Krysti did not set prices for chlorine. Indeed, the plaintiffs themselves assert that Joe Ragusa was solely responsible for setting chlorine prices in Alabama, and none of the many Harcros documents in the record indicate otherwise. On the contrary, in a 1984 memorandum, Ragusa severely upbraided several Harcros sales managers who set chlorine prices without his approval.

Because the content of Lloyd Krysti's statements did not concern a matter within the scope of his employment or agency, they do not fall within the party admission exception in Rule 801(d)(2)(D). In addition, Lloyd Krysti's statements were not made in furtherance of the alleged conspiracy, but "merely informed" Barbara Krysti — a non-conspirator — of the existence of the alleged conspiracy. Because Lloyd Krysti's statements to Barbara Krysti do not fall within any exception to the hearsay rule, we affirm the district court's ruling excluding the testimony of Barbara Krysti.

* * *

REVERSED in part and AFFIRMED in part.

PROBLEM 11-1

In response to increased drug availability at the high school, the local F.B.I. agent, Clean Cut, goes undercover in a drug sting operation. A shabbily dressed Clean Cut meets Middle Man at a local bar who agrees to arrange a sale of drugs from Clean Cut to Middle Man's friend, Drug Dealer. The deal is set for 1:00 a.m. at a local park. Drug Dealer shows up at the appointed hour wearing a top hat and pays for the drugs with \$5000 in one-hundred dollar bills. Middle Man and Drug Dealer are arrested on the spot and later charged with conspiracy to distribute illegal drugs. Drug Dealer intends to defend the case on the theory that his purchase was simply for his own use.

Drug Dealer files a motion in limine asking for suppression at trial of certain statements made by Middle Man. Clean Cut is on the stand at the pre-trial hearing.

Prosecution: State your name.
Clean Cut: Clean Cut.
Prosecution: Did you arrest the defendant?
Clean Cut: Yes, I did.
Prosecution: When did you first hear anything about the defendant?
Clean Cut: Well, I was sitting at the bar with Middle Man. We were talking about the sale of some drugs. We agreed that \$5000 was the right price for the quantity that I was selling. I also let him know that I wanted the money in \$100 bills.
Prosecution: Did Middle Man say anything then?
Clean Cut: No, he got up and went over to the telephone.
Prosecution: Then what happened?
Clean Cut: He came back and said, "I've got this buddy named Drug Dealer. He can really move the product. He said to meet him at the park at 1:00 a.m." Then I asked Middle Man how I would know it was Drug Dealer and he said that Drug Dealer always wears a top hat.
Prosecution: Did Middle Man say anything else to you before you left the bar?
Clean Cut: Yeah, he said "If this goes down clean I know another dealer who can double the score."
Prosecution: When you arrested the defendant, did Middle Man say anything?
Clean Cut: Yes, even before I could give him his rights he blurted out, "I guess Drug Dealer won't be able to peddle that stuff at the high school after all."

You be the judge.

PROBLEM 11-2

Karyl Keaty has filed an action against his former employer, the Ace Equipment Company, alleging that he was terminated at age 52 as a result of age discrimination. Karyl was fired a year ago after working for the company for 22 years. At trial Karyl calls several witnesses, including Shannon Sman.

Direct Examination of Shannon Sman

Plaintiff: Where do you work?
Witness: Ace Equipment Company.
Plaintiff: How long have you worked there?
Witness: Fourteen years.
Plaintiff: Were you working there a year ago?
Witness: Yes.

- Plaintiff:** In what capacity?
Witness: Assistant Director of Personnel.
Plaintiff: Who was the Director of Personnel?
Witness: Nat Nopes. She was in charge.
Plaintiff: What role did Ms. Naps have in termination decisions?
Witness: She was part of the team that decided whether to let someone go, but I wasn't involved in termination decisions.
Plaintiff: When did you learn that the plaintiff was terminated?
Witness: When I heard Ms. Naps say that "we had to let the old guy go."
Defendant: (1) Objection. _____
Plaintiff: (2) _____
Court: (3) _____
Plaintiff: Did you say anything when Ms. Nopes told you "we had to let the old guy go"?
Witness: I said to her, "you didn't fire Mr. Keaty because he's 50 years old, I hope. That would be wrong."
Plaintiff: What response did Ms. Nopes make?
Witness: She looked at me with an angry look on her face, and said nothing.
Defendant: Objection and move to strike the witness' out-of-court statement. It's hearsay.
Plaintiff: (4) _____
Court: (5) _____
Plaintiff: Did you hear Ms. Nopes say anything else about the plaintiff?
Witness: Yes, I did. Ms. Nopes had a friend who worked for a competitor but who often stopped by to give her a ride home from work. On the day the plaintiff was fired, the friend stopped by, and when she asked Ms. Nopes why she appeared in a bad mood, Ms. Nopes said "we just canned a guy because he was too old."
Defendant: Objection. Hearsay.
Plaintiff: (6) _____
Defendant: It cannot be an admission. It's a statement to a friend who works for a competitor.
Court: (7) _____
Plaintiff: Did you have any conversation with the president of the company about the plaintiff after he was fired?
Witness: Yes, at the water cooler the president of the company, Larry Lester, said "I don't want old guys here."
Defendant: (8) Objection. _____
Plaintiff: (9) _____

Court: (10) _____.

Plaintiff: Did you tell anyone else what Ms. Nopes told you?

Witness: Sure, the day he got fired I went home and told my roommate that the Director of Personnel told me that the plaintiff got fired because "we had to let the old guy go."

Defendant: (11) Objection. _____.

Plaintiff: It's an admission.

Court: (12) _____.

Cross-Examination by the Defendant

Defendant: Six months ago you actually received a reduction in pay, right?

Witness: Yes.

Defendant: It was after that reduction that you contacted the plaintiff's attorney for the first time?

Witness: Yes, that's true.

Defendant: You had your deposition taken in this case before your reduction in pay?

Witness: Yes.

Defendant: The reduction in pay made you angry?

Witness: I suppose so.

Defendant: Do you recall being asked on page 10, lines 3-4, "Did you hear anything about the plaintiff's termination on the day it occurred, and giving the answer, 'no'?" Do you recall that question and that answer?

Plaintiff: Objection. Hearsay. The witness is present. If this is admissible at all, it should only be for impeachment, not for its truth.

Defendant: (13) _____.

Court: (14) _____.

Re-Direct Examination

Plaintiff: When you first contacted me, what did you tell me about your deposition testimony?

Witness: I told you that I had not been truthful.

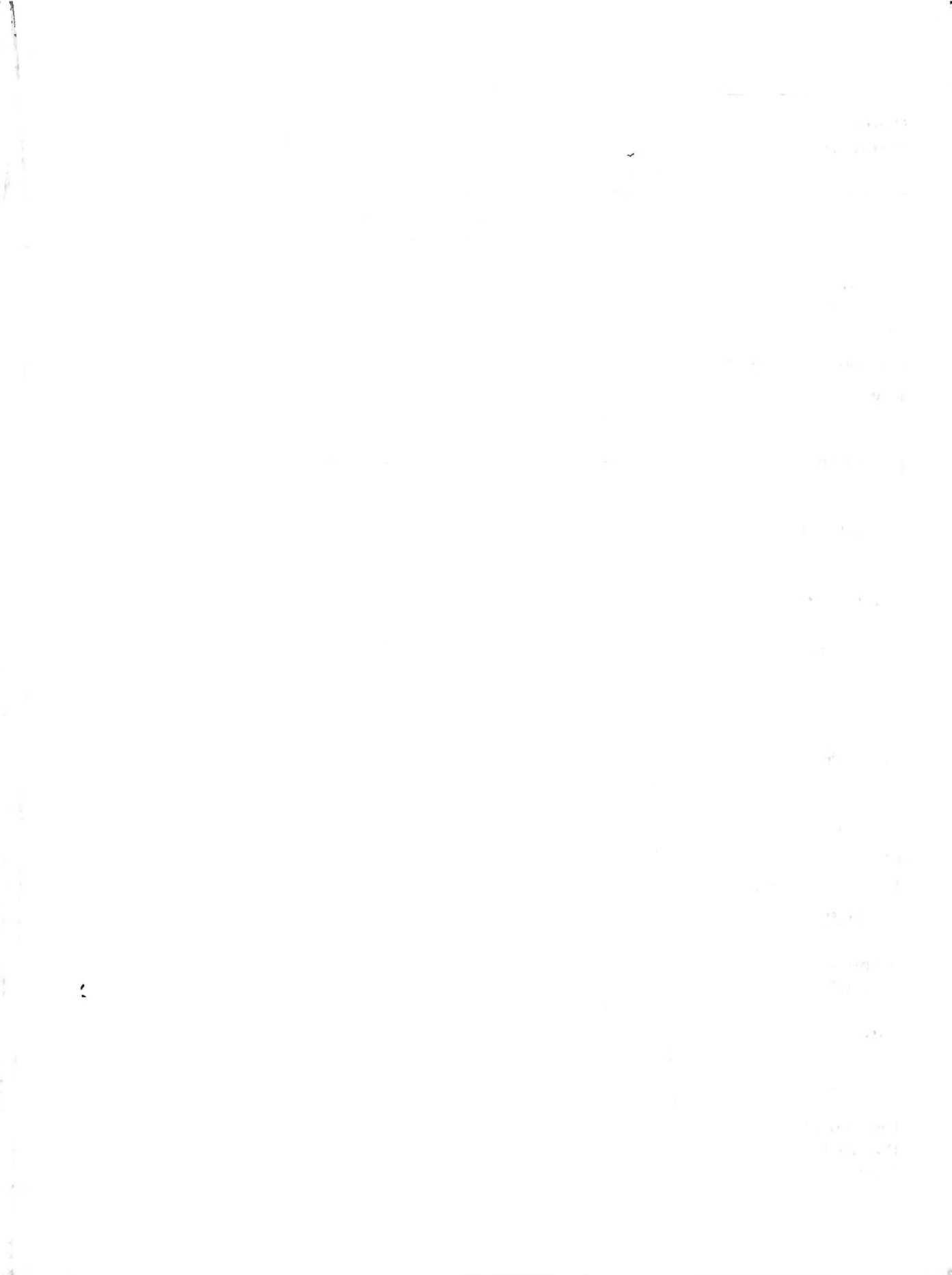
Plaintiff: What exactly did you say that you had not been truthful about?

Witness: I told you that when I said I did not hear anything about the plaintiff's termination on the day it occurred, I was not truthful because I did hear the Director of Personnel say * * *

Defendant: (15) Objection. _____.

Plaintiff: (16) _____.

Court: (17) _____.



Chapter 12

HEARSAY EXCEPTIONS DEPENDENT ON THE UNAVAILABILITY OF THE DECLARANT

A. INTRODUCTION

The exceptions to the hearsay rule covered in this Chapter require that the declarant be unavailable to testify at trial. The rationale of these exceptions is that the hearsay they cover is reliable, but it would be better to have testimony from the declarant at trial. Unavailability may arise because the witness is not physically present because of illness, death, or absence from the jurisdiction. Unavailability may also occur when, although physically present, the declarant refuses or is unable to testify. For example, the witness may assert a privilege, may refuse to testify, or may have a lack of memory.

The next Chapter will deal with the exceptions to the hearsay rule that do not require declarant unavailability.

B. UNAVAILABILITY DEFINED

[1] Federal Rule of Evidence 804(a)

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability. “Unavailability as a witness” includes situations in which the declarant —

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant’s statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement of wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

[2] Privilege

[a] Federal Rule of Evidence 804(a)(1)

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant —

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; * * *

* * *

[b] Illustration

The prosecutor desperately needs the testimony of a certain witness to ensure a conviction of the defendant. The witness testified at the preliminary hearing in the same case. The prosecutor would be happy with either the introduction of the transcript from the preliminary hearing or the live testimony of the witness. It is time to call the witness to the stand. The prosecutor addresses the court:

Prosecutor: Your Honor, I understand that Mr. I. Refuse has decided not to testify in this case and that he will take the 5th if called to the stand. I therefore request that I be allowed to introduce the transcript of Refuse's preliminary hearing testimony.

Defendant: _____.

[c] Burden of Proof

UNITED STATES v. PELTON & RICH 578 F.2d 701 (8th Cir. 1978)

GIBSON, CHIEF JUDGE.

This case involves charged violations of the Mann Act arising out of certain interstate activities undertaken by a prostitution operation based in St. Louis, Missouri. In July 1977, the Government returned an eight-count indictment against Jacqueline "Pat" Rich, Lloyd Pelton and Ann Frazier. The first four counts of the indictment related to travel by prostitutes between St. Louis, Missouri, and Chicago, Illinois * * *.

Grand jury testimony of Kathleen Waggoner

Count II of the indictment underlying the instant case charged Rich * * * with regard to the transportation of Kathleen Waggoner to Chicago. Waggoner's trip to Chicago was also one of the overt acts alleged in support of the conspiracy charged in Count I. On June 1, 1977, pursuant to a grant of use immunity, Waggoner testified before a grand jury * * *. During her appearance before the grand jury, Waggoner denied that Rich had sent her

to Chicago in 1976 to work as a prostitute at the boat show and also denied that Rich had ever set her up on prostitution dates. As a consequence of this testimony, Waggoner was indicted on two counts of perjury before the grand jury in violation of 18 U.S.C. § 1623. This indictment, which was handed down on June 25, 1977, set forth verbatim those portions of the grand jury transcript in which Waggoner denied that Rich had sent her to Chicago or set her up on prostitution dates. Waggoner was convicted on both counts of perjury at a trial which took place after the trial of Rich and Pelton.

* * *

Waggoner was not called as a witness at Rich's trial. Rich herself did not attempt to call Waggoner as a witness. Rather, she assumed that Waggoner would refuse to testify and sought, on that basis, to introduce a transcript of Waggoner's grand jury testimony into evidence.

On the morning of the third day of trial, counsel for Rich made the following in-chambers presentation to the trial court:

I have caused a subpoena to be served upon Kathleen Waggoner to testify. It is my understanding that she is under charges at the present time in this Court or in another Division and her attorney has indicated that he will advise her to invoke her privilege under the Fifth Amendment and refuse to testify. On that basis, Your Honor, I would request an opportunity to utilize her Grand Jury testimony and introduce portions of the Grand Jury testimony which would be relevant and request that the Government furnish me with a copy of her Grand Jury testimony. I believe that it would be admissible pursuant to Rule 804 of the Federal Rules of Evidence.

The Government objected to the use of Waggoner's grand jury testimony. The court and both parties then discussed the general nature of Waggoner's testimony before the grand jury, the use immunity under which she had testified and the perjury indictment then pending against her. The district judge ultimately refused to allow Rich to introduce the transcript of Waggoner's grand jury testimony into evidence. Contemporaneously, however, he ruled that Rich could read Waggoner's indictment to the jury. Although this indictment contained testimony in which Waggoner denied that Rich had sent her to Chicago or had set her up on prostitution dates, counsel for Rich chose not to introduce it into evidence.

Rich now contends that Waggoner's grand jury testimony was admissible under Fed. R. Evid. 804(a)(1) [the hearsay exception for prior testimony] and that the trial court erred in refusing to allow her to introduce the relevant portions of this transcript at trial. Rule 804 sets forth those instances in which the hearsay statements of unavailable declarants may be admitted into evidence at trial. Rich relies upon § (a)(1) of Rule 804, which provides that a declarant is "unavailable" if he or she "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement."

The unavailability requirement of Rule 804 places the burden of producing an unavailable declarant upon the proponent of the evidence. * * * Rich, the

proponent here, accordingly had the burden of establishing that Waggoner would invoke her fifth amendment privilege and thus be unavailable to testify. Our review of the record convinces us that Rich utterly failed to carry this burden. Counsel for Rich made no effort to produce Waggoner, whom he had subpoenaed, and to demonstrate firsthand and in the court's presence that she did intend to refuse to testify in reliance on her fifth amendment privilege against self-incrimination. Rather, he chose to raise the issue of her privilege in an extenuated and circuitous manner which gave the court nothing more than a speculative basis for determining whether she was available. Rich's proof that Waggoner was unavailable under Rule 804(a)(1) was that Waggoner's attorney had said that he was going to advise Waggoner not to testify. There was no indication that Waggoner had in fact been so advised or that, if she had been, she had decided to exercise her privilege. We consider Rich's suggestion, that Waggoner might in the future be advised of and then choose to exercise her fifth amendment privilege, to be a wholly inadequate showing of unavailability under Rule 804(a)(1). The trial court did not err in refusing, on this speculative basis, to allow Rich to introduce into evidence the transcript of Waggoner's testimony before the grand jury.

* * *

Affirmed.

NOTES

1. Is a declarant unavailable under Federal Rule 804(a)(1) by merely asserting the privilege in open court?

More is required. In *United States v. MacCloskey*, 682 F.2d 468 (4th Cir. 1982), the Court noted that the rule also requires a judicial ruling that the witness is exempt from testifying.

2. If a criminal defendant invokes his privilege to refuse to testify at trial, is he considered unavailable so that his hearsay statement, otherwise admissible under one of the Rule 804 exceptions, can be admitted?

In *United States v. Kimball*, 15 F.3d 54 (5th Cir. 1994), Kimball's first trial ended in a mistrial. At his second trial, he proffered a transcript of his own testimony given at his first trial. He argued that his testimony was admissible as prior testimony under Rule 804(b)(1), and that he was unavailable to testify at his second trial due to his invocation of his Fifth Amendment privilege. The Court held that the prior testimony was inadmissible because "the sponsor of a declarant's former testimony may not create the condition of unavailability and then benefit therefrom." It reasoned that Kimball had created his own unavailability by declaring the Fifth Amendment privilege. Was Kimball essentially penalized for exercising a constitutional right? The court, in support of its conclusion, stated that "a defendant seeking to testify and make exculpatory statements must face cross-examination." But hadn't Kimball already faced cross-examination at his prior trial?

[3] Refusal

[a] Federal Rule of Evidence 804(a)(2)

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant —

* * *

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; * * *

[b] Illustration

Again, the prosecutor needs the testimony of I. Refuse, either live or from the transcript of the preliminary hearing. I. Refuse is on the stand.

Prosecutor:	State your name.
Witness:	I. Refuse.
Prosecutor:	Were you at the scene of the hold-up?
Witness:	Why do you ask?
Prosecutor:	Just answer my question. Were you at the scene of the hold-up?
Witness:	What I do is my own business.
Prosecutor:	Will you answer my question?
Witness:	No.
Prosecutor:	Your Honor, _____.

NOTE

How should the court determine that the witness refuses to testify even though ordered to do so?

See *United States v. MacCloskey*, 682 F.2d 468 (4th Cir. 1982), where the court indicated that the correct procedure is to require the witness to testify outside of the jury's presence and the judge should order the witness to testify subject to the threat of contempt. If the witness still refuses, then the witness is unavailable under Rule 804(a)(2).

[4] Lack of Memory

[a] Federal Rule of Evidence 804(a)(3)

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant —

* * *

(3) testifies to a lack of memory of the subject matter of the declarant's statement; * * *

[b] Illustration

The prosecutor needs the testimony of I. Forget, either live or through the transcript of the preliminary hearing. I. Forget takes the stand.

Prosecutor:	State your name.
Witness:	They tell me it's I. Forget.
Prosecutor:	Excuse me?
Witness:	They tell me it's I. Forget.
Prosecutor:	Don't you know your own name?
Witness:	No.
Prosecutor:	Were you at the scene of the hold-up?
Witness:	I don't know.
Prosecutor:	What do you mean, you don't know?
Witness:	Like I said, I don't know.
Prosecutor:	Why don't you know?
Witness:	I don't remember anything.
Prosecutor:	And why not?
Witness:	Total amnesia from a car wreck.
Prosecutor:	_____.

[c] Permanent Loss

UNITED STATES v. AMAYA 533 F.2d 188 (5th Cir. 1976)

RONEY, CIRCUIT JUDGE:

* * * The case involves the alleged activity of defendant, a practicing attorney, to organize and arrange contact between an alleged seller and buyer in a particular transaction for an unnamed quantity of heroin. Defendant's challenge to his conviction concerns the use of transcribed testimony of a Government witness from a prior trial because of the witness's subsequent loss of memory.* * * We affirm.

Facts

A one count indictment charged a conspiracy between the defendant, a San Antonio attorney, and two of his clients to distribute heroin. The Drug Enforcement Agency was apprised of the formation of the alleged conspiracy by Gregory Sprouse, a former client of the defendant. Sprouse reported to the D.E.A. that during a conversation on or about the middle of February 1973, defendant solicited his help in finding buyers for heroin that the defendant could procure from another individual. Special Agent Jeffrey Wood was dispatched by the D.E.A. to act as an undercover agent with the task of posing as a buyer of heroin to gather evidence of the alleged conspiracy. The central

controversy in the case revolves around a meeting at a restaurant on March 1, 1973, attended by defendant Amaya, Sprouse, Agent Wood and another individual who is at present a fugitive. This meeting was for the purpose of establishing the procedures of exchange, price and quantity of heroin that Agent Wood would purchase. Most of the conversation was secretly recorded by Agent Wood and the transcript of that recording contained the bulk of the Government's case against Amaya.

At the first trial Sprouse testified at length against the defendant. The case was tried before a jury and defendant Amaya was convicted. On appeal, we reversed the conviction and granted a new trial because of an impermissible *Allen* charge. Prior to the commencement of the second trial Sprouse suffered injury in an automobile accident resulting in a loss of memory regarding his prior testimony. The district judge, who presided at both trials, determined that Sprouse was unavailable within the meaning of Rule 804(a)(3), Federal Rules of Evidence, and permitted his prior testimony to be read into the record *in toto*.

* * *

Amaya * * * argues that Sprouse was never conclusively shown to be unavailable because it was never established by expert testimony that his lack of memory was permanent. The party offering the prior testimony has the burden of proving the unavailability of the witness.* * * Determination of unavailability is a judicial exercise reviewable by this Court only for abuse of discretion.* * * Defendant alleges that a continuance should have been given to allow expert testimony bearing on the permanence of the loss of memory before establishing unavailability for trial. Although the duration of an illness is a proper element of unavailability, the establishment of permanence as to the particular illness is not an absolute requirement. The duration of the illness need only be in probability long enough so that, with proper regard to the importance of the testimony, the trial cannot be postponed. * * * There was no guarantee that Sprouse's memory would ever return. The trial judge did not abuse his discretion in deciding on the evidence in the record that Sprouse was unavailable for trial.

The Eighth Circuit reached a similar result in *McDonnell v. United States*, 472 F.2d 1153 (8th Cir. 1973). In that case the witness was present at the second trial and testified. Testimony at a prior trial was admitted, however, because of the witness's faulty memory. The court said: "Since [the witness] testified to a lack of memory as to a material portion of the subject matter of his prior testimony, he would be unavailable under Rule 804 and his former testimony on the subject would be admissible. Such a rule of evidence is supported by textwriters and case law * * * ."

* * *

Upon full examination of the record and consideration of all of the arguments of counsel, we are satisfied that the conviction should stand.

Affirmed.

NOTE

How extensive must the memory loss be for the witness to be found unavailable?

In *North Miss. Commun., Inc. v. Jones*, 792 F.2d 1330 (5th Cir. 1986), the Court held that a witness was not unavailable where he remembered the general subject matter of a conversation but could not remember certain details.

[5] Death or Disability

[a] Federal Rule of Evidence 804(a)(4)

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant —

* * *

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; * * *

[b] Illustration

The prosecutor needs the testimony of I. M. Sick, either live or through the transcript of the preliminary hearing. I. M. Sick is in the hospital, having just undergone surgery for a brain tumor.

Prosecutor: Your Honor, I have here a letter from I. M. Sick's physician which indicates that he is incapable of attending the trial or being a witness.

Defendant: _____

[c] Temporary Disability

UNITED STATES v. FAISON 679 F.2d 292 (3d Cir. 1982)

GIBBONS, CIRCUIT JUDGE:

James Raymond Faison, convicted of violating the "wire fraud" statute, 18 U.S.C. § 1343 *et seq.* (1976), and of transporting stolen securities in interstate commerce, 18 U.S.C. § 2314 (1976), contends that the court erred * * * in denying his motion for a new trial. We vacate the judgment and remand for further proceedings.

I.

* * *

The evidence suggests that Faison, a New Jersey resident, operated an auto-body shop in New York City. In August 1980, he decided to move his business to New Jersey, whereupon he started negotiating with one Cal Mancuso to lease Mancuso's New Jersey trucking terminal. Meanwhile, defendant had obtained blank checks stolen from the American Foundation for the Blind whose offices are also in New York City. In due time, defendant asked Mancuso to help him cash these illegal checks in a scheme to raise money for both men. * * * Mancuso then made contact in New Jersey with Michael Selvanto, who was thought to have the necessary connections to cash the illicit checks. Selvanto, in turn, notified the FBI with whom he thereafter cooperated by recording his conversations with the conspirators and by keeping the FBI informed of Faison's and Mancuso's activities. * * * Faison personally delivered the stolen checks to Mancuso in New Jersey. Mancuso, copying from a cancelled check provided by Faison, forged the Foundation's signature on the blanks and turned the checks over to Selvanto.

* * *

II.

* * *

Faison's first trial started on January 21, 1981. Mancuso, who had entered a guilty plea * * *, testified as a government witness. The jury was unable to reach a verdict, and the District Court declared a mistrial. A second trial began on March 17, 1981. By this time Mancuso was in the hospital for treatment of his heart problem. Defense counsel requested an adjournment of the trial so that the jury would have the benefit of Mancuso's live testimony and live cross-examination. This request was repeated throughout the trial. The District Court, however, refused to adjourn the trial and instead permitted the introduction of the testimony which Mancuso gave at the first trial. On March 25, the jury found Faison guilty of all counts.

Faison argues that the admission of Mancuso's testimony violated his Sixth Amendment confrontation rights. Alternatively he urges that the court improperly applied Fed. R. Evid. 804(a)(4), or abused its discretion in failing to grant a continuance to determine whether Mancuso would be available in the near future.

* * *

In this instance, the trial court decided that Mancuso, who was in the hospital suffering from a heart attack, was unavailable. * * * There is no question Mancuso was too sick to testify at the time of trial. That is not, however, dispositive. Our inquiry, instead, is whether the District Court properly exercised discretion in not adjourning the trial for a reasonable period

to afford the witness enough time to recover from an illness which might be temporary, and thus to be available once more for live testimony.

There is evidence in this record that a decision not to adjourn might well have been within the parameters which we must accord to trial judges in their exercises of discretion in matters such as this. On the date that the trial court made its determination not to adjourn, the court had before it information that Mancuso was about to undergo coronary bypass surgery and would not be available to testify for at least four to five weeks after the surgery.* * * Although the United States Attorney expressed his expectation that Mancuso would be available to testify in four to five weeks, the trial court had no assurance that even if Mancuso successfully underwent surgery, his physician would accede to his appearance at trial in four or five weeks in light of his heart condition. Appearance at a major criminal trial, particularly when a witness, such as Mancuso, was personally implicated in the events, must be an emotional and traumatic experience. The trial court may have been aware of the frequency with which requests to excuse appearance of a witness are made and granted on medical evidence less compelling than that which seemed likely to have been presented on behalf of Mancuso were the trial adjourned. Thus, the trial court's refusal to adjourn may have been warranted, particularly when the Federal Rules of Evidence explicitly provide that in such a situation prior reliable testimony is admissible in lieu of live testimony.

* * *

The trial judge's discretion in granting an adjournment for witnesses unavailable due to illness must be guided on the one hand by the policy of favoring live testimony and confrontation in the presence of the factfinder and, on the other, by the policy, manifested in the Speedy Trial Act, 18 U.S.C. § 3161 (1976), of prompt disposition of criminal trials. Moreover, since witness availability affects the court's ability to manage its cases, the trial court's decision to refuse an adjournment and to admit prior testimony must be treated with respectful deference. In exercising discretion a trial judge must consider all relevant circumstances, including: the importance of the absent witness for the case; the nature and extent of cross-examination in the earlier testimony; the nature of the illness; the expected time of recovery; the reliability of the evidence of the probable duration of the illness; and any special circumstances counseling against delay. * * *

Applying the above standards to this record, we hold that the District Court abused his discretion by not adjourning Faison's trial for a reasonable period. Here Mancuso was an important witness against defendant. The live cross-examination of such a witness before a jury, even if not constitutionally mandated, ought not to be lightly dispensed with. The fact that the first trial yielded a hung jury suggests that the evidence against defendant had weaknesses. The District Court should have been especially careful that the omission of live cross-examination of Mancuso before the new jury not tip the balance in a close case against defendant.

Since the court's error — one of nonconstitutional dimensions, deprived Faison, at most, of the opportunity to present Mancuso's testimony live, an outright reversal for a new trial is inappropriate without further inquiry. By

now Mancuso has undergone surgery. Whether he has recovered sufficiently to testify is not known. If his health is such that he would be unavailable at a new trial, granting a new trial would serve no purpose. Faison already had a trial at which Mancuso's prior testimony was read to the jury. If he could testify at a new trial, however, Faison should be afforded the opportunity to have him do so. Thus the case will be remanded to the trial court for appropriate proceedings to determine whether Mancuso would now be available to testify. If he would be, the trial court is directed to grant a new trial.

III.

The judgment appealed from is vacated and the case remanded for further proceedings consistent with this opinion.

[Concurring opinion omitted.]

NOTE

On remand in *Faison*, the District Court found that the government witness was unavailable because of a serious heart condition from which he was unlikely ever to recover. Thus, no purpose would be served in granting the defendant a new trial. 564 F. Supp. 514 (D. N.J. 1983). See also *Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707 (9th Cir. 1992) (witness was sufficiently shown to be unavailable where he required surgery that would leave him indisposed for one to two weeks). Compare *United States v. Acosta*, 769 F.2d 721 (11th Cir. 1985) (uncorroborated statement of defense counsel that witness was unavailable to testify because of her child's illness was insufficient to permit the introduction of her prior testimony).

[6] Absence

[a] Federal Rule of Evidence 804(a)(5)

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant —

* * *

(5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

NOTE

Is Rule 804(a)(5) concerned with the physical absence of the declarant, or with the absence of testimony from the declarant?

Professors Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (9th ed. 2006), point out that absence for purposes of the Rule means absence of *testimony*, not physical absence of the declarant:

A declarant is not absent under the terms of Rule 804(a)(5) simply because he is out of the jurisdiction or cannot be located. The party relying on absence to support an offer of hearsay evidence, in the case of any of the basic exceptions covered by subdivision (b) of Rule 804 aside from former testimony, must demonstrate that it has not been possible to take a deposition. The Senate objected to the requirement that an attempt to depose be required. However, the Rule follows the House provision in requiring a showing of inability to obtain *testimony* of a declarant before a dying declaration, statement against interest, or statement of pedigree can be admitted on the ground that the declarant is absent. As a practical matter, the issue does not arise for statements offered as dying declarations or statements of pedigree. The ground of unavailability for dying declarations is ordinarily death, not absence; and statements of pedigree are rarely offered. So the deposition requirement with respect to the absence ground of unavailability is really limited to situations in which the proponent has a statement that would otherwise be admissible as a declaration against interest, and the asserted ground of unavailability is absence.

(The deposition preference issue will probably not arise under Rule 804(b)(6), the hearsay exception based on forfeiture by misconduct. That exception applies only if the party against whom the hearsay is offered intentionally created the witness's unavailability. If the party has engaged in such conduct, the declarant is quite unlikely to be available for a deposition. At any rate, the deposition preference by its terms applies only to statements offered under Rules 804(b)(2)-(4)).

Rule 804(a)(5) requires an attempt to depose. The rationale is that if a deposition can be taken, the deposition testimony will be admissible as prior testimony; and prior testimony is preferred to the declaration against interest, because prior testimony has been subject to cross-examination. Consequently, if the attempt to depose is successful, the hearsay declarant is no longer considered unavailable and statements falling within 804(b)(3), (or technically (2) or (4)) are no longer admissible for their truth. Note, however, that if the deposition is offered, the deponent may be *impeached* under Rule 806 with the statements that are inadmissible for their truth.

If the hearsay statement is offered under Rule 804(b)(1), the proponent need not prove an attempt to depose, for the obvious reason that a deposition or its equivalent has already been taken. When the statement is admissible under Rule 804(b)(1), the declarant has *already* testified under oath and subject to cross-examination; there is thus no need to obtain what would amount to duplicative evidence.

The problems created by the deposition preference in Rule 804(a)(5) are well-illustrated by *Campbell v. Coleman Co.*, 786 F.2d 892 (8th Cir. 1986). The minor plaintiffs alleged that they were severely burned by a defective gasoline lantern that exploded. Coleman had a different theory: that Johnnie Hayes, who was babysitting the children, over-filled the lighted lantern with gasoline, then panicked and threw the burning lantern out of the house where it accidentally hit the children. Coleman had deposed Hayes, but at the deposition, Hayes flatly denied having anything to do with the accident. The deposition was not introduced at trial. However, Hayes had made several statements to various people implicating himself in the accident, and these were introduced at trial as declarations against interest. Coleman contended that Hayes was unavailable on the ground of absence because it had made good faith attempts to locate him before trial, and he could not be found. The trial court admitted the statements, but the Court of Appeals found that this was reversible error, because Hayes was not absent within the meaning of Rule 804(a)(5). As the Court put it, the "subsection is concerned with the absence of testimony, rather than the physical absence of the declarant." Thus, while Hayes was absent from the trial, his testimony was available (i.e., the deposition), and his hearsay statements were therefore not admissible under Rule 804(b)(3).

The result in *Coleman* shows that the deposition preference can create anomalous results. Hayes's deposition was undoubtedly a *less* reliable indicator of what happened than were his informal statements against interest. The congressional assumption that a declaration against interest is not necessary where a deposition can be or has been taken assumes that the proponent will get the same information, only better, from the deposition as from the declaration against interest. But, *Coleman* shows that this is not always the case. The anomaly of the Rule is even more striking when it is considered that if Hayes were dead or declaring the privilege at the time of trial, the declarations against interest would have been admissible. The deposition preference is applied only when absence is the asserted ground of unavailability. Clearly, this makes no sense. If nothing else it is inconsistent with the general goal of Rule 804(a), which was to provide a unitary test of unavailability for all hearsay exceptions. Finally, the deposition preference is problematic because it ends up penalizing parties who depose witnesses in a timely fashion. If Coleman had not bothered to depose Hayes before he disappeared, the declarations against interest would have been admissible. It seems odd to penalize Coleman for engaging in diligent efforts to prepare for litigation.

Of course, as discussed above, the declarations against interest in *Coleman* would still have been admissible to impeach Hayes under Rule 806. But this assumes that the Hayes deposition would be proffered at the trial. The plaintiffs in *Coleman* were unlikely to do so, and in fact did not do so, because introducing the deposition would have accomplished little more than to open the door to the damaging "impeachment" evidence that the jury would misuse for its truth. The

plaintiffs did not need the Hayes deposition as substantive evidence, given the availability of expert testimony and the sympathetic nature of their case. Moreover, even if the plaintiffs had introduced the deposition, the declarations against interest could not have been used as substantive evidence on Coleman's behalf. This point was made by the Court in *Coleman* when it rejected Coleman's argument that the introduction of the declarations against interest at trial was harmless error:

At the close of plaintiffs' case-in-chief, no evidence had been introduced from which Coleman could have argued that plaintiffs' injuries were caused by the negligent actions of a nonparty. Introduction of the inadmissible hearsay created a substantive defense for Coleman.* * * Plaintiffs were thereby prejudiced.

Because there is a deposition preference in Rule 804(a)(5), however misguided it might be, it follows that a declarant will not be considered absent for purposes of Rules 804(b)(2)-(4) simply because he is outside the jurisdiction and beyond the subpoena power. The Federal Rules of Civil and Criminal Procedure make provision for deposing witnesses who are beyond the territorial jurisdiction of the court. If the witness is deposable, he is not absent under Rule 804(a)(5). See, e.g., *United States v. Curbello*, 940 F.2d 1503 (11th Cir. 1991) (a declaration against interest was not admissible where the declarant was incarcerated in the Bahamas and could have been deposed under Fed. R. Crim. P. 15).

[7] Procurement or Wrongdoing

[a] Federal Rule of Evidence 804(a)

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability. * * *

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

[b] Negligence

UNITED STATES v. MATHIS

550 F.2d 180 (4th Cir. 1976)

PER CURIAM:

David Mathis and Samuel Moore both appeal their convictions for armed bank robbery. They assert numerous grounds for reversal, but we find none meritorious. We affirm.

I.

Defendants' principal argument is that the district court committed reversible error in permitting the testimony of Karen Jones, given at a previous trial in which a mistrial was granted, to be read to the jury. Karen Jones was not available to testify in person because she could not be located; inadvertently she had been released from a District of Columbia penal institution pursuant to a court order requiring the release of another prisoner bearing the same name.

Jones' prior testimony was admissible under Rule 804 of the Federal Rules of Evidence if her attendance at the trial could not be procured by process or other reasonable means. Rule 804(a)(5). The record shows that reasonable efforts were made to find her, but to no avail. * * * In the instant case * * * the disappearance of Jones was due to inadvertence, not reckless disregard of an obligation to produce her, and there is no evidence that the prison official who released her knew that she would be needed as a witness.

* * *

Affirmed.

[Dissenting opinion omitted.]

C. UNAVAILABILITY EXCEPTIONS

[1] Federal Rule of Evidence 804(b)

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * *

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a

reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) [Transferred to Rule 807].

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

[2] Former Testimony

[a] Federal Rule of Evidence 804(b)(1)

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * *

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

* * *

[b] Predecessor in Interest and Similarity of Motive

IN THE MATTER OF JOHNS-MANVILLE/ASBESTOSIS CASES

93 F.R.D. 853 (N.D. Ill. 1981)

SHADUR, DISTRICT JUDGE:

Dr. Kenneth W. Smith ("Dr. Smith") was hired in 1944 as a Canadian Johns-Manville Company, Ltd. ("Canadian J-M") plant physician and eventually

served as Medical Director for Johns-Manville Corporation ("J-M") from 1952 to 1966. Dr. Smith died in July 1977.

Dr. Smith was deposed in two earlier asbestos-related cases: *Louisville Trust Co. v. Johns-Manville Corp.*, No. 164922 (Jefferson Cty., Ky. Cir. Ct. 1972) (the "*Louisville Trust* deposition," taken April 21, 1976 * * *) and *DeRocco v. Forty-Eight Insulations, Inc.*, Nos. 2880, 2881 (Allegheny Cty., Pa. Ct. of Common Pleas 1974) (the "*DeRocco* deposition," taken January 13, 1976 * * *). Plaintiffs have moved to permit use of the *Louisville Trust* deposition at trial in these consolidated actions. J-M, Johns-Manville Sales Corporation ("J-M Sales") and Canadian J-M have filed a cross-motion *in limine* seeking to exclude use of both the *Louisville Trust* and *DeRocco* depositions. * * * Because of Dr. Smith's death his testimony is admissible if it satisfies the requirements of Rule 804(b)(1).

* * *

Relationship of the Parties

Rule 804(b)(1) * * * requires that the party against whom a deposition is offered, or that party's "predecessor in interest," have been a party in the earlier proceeding. Johns-Manville Products Corporation ("J-M Products") was a defendant in both *Louisville Trust* and *DeRocco*, while none of J-M Defendants was. Nonetheless this Court finds the "predecessor in interest" condition satisfied.

First, as to J-M Sales plaintiffs' R. Mem. 7 asserts:

The Johns-Manville Waukegan Plant at which plaintiffs were employed was previously under the name of Johns-Manville Products Corporation and is now under the name of Johns-Manville Sales Corporation.

It is unclear whether that statement denotes the same corporate entity with a name change or a transfer of assets between two J-M subsidiaries. In either event even the strictest reading of the "predecessor" language is met.

Even were that not the case, the relationships among the J-M Defendants compel the same result as to each. As the December 2, 1977 affidavit of J-M's Vice President, Secretary and General Counsel in these actions explains:

- (1) J-M is the publicly-owned parent corporation.
- (2) All the other entities (other J-M Defendants and J-M Products) are its wholly-owned subsidiaries.
- (3) There are interlocking officers, uniformity of employee benefit programs, centralization of all major staff functions, common "Johns-Manville" advertising and a total general integration among all the corporations.
- (4) Ultimate responsibility for all management decisions rests with J-M and its corporate officers.

In summary the affidavit puts it: "That in a defacto and operations sense there is but one integrated entity, to wit: 'Johns-Manville.'"

That centralization and integration extended to Dr. Smith himself as the only full-time physician in the whole J-M corporate structure. Dr. Smith said * * * he acted "as sort of an *ad hoc* consultant to the total corporation * * * ."

How does such a close-knit corporate family fare in "predecessor in interest" terms? As originally proposed by the Supreme Court Rule 804(b)(1) would have permitted use of prior testimony whenever any party with a similar motive or interest had an opportunity to examine the witness in the earlier proceeding. However the House Judiciary Committee rejected that innovation and proposed the language eventually adopted because: "it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party * * * ." In accepting the House amendment, the Senate noted "that the difference between the two versions is not great." * * *

Based on that legislative history the Third Circuit has given an expansive reading to "predecessor in interest." In *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179, 1185-87 (3d Cir. 1978) that Court required only that the parties to the earlier and later actions have a "sufficient community of interest" or a "like motive" for cross-examination. That approach would clearly permit use of the Smith depositions against all J-M Defendants. * * *

* * * Congress certainly did not intend to use "predecessor in interest" in the strict sense of corporate privity. Given the policies underlying the hearsay concept, it is eminently fair to admit testimony, cross-examined by J-M's lawyers on behalf of one J-M subsidiary, against all J-M Defendants.

It is true that this Court has held the J-M corporations separate legal entities in a worker's compensation context. *In re Johns-Manville / Asbestosis Cases*, 511 F. Supp. 1229, 1234 (N.D. Ill. 1981). But the considerations there were very different from those now at issue, those with which the Supreme Court and Congress were concerned in drafting the Rule 804(b) (1) hearsay exception. All Johns-Manville entities, though not a single party, are successors in interest to J-M Products for purposes of the Dr. Smith depositions.

"Similar Motive"

J-M Defendants urge that J-M Products lacked motive in *Louisville Trust* and *DeRocco* to develop testimony on issues relevant to these consolidated actions. Specifically they point out that those cases were brought by end users of asbestos, while these involve employees. Both the depositions, they argue, involved the issue whether a warning label was appropriate on asbestos products. J-M Defendants thus assertedly lacked the motive to explore issues such as warnings given to employees.

But the depositions were much broader than J-M Defendants would have it. * * * To a substantial extent plaintiffs' focus in the depositions was the same as that of the current plaintiffs. They were exploring the degree of J-M's awareness of various aspects of asbestos-related diseases from the 1940s through the 1960s. Warnings of the hazards (including warning labels) were only part of the many issues touched on during the depositions.

As to at least two currently critical issues — knowledge of J-M's corporate officers and knowledge of J-M's only medical officer Dr. Smith — J-M Products had full motive and opportunity to cross-examine Dr. Smith. *Louisville Trust* and *DeRocco* were personal injury actions based on asbestos-related claims. Like the current consolidated actions, they asserted J-M's culpability. Suits by end users of asbestos and suits by J-M employees implicate J-M's corporate knowledge equally.

J-M Defendants point out that the *Louisville Trust* and *DeRocco* plaintiffs sought recovery on theories of negligence, breach of warranty and misrepresentation, while the current actions involve allegations of intentional and fraudulent activity. That distinction is irrelevant. Under whatever label, the cases pose the question of J-M's awareness of asbestos-related problems. On that score the "similar motive" test is plainly met.

Several other arguments by J-M Defendants appear to suffer from the simplistic notion that a witness' testimony is not admissible unless it deals with all the issues relevant to the litigation. Of course that is not so. To the extent J-M Defendants do not view Dr. Smith's testimony as fully representative of J-M's knowledge of the art, efforts to protect its employees against asbestos-related risks or any other matter, they are free to adduce any other evidence they choose.

This opinion does not treat with the possibility that some portions of Dr. Smith's deposition testimony (as distinct from the depositions as a whole) may be excludable because of the absence of "similar motive." That prospect has not been posed adequately by the parties' memoranda.

* * *

Conclusion

Plaintiffs' motion to permit use of the *Louisville Trust* deposition at trial is granted. J-M Defendants' motion *in limine* to exclude the Dr. Smith depositions is denied. Any decision as to exclusion of designated portions of Dr. Smith's testimony must await more specific submissions by the parties.

NOTES

1. Does the "predecessor in interest" requirement prohibit prior testimony even if the testimony was developed by someone who had a motive similar to that of the party against whom the testimony is now offered?

Professors Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (9th ed. 2006), have this to say about the "predecessor in interest" and "similar motive" requirements of Rule 804(b)(1):

The touchstone of admissibility is a similar motive to develop the testimony on the part of the nonoffering party (or a predecessor in

interest in a civil case). The way to determine whether or not motives are similar is to look at the issues and the context in which the opportunity for examination previously arose, and compare that to the issues and context in which the testimony is currently proffered. The similar motive inquiry is essentially a hypothetical one: is the motive to develop the testimony at the prior time similar to the motive that would exist if the declarant were produced (which of course he is not) at the current trial or hearing? *See, e.g., United States v. Tannehill*, 49 F.3d 1049 (5th Cir. 1995) (testimony from a prior multi-defendant trial on the same charges was admissible under Rule 804(b)(1); the defendant argued that at the first trial, his strategy was to “disappear into the woodwork and hope for the best,” but the defendant’s motive for cross-examination at both trials was similar: “to discredit the witness and separate himself from the other members of the conspiracy”). *See also Battle v. Memorial Hosp.*, 228 F.3d 544 (5th Cir. 2001) (deposition testimony should have been admitted against the defendants under Rule 804(b)(1); the defendants were on the same side of the same issues at the deposition and at trial and they had the same interest in asserting and prevailing on those issues; the defendants claimed that they did not aggressively test the witness’s deposition answers with cross-examination-type questions because they were motivated only by the desire to understand the plaintiffs’ case; but the defendants could not suggest a single question or line of questions that would have added reliability to the deposition). Compare *New England Mut. Life Ins. Co. v. Anderson*, 888 F.2d 646 (10th Cir. 1989) (an insurance company brought an action to set aside a life insurance policy as fraudulently procured by a beneficiary, who allegedly conspired to murder the insured, her first husband; testimony given by an unavailable witness at the trial of another conspirator was properly excluded, as the defendant in that case was not disposed to protect the interests of the defendant in the instant case, but rather would be likely to shift the blame to her, so he had no “like motive” to develop the same facts).

Under Rule 804(b)(1), it does not matter whether the opportunity for examination came in the form of direct or cross-examination, as long as there was a similar motive and adequate opportunity to develop the testimony of the witness.

In civil cases only, it will suffice that a predecessor in interest had an opportunity and a motive to examine the testimony similar to that of the party against whom the testimony is offered. The Advisory Committee attempted to expand this exception in civil cases to cover situations in which some unrelated party had a similar motive and opportunity for examination. But Congress rejected this innovation. There was a general feeling that it was unfair to bind one party to the examination of another, and so the term “predecessor in interest” was included, to provide for binding effect against nonparties only if they had some juridical relationship with a party to the prior litigation. Yet many of the court decisions under the Rule are closer to the Advisory Committee’s view than to that of Congress. Most courts apply

the term "predecessor in interest" broadly. *See, e.g., Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119 (4th Cir. 1995) (in an antitrust action, testimony by a dairy official testifying as a government witness in a prior criminal conspiracy trial was admissible as former testimony, even though the dairies were not the defendants in the criminal case; privity is not the gravamen of a Rule 804(b)(1) analysis; rather, the issue is whether the party who cross-examined the witness had a motive similar to that of the party against whom the testimony is offered).

The difference in views is set forth by Judge Becker and Professor Orenstein in *The Federal Rules of Evidence After Sixteen Years — The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 Geo. Wash. L. Rev. 857, 898 (1992):

Another circuit split revolves around the definition of the "predecessor-in-interest" requirement of the former testimony exception to hearsay. Rule 804(b)(1) admits testimony of an unavailable witness in a civil case if the party against whom the testimony is offered, or his predecessor in interest, possessed a similar motive and opportunity to cross examine the witness. The definition is complicated by a tortured legislative history. The predecessor-in-interest requirement was added to the Rule to restrict its scope. * * * In *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir. 1978), the Third Circuit construed the predecessor-in-interest language as mandating only a "sufficient community of interest" between the prior litigant and party against whom the hearsay is offered. This construction arguably reads the predecessor-in-interest standard out of the Rule. * * * Many courts have followed *Lloyd's* interpretation. *See, e.g., Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d 276 (4th Cir. 1993) (in a product liability case resulting from asbestos exposure, the Court held that a deposition from another asbestos case was properly admitted against the plaintiff as prior testimony, even though she had no relationship to the plaintiff in that prior litigation; the party against whom the deposition is offered "must point up distinctions in her case not evident in the earlier litigation that would preclude similar motives of witness examination"; the plaintiff in this case was in the same situation with respect to asbestos exposure as the plaintiff in the case in which the deposition was taken); *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289 (6th Cir. 1983) (deposition from a prior litigation is admissible against a nonparty to that litigation, where the party who cross-examined the deponent had the same goal in cross-examination as the party against whom the deposition is now offered). But others have adhered to a more narrow interpretation. *See, e.g., In re Screws Antitrust Litig.*, 526 F. Supp. 1316 (D. Mass. 1981) (testimony was not admissible against a nonparty to the prior litigation who had no legal relationship with the party against whom the testimony was originally offered).

In our view, the “predecessor-in-interest” language of the Rule should be revised. Congress was concerned about one party being bound by the inadequate cross-examination of a previous litigant with whom the party had no legal relationship. But this assumes that the previous litigant in fact engaged in inadequate cross-examination. As most Courts recognize, if the prior cross-examination was as effective and thorough as the subsequent party could expect to have done, it is not unfair to admit the testimony against that later party. We note that those Courts that adhere to a strict construction of the “predecessor-in-interest” requirement of Rule 804(b)(1) have nonetheless admitted prior testimony under the residual exception [Rule 807, *infra*] as a “near miss” — so long as the prior cross-examination was effective enough to bind the party against whom the testimony is offered. *See, e.g., Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985) (a deposition was offered against a defendant who was not a party to the litigation in which the deposition was taken; the party who cross-examined the deponent was not a predecessor in interest because there was no legal relationship between them; however, because the defendant could have added nothing to the cross-examination that did take place, the deposition was admissible against the defendant under the residual exception, as a “near miss” of the prior testimony exception). These Courts are simply evading the “predecessor-in-interest” requirement by invoking the residual exception rather than reading it out of Rule 804(b)(1) — but the end result is the same. Obviously the courts are showing discontent with the “predecessor-in-interest” requirement; Congress may have intended to protect against unfairness, but in fact, unfairness is created if probative and reliable evidence is unnecessarily excluded.

2. Can grand jury testimony that exculpates the defendant be offered against the government at trial under the prior testimony exception?

Professors Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (9th ed. 2006), provide this comment on the admissibility of grand jury testimony against the government under Federal Rule 804(b)(1):

Grand jury testimony is not admissible under Rule 804(b)(1) against a criminal defendant, because the defendant has no opportunity to cross-examine a witness at a grand jury proceeding. But, can grand jury testimony be admitted against the government under Rule 804(b)(1) when it exculpates the defendant? This question arose in *United States v. Salerno*, 505 U.S. 317 (1992).

The prosecutor in *Salerno* granted use immunity to two witnesses who then testified before the grand jury. Contrary to the prosecutor’s expectations, the testimony was exculpatory to the defendants. At trial the defendants called the two witnesses, hoping either to obtain favorable trial testimony, or to use the grand jury testimony as prior inconsistent statements admissible under Rule 801(d)(1)(A), should the witnesses change their testimony on the stand. But the witnesses

invoked their Fifth Amendment privileges and refused to testify. So the defendants argued that the grand jury testimony was admissible against the government as prior testimony. The government contended that the grand jury testimony could not be admitted under that Rule because the "similar motive" requirement had not been met. The Trial Court agreed with the government, stating that the "motive of a prosecutor in questioning a witness before the grand jury in the investigatory stages of a case is far different from the motive of a prosecutor in conducting a trial."

The Second Circuit held that it was reversible error to exclude the exculpatory grand jury testimony. It found it unnecessary to decide whether a similar motive existed, because it held that "adversarial fairness" prohibited the Government from relying on the similar motive requirement to exclude the exculpatory testimony. The Court of Appeals found it unfair for the government to develop evidence in a one-sided manner, by immunizing some witnesses and not others, depending on whether their testimony was favorable to the Government.

However, the "adversarial fairness" rationale of the Court of Appeals was rejected by the Supreme Court in *Salerno*. The Court declared that the plain language of Rule 804(b)(1) requires proof of a similar motive in all cases in which hearsay is proffered as prior testimony. The Court contended that it had no authority to override the plain meaning of the Rule by applying notions of adversarial fairness, because Congress "presumably made a careful judgment as to what hearsay may come into evidence and what may not," and that to respect Congress's determination, "we must enforce the words that it enacted." In essence, the Court held that it didn't matter if the government had acted unfairly and had developed the evidence in a one-sided manner: the plain meaning rule prohibited the Court from considering this unfairness.

The question remained whether the prosecution indeed *had* a similar motive to develop the witnesses' testimony at the grand jury as it would have had at the trial. The Supreme Court remanded this question to the Second Circuit, which ultimately decided it in an *en banc* opinion. *United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993) (*Salerno* having died in the interim). The *DiNapoli* Court rejected the extreme views of both the government and the defendant — the government arguing that the prosecution *never* has a similar motive to develop testimony at the grand jury as it would have at trial, and the defendant arguing that the prosecution *always* has a similar motive to develop grand jury testimony as it would have at trial. The Court analyzed the question of similar motive as follows:

The proper approach * * * in assessing similarity of motive under rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding has at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the

same side of a substantially similar issue. The nature of the two proceedings — both what is at stake and the applicable burden of proof — and, to a lesser extent, the cross-examination at the prior proceeding — both what was undertaken and what was foregone — will be relevant though not conclusive on the ultimate issue of similarity of motive.

Applying these principles to the facts, the *DiNapoli* Court found that the government did not, in the instant case, have a similar motive to develop the testimony of the witnesses at the grand jury as it would have had at the trial. The Court noted that at the time the witnesses gave exculpatory testimony at the grand jury, there was no question of probable cause as to any of the defendants in the case, because they had already been indicted, and the grand jury was simply investigating whether other defendants should be indicted. The witnesses had essentially denied that there was any conspiracy among the defendants, and at that point, the prosecution could not have been concerned that the grand jury proceeding would have been altered in any way as to the defendants by the testimony. As the Court put it, “the grand jury had already been persuaded, at least by the low standard of probable cause, to believe that the [conspiracy] existed and that the defendants had participated in it to commit crimes.” In contrast, at trial, where the government has the burden to prove the defendants guilty beyond a reasonable doubt, the prosecutor would have had a substantial incentive to attack the testimony of exculpatory witnesses.

The *DiNapoli* Court also relied on the fact that the record showed that the grand jurors had indicated to the prosecutor that they did not believe the testimony of the exculpatory witnesses. The Court concluded that “a prosecutor has no interest in showing the falsity of testimony that a grand jury already disbelieves.”

The defendants in *DiNapoli* argued that the prosecutor himself showed a similar motive to attack the testimony at the grand jury proceeding when he challenged the witnesses, accused them of lying, and confronted them with contradictory evidence. However, the Court did not find this enough for the grand jury proceeding to be considered a trial-like situation:

A prosecutor may have varied motives for asking a few challenging questions of a grand jury witness who the prosecutor thinks is lying. The prosecutor might want to afford the witness a chance to embellish the lie, thereby strengthening the case for a subsequent perjury prosecution. Or the prosecutor might want to provoke the witness into volunteering some critical new fact in the heat of an emphatic protestation of innocence.

Thus, a prosecutor can challenge an exculpatory witness at a grand jury, to some extent, without crossing the line into a trial-like cross-examination that would result in a finding of a similar motive under Rule 804(b)(1). The *DiNapoli* Court particularly noted the prosecutor’s “careful limitation of questioning to matters already publicly disclosed.” That is, the prosecutor was not pulling out all the stops at

the grand jury by attacking the witness with secret information, as he might well have done at trial.

While the *DiNapoli* Court refused to establish a bright-line rule, it is clear that, under the Court's decision, exculpatory grand jury testimony will only rarely be admissible against the government under Rule 804(b)(1). A similarity of motive is likely to be found only where some kind of combination of three factors exists: (1) the issuance of an indictment is in doubt because the case as to probable cause is close; (2) it appears as if the grand jury could have believed the witness; and (3) the witness is in fact attacked in much the same way as he would have been at trial. *See, e.g., United States v. Peterson*, 100 F.3d 7 (2d Cir. 1996) (exculpatory grand jury testimony in a prior state criminal proceeding was not admissible as prior testimony in a federal trial on firearm charges; even assuming that the state government could be considered a predecessor in interest of the federal government, the similar motive requirement of Rule 804(b)(1) was not met; the evidence before the state grand jury "provided ample probable cause to indict Peterson for possession" and therefore there was no reason for the government to attack Peterson's exculpatory testimony in the same manner as it would have done at trial). Compare *United States v. Foster*, 128 F.3d 949 (6th Cir. 1997) (exculpatory grand jury testimony should have been admitted against the government under Rule 804(b)(1); at the time the witness testified, the outcome of the grand jury proceeding was in doubt, and there was no indication that the grand jury did not believe the witness).

[3] Dying Declarations

[a] Federal Rule of Evidence 804(b)(2)

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * *

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

* * *

(2) **Statement under belief of impending death.** In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

[b] Declarant's Belief in Impending Death**STATE v. QUINTANA**
644 P.2d 531 (N.M. 1982)

RIORDAN, JUSTICE.

Rosinaldo Quintana (Quintana) was convicted of voluntary manslaughter. Quintana alleged on appeal that the deathbed statement of Telesfor Lopez (Lopez), the decedent, was erroneously admitted into evidence. The Court of Appeals held that the admission of the statement was reversible error. We granted *certiorari*; and we reverse the Court of Appeals.

The issue on appeal is:

Whether Lopez' deathbed statement was a dying declaration that was properly admitted into evidence.

In the early evening of May 21, 1980, there was an altercation between two groups of men at the bridge that separates East and West Pecos, New Mexico. One of the men from Lopez' group smashed the windshields of three trucks belonging to men of the other group. After this incident, Lopez' group went to the Valencia residence in East Pecos. The residence was on top of a wooded hill off the main roadway. A bonfire was built, and the group sat outside by the fire and drank beer.

The other group drove their damaged trucks to Quintana's trailer. Quintana, for approximately seven months, had been the deputy marshal for the Village of West Pecos and a special deputy sheriff for San Miguel County. The men reported the incident to Quintana and he inspected the damage to their windshields. Quintana then got dressed in his official shirt and badge. He borrowed a truck belonging to his nephew, a member of the group whose vehicles were damaged, because the tires on his police car were low and the car would not start. Quintana intended to investigate the incident.

First, Quintana drove to the bridge and observed the glass. The other men followed in their trucks. Then he drove to the Valencia residence in East Pecos. He parked the borrowed truck in the driveway where he could see the bonfire. He testified that when he got out of the truck, he identified himself twice as the deputy marshal and said he wanted to talk. He then heard several "pop shots" like the discharge of a small automatic weapon. He assumed that someone was shooting at him. He testified that he then shot his rifle into the air three or four times. Someone then grabbed Quintana and said "let's go"; the group left and returned to Quintana's trailer. Quintana denied ever shooting towards the group of men.

Members from the Lopez group testified that they were sitting by the bonfire. They saw a truck drive part way up the driveway, followed by other vehicles. They heard what they thought was a gun being fired. They ran for cover and heard more shots fired. After Quintana and the group of men left, Lopez was found hiding near a car. It was discovered that he had been shot, and he was taken to the hospital. All members of the Lopez group testified that none of them had any firearms. Also, they did not see who shot at them.

Lopez died May 26, 1980 from infection caused by a single gunshot wound. The bullet removed during the autopsy on Lopez was tested and found to have come from Quintana's rifle. Quintana was then charged with Lopez' death.

At trial, the State sought admission of a hearsay statement made by Lopez just before his death. The statement had been elicited at the hospital by the attorney retained by Lopez' family to investigate the civil liability aspect of the shooting. The statement was admitted over Quintana's objection.

The family attorney testified that he went to the hospital on May 26th for the express purpose of obtaining a dying declaration from Lopez. He spoke to Lopez for two to six minutes. The attorney testified that when he went to the intensive care unit, he saw Lopez: "wired to any number of machines. They were monitoring his heartbeat. They were monitoring his blood pressure. He had oxygen — he was breathing oxygen. They had his feet elevated. It was my understanding — and I saw that myself — it was my understanding that the reason they had his feet slightly elevated was because the kid was choking on his own blood. When I saw him and during the time that I spoke to him, his breathing was labored; his speech was somewhat difficult. During the entire time that I talked to him, the blood continued to ooze out of his nose and mouth and he was in great pain."

The attorney testified that during the conversation Lopez was conversant, conscious and lucid. Lopez was *never* told by his doctors that he was going to die; however, Lopez told the attorney that he knew he was very seriously injured; he knew that his back was broken, and he was paralyzed; and he knew that there was a strong possibility of dying. During the interview, the attorney elicited answers from Lopez as to circumstances surrounding the shooting; however, Lopez was not able to identify the person who shot him.

* * *

The admissibility of evidence is within the sound discretion of the trial court, and its ruling will be upheld unless there is a showing of an abuse of that discretion. We find there was no abuse of the trial judge's discretion.

A dying declaration is admissible when there is a showing that the statement was made under a sense of "impending death". When such a declaration is made, the declarant must be conscious and the realization of approaching death must exist. The determination as to whether the particular testimony is admissible must depend upon the particular circumstances of each case.

In determining "impending death", one is to look to the state of mind of the victim. * * * Fear or even the belief that the illness will end in death is not enough for a dying declaration. There must be a settled hopeless expectation that death is near, and what is said must have been spoken in the hush of impending death.* * * The state of mind must be exhibited in the evidence and not left to conjecture.* * * Therefore, a dying person can declare that he believes he is dying; however, there are no specific words that have to be spoken by the declarant.* * * Alternatively, if it can reasonably be inferred from the state of the wound or the state of the illness that the dying person was aware of his danger, then the requirement of impending death is met.* * * Therefore, a decedent does not have to be told he is dying; it can be obvious from the circumstances that death is impending.* * *

* * *

Lopez' statements and circumstances surrounding his statements are sufficient to show that he believed his death was imminent. He stated that he knew that he was seriously injured; he knew his back was broken, and he was paralyzed; he also stated that there was a strong possibility of dying. The attorney also testified as to what he witnessed about Lopez' condition. He stated that he was hooked up to several machines and was oozing blood from his nose and mouth. Lopez died about three hours after giving the statement. Therefore, we hold that the dying declaration was properly admitted into evidence.

However, a dying declaration by no means implies absolute verity. It can be impeached.* * * After the declaration has been found to be admissible, the defendant can impeach the statement in the same manner as the defendant could impeach a witness. He can discredit the statement by showing that the deceased bore a bad reputation or that he did not believe in a future state of rewards or punishment.* * *

Therefore, we find that the trial court did not abuse its discretion in admitting the dying declaration. The Court of Appeals is reversed and the trial court's verdict is affirmed.

NOTES

1. Are statements by a homicide victim that tend to exculpate the accused admissible into evidence?

Federal Rule 804(b)(2) does not by its language limit the exception to use by the prosecution against the defendant. Thus, it would seem that a dying statement that someone other than the defendant committed the homicide could be admitted on behalf of the defendant.

2. Must the declarant have personal knowledge of the facts alleged in the statement?

According to the court in *Shepard v. United States*, 290 U.S. 96 (1933), the statement should not be admitted absent a showing of some knowledge by the declarant. Suspicion or conjecture is insufficient. The reason for a personal knowledge requirement is that hearsay testimony is the equivalent of the declarant testifying at trial. Because the declarant could not testify without personal knowledge, it follows that the declarant's hearsay statement made without personal knowledge is equally inadmissible. The only exception to the personal knowledge requirement for hearsay statements is admissions — see the discussion of Rule 801(d)(2), *supra*. If a party's own statement (or that of an agent) is offered against the party, that party has no right to complain that there was no basis for making the statement.

3. What factors are relevant to the determination of whether the declarant was aware of impending death?

The nature of this inquiry was discussed in detail in *People v. Nieves*, 67 N.Y.2d 125, 501 N.Y.S.2d 1 (1986). In *Nieves*, a stabbing victim was brought into a hospital emergency room by the defendant and another person. She was in shock and unable to speak. The initial medical examination showed a small incision which indicated a possible heart wound. After some treatment, the victim improved and became lucid. Pursuant to questioning from medical personnel, the victim identified the defendant as the person who stabbed her. The victim began complaining of strong chest pains, and stated several times that she did not want to die. She was never told that her condition was critical. Her condition worsened and she died within 90 minutes of making her statements.

The *Nieves* Court set forth the following guidelines for assessing the dying declarant's mental state:

Under any justification for permitting the use of dying declarations, the crucial inquiry is directed toward the state of mind of the declarant. Thus, by the early part of this century it was established that for a statement to constitute a dying declaration, the declarant must not only have been in extremis, but must also have spoken under a sense of impending death, with no hope of recovery. Belief by the declarant that death is possible, or even probable, is not sufficient. Rather, "[there] must be 'a settled hopeless expectation' * * * that death is near at hand" (*Shepard v United States*, 290 U.S. 96, 100 [Cardozo, J.]).

* * *

* * * The People correctly point out that a statement's qualification as a dying declaration does not hinge upon the declarant having actually expressed a certainty of impending death. * * * [T]here is no standardized ritual spoken by all dying persons. There is also no unvarying requirement that the declarant had been told by a doctor that an imminent death was certain.

Rather, the requisite state of mind of declarant may be found from all of the circumstances surrounding the statement sought to be admitted. Any statements made by the declarant as to his condition or his expectations, as well as any statements made by medical personnel to the declarant as to the severity of his injury, are, of course, highly relevant. Among the other factors to be considered by the trial court are the nature and severity of the wound, as apparent to the declarant; whether the person's condition appeared to be improving or declining when the declaration was made; and, whether any actions normally associated with an expectation of imminent death, such as asking for last rites, disposing of property, or attempting to make arrangements for the care of family members were taken.

Applying this totality of the circumstances test to the facts, the *Nieves* Court held that the victim's identification of the defendant was not made while under a certainty of imminent death. The Court noted that the proponent, in this

case the prosecution, had the burden of proving that the admissibility requirements of the hearsay exception were met. The government pointed out that the declarant stated that she did not want to die, but the court reasoned that this did not necessarily mean that she had given up all hope of recovery; it might well have meant the opposite. The fact that the victim had never been informed of her critical condition, while not dispositive, certainly cut against her having a certainty of impending death. While the wound turned out to be fatal, the victim was never bleeding profusely and thus the wound "was not of such nature that its severity would have been obvious" to the victim. Furthermore, the emergency room doctor testified at the admissibility hearing that at the time the declarant spoke, he did not think that she would die, and that when she spoke her condition was improving, or at least stabilizing. Finally, the victim took no steps which would reveal an expectation of death (such as ordering her affairs) despite having had ample opportunity to do so.

[4] Statement Against Interest

[a] Federal Rule of Evidence 804(b)(3)

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * *

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

* * *

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

* * *

[b] Pecuniary Interest

GHELIN v. JOHNSON
243 N.W. 443 (Minn. 1932)

OLSEN, J.

Marie Chapman, or Marie Chapman Ghelin, appeals from an order denying her alternative motion for judgment or a new trial. For convenience, we refer to her as claimant.

Franz Frithiof Lust, known also as Frank Ghelin, a resident of Hennepin county, died on March 28, 1929, leaving an estate in said county. He died while abroad, leaving no legally executed will. Clara Johnson, a sister of the deceased, petitioned the probate court of said county for the appointment of the Minnesota Loan & Trust Company as administrator of the estate. Two other sisters and a brother of deceased thereafter joined with the petitioner in asking for the appointment of that company as administrator. The claimant appeared and opposed the appointment of the Minnesota Loan & Trust Company as administrator, and asked that she be appointed as sole administratrix of the estate, on the ground that she was the surviving spouse, the widow, of said deceased. The question of whether Marie Chapman was the wife of the deceased at the time of his death, and hence his surviving spouse, was tried in the probate court, and that court found that she was not the wife or surviving spouse of the decedent. That court then granted the petition for the appointment of the Minnesota Loan & Trust Company as administrator of the estate. Appeal was taken by Marie Chapman to the district court. In the district court the same question was tried to a jury, and the jury, by its verdict, found that she was not the wife or surviving spouse of decedent. The trial court has approved the verdict.

* * * A preliminary consideration of the nature and kind of proof required to prove the marriage may be of assistance in passing upon the claimed errors. There was no written contract of marriage.* * * There was no civil or religious ceremony of marriage and no license to marry. The other party being dead, claimant could not and did not testify to any verbal contract of marriage, and no other witness testified to the making of any such contract by the parties. In that situation, the claimant necessarily had to rely on circumstantial evidence to prove the contract of marriage. * * * The inquiry then is: What is proper evidence for that purpose? * * *

Income tax statements made by the deceased regularly during the time the marriage is claimed to have existed were received in evidence. In these statements decedent declared that he was not married. We think these statements may be admissible as declarations against interest. A declaration by him in these statements that he was a married man might have resulted in the immediate saving of a substantial amount of tax money. A declaration therein that he was not married, if he in fact was a married man, resulted in the payment by him of substantial amounts of tax money in excess of what he would have been required to pay if he had been and had declared that he was married.

* * *

NOTE

What is the difference between a statement against interest and a party admission?

See Martin, Capra, and Rossi, *New York Evidence* (2d ed. 2002):

The exception for party admissions is sometimes unfortunately confused with the separate hearsay exception for declarations against interest. These two exceptions in fact have little in common. The admissions exception covers statements by the party or his agents. In contrast, a declaration against interest is made by a non-party to the action, and the declarant must be unavailable for trial. Moreover, declarations against interest are admitted because they are thought to be reliable — the declarant would not say something dis-serving to his interest unless it were true. In contrast, admissions need not be dis-serving when made, and in fact many statements admitted under the exception are misguided attempts by the party to exculpate himself by telling a story that turns out to be inconsistent from the later story told at trial. An admission need not be reliable to be admitted, because the basis for admissibility lies in the adversarial theory of litigation.

[c] Penal Interest

WILLIAMSON v. UNITED STATES

512 U.S. 594 (1994)

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case we clarify the scope of the hearsay exception for statements against penal interest. Fed. Rule Evid. 804(b)(3).

I

A deputy sheriff stopped the rental car driven by Reginald Harris for weaving on the highway. Harris consented to a search of the car, which revealed 19 kilograms of cocaine in two suitcases in the trunk. Harris was promptly arrested.

Shortly after Harris' arrest, Special Agent Donald Walton of the Drug Enforcement Administration (DEA) interviewed him by telephone. During that conversation, Harris said that he got the cocaine from an unidentified Cuban in Fort Lauderdale; that the cocaine belonged to petitioner Williamson; and that it was to be delivered that night to a particular dumpster. Williamson was also connected to Harris by physical evidence: The luggage bore the initials of Williamson's sister, Williamson was listed as an additional driver on the car rental agreement, and an envelope addressed to Williamson and a receipt with Williamson's girlfriend's address were found in the glove compartment.

Several hours later, Agent Walton spoke to Harris in person. During that interview, Harris said he had rented the car a few days earlier and had driven

it to Fort Lauderdale to meet Williamson. According to Harris, he had gotten the cocaine from a Cuban who was Williamson's acquaintance, and the Cuban had put the cocaine in the car with a note telling Harris how to deliver the drugs. Harris repeated that he had been instructed to leave the drugs in a certain dumpster, to return to his car, and to leave without waiting for anyone to pick up the drugs.

Agent Walton then took steps to arrange a controlled delivery of the cocaine. But as Walton was preparing to leave the interview room, Harris * * * told Walton he had lied about the Cuban, the note, and the dumpster. The real story, Harris said, was that he was transporting the cocaine to Atlanta for Williamson, and that Williamson was traveling in front of him in another rental car. Harris added that after his car was stopped, Williamson turned around and drove past the location of the stop, where he could see Harris' car with its trunk open. * * * Because Williamson had apparently seen the police searching the car, Harris explained that it would be impossible to make a controlled delivery.* * *

Harris told Walton that he had lied about the source of the drugs because he was afraid of Williamson.* * * Though Harris freely implicated himself, he did not want his story to be recorded, and he refused to sign a written version of the statement.* * * Walton testified that he had promised to report any cooperation by Harris to the Assistant United States Attorney. Walton said Harris was not promised any reward or other benefit for cooperating.* * *

Williamson was eventually convicted of possessing cocaine with intent to distribute, conspiring to possess cocaine with intent to distribute, and traveling interstate to promote the distribution of cocaine * * *. When called to testify at Williamson's trial, Harris refused, even though the prosecution gave him use immunity and the court ordered him to testify and eventually held him in contempt. The District Court then ruled that, under Rule 804(b)(3), Agent Walton could relate what Harris had said to him. * * * Williamson appealed his conviction, claiming that the admission of Harris' statements violated Rule 804(b)(3) and the Confrontation Clause of the Sixth Amendment. The Court of Appeals for the Eleventh Circuit affirmed without opinion, and we granted *certiorari*.

II

A

The hearsay rule, Fed. Rule Evid. 802, is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements — the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine — are generally absent for things said out of court.

Nonetheless, the Federal Rules of Evidence also recognize that some kinds of out-of-court statements are less subject to these hearsay dangers, and therefore except them from the general rule that hearsay is inadmissible. One such category covers statements that are against the declarant's interest: "statement[s] which * * * at the time of [their] making * * * so far tended to subject the declarant to * * * criminal liability * * * that a reasonable person in the declarant's position would not have made the statement[s] unless believing [them] to be true." Fed. Rule Evid. 804(b)(3).

To decide whether Harris' confession is made admissible by Rule 804(b)(3), we must first determine what the Rule means by "statement," which Federal Rule of Evidence 801(a)(1) defines as "an oral or written assertion." One possible meaning, "a report or narrative," *Webster's Third New International Dictionary* 2229, defn. 2(a) (1961), connotes an extended declaration. Under this reading, Harris' entire confession — even if it contains both self-inculpatory and non-self-inculpatory parts — would be admissible so long as in the aggregate the confession sufficiently inculpates him. Another meaning of "statement," "a single declaration or remark," *ibid.*, defn. 2(b), would make Rule 804(b)(3) cover only those declarations or remarks within the confession that are individually self-inculpatory.

Although the text of the Rule does not directly resolve the matter, the principle behind the Rule, so far as it is discernible from the text, points clearly to the narrower reading. Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. This notion simply does not extend to the broader definition of "statement." The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.

In this respect, it is telling that the non-self-inculpatory things Harris said in his first statement actually proved to be false, as Harris himself admitted during the second interrogation. And when part of the confession is actually self-exculpatory, the generalization on which Rule 804(b)(3) is founded becomes even less applicable. Self-exculpatory statements are exactly the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements.

We therefore cannot agree with JUSTICE KENNEDY's suggestion that the Rule can be read as expressing a policy that collateral statements — even ones that are not in any way against the declarant's interest — are admissible. * * * Nothing in the text of Rule 804(b)(3) or the general theory of the hearsay Rules suggests that admissibility should turn on whether a statement is collateral to a self-inculpatory statement. The fact that a statement is self-inculpatory does make it more reliable; but the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability. We see no reason why collateral statements, even ones that are neutral as to interest * * * should be treated any differently from other hearsay statements that are generally excluded.

Congress certainly could, subject to the constraints of the Confrontation Clause, make statements admissible based on their proximity to self-inculpatory statements. But we will not lightly assume that the ambiguous language means anything so inconsistent with the Rule's underlying theory. * * * In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else. "[T]he arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence."* * *

B

* * *

C

In this case * * * we cannot conclude that all that Harris said was properly admitted. * * * [P]arts of his confession, especially the parts that implicated Williamson, did little to subject Harris himself to criminal liability. A reasonable person in Harris' position might even think that implicating someone else would decrease his practical exposure to criminal liability, at least so far as sentencing goes. Small fish in a big conspiracy often get shorter sentences than people who are running the whole show, *see, e.g.*, United States Sentencing Commission, Guidelines Manual § 3B1.2 (Nov. 1993), especially if the small fish are willing to help the authorities catch the big ones, *see, e.g., id.*, at § 5K1.1.

Nothing in the record shows that the District Court or the Court of Appeals inquired whether each of the statements in Harris' confession was truly self-inculpatory. As we explained above, this can be a fact-intensive inquiry, which would require careful examination of all the circumstances surrounding the criminal activity involved; we therefore remand to the Court of Appeals to conduct this inquiry in the first instance.

In light of this disposition, we need not address Williamson's claim that the statements were also made inadmissible by the Confrontation Clause * * *. We also need not decide whether, as some Courts of Appeals have held, the second sentence of Rule 804(b)(3) — "A statement tending to expose the declarant to criminal liability *and offered to exculpate the accused* is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement" (emphasis added) — also requires that statements inculpatory of the accused be supported by corroborating circumstances. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

[The concurring opinion of JUSTICE SCALIA is omitted.]

JUSTICE GINSBURG, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE SOUTER join, concurring in part and concurring in the judgment.

* * * I agree with the Court that Federal Rule of Evidence 804(b)(3) excepts from the general rule that hearsay statements are inadmissible only “those declarations or remarks within [a narrative] that are individually self-inculpatory.” As the Court explains, the exception for statements against penal interest “does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.”* * * the exception applies only to statements that are “sufficiently against the declarant’s penal interest ‘that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.’”* * *

Further, the Court recognizes the untrustworthiness of statements implicating another person.* * * A person arrested in incriminating circumstances has a strong incentive to shift blame or downplay his own role in comparison with that of others, in hopes of receiving a shorter sentence and leniency in exchange for cooperation. * * *

* * * I conclude that Reginald Harris’ statements, as recounted by DEA Special Agent Donald E. Walton, do not fit, even in part, within the exception described in Rule 804(b)(3), for Harris’ arguably inculpatory statements are too closely intertwined with his self-serving declarations to be ranked as trustworthy. Harris was caught red-handed with 19 kilos of cocaine — enough to subject even a first-time offender to a minimum of 12 1/2 years’ imprisonment. He could have denied knowing the drugs were in the car’s trunk, but that strategy would have brought little prospect of thwarting a criminal prosecution. He therefore admitted involvement, but did so in a way that minimized his own role and shifted blame to petitioner Fredel Williamson (and a Cuban man named Shawn).

Most of Harris’ statements to DEA Agent Walton focused on Williamson’s, rather than Harris’, conduct.

* * * To the extent some of these statements tended to incriminate Harris, they provided only marginal or cumulative evidence of his guilt. They project an image of a person acting not against his penal interest, but striving mightily to shift principal responsibility to someone else. *See United States v. Sarmiento-Perez*, 633 F.2d 1092, 1102 (CA5 1981) (“[The declarant] might well have been motivated to misrepresent the role of others in the criminal enterprise, and might well have viewed the statement[s] as a whole — including the ostensibly disserving portions — to be *in* his interest rather than against it.”).

For these reasons, I would hold that none of Harris’ hearsay statements were admissible under Rule 804(b)(3). * * * I concur in the Court’s decision to vacate the Court of Appeals’ judgment, however, because I have not examined the entire trial court record; I therefore cannot say the Government should be denied an opportunity to argue that the erroneous admission of the hearsay statements, in light of the other evidence introduced at trial, constituted harmless error.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, concurring in the judgment.

* * *

I would adhere to the following approach with respect to statements against penal interest that inculcate the accused. A court first should determine whether the declarant made a statement that contained a fact against penal interest. * * * If so, the court should admit all statements related to the precise statement against penal interest, subject to two limits. Consistent with the Advisory Committee's Note, the court should exclude a collateral statement that is so self-serving as to render it unreliable (if, for example, it shifts blame to someone else for a crime the defendant could have committed). In addition, in cases where the statement was made under circumstances where it is likely that the declarant had a significant motivation to obtain favorable treatment, as when the government made an explicit offer of leniency in exchange for the declarant's admission of guilt, the entire statement should be inadmissible.

* * *

UNITED STATES v. PAGUIO
114 F.3d 928 (9th Cir. 1997)

KLEINFELD, CIRCUIT JUDGE:

This case turns on Federal Rule of Evidence 804(b)(3), the hearsay exception for inculpatory statements by unavailable witnesses.

I. Facts

Appellants Gil Manuel Paguio, Jr. and Angelica D. Acosta, husband and wife, were convicted of false statements to a bank to influence action on a loan application * * *. Paguio Jr.'s father, Gil Paguio, Sr., initiated the loan process. The father approached the institution's loan officer about a \$204,000 loan so that his son, Paguio Jr., and Acosta, could buy property next to his house. The loan officer gave the father the application, and the father returned the handwritten loan application with what purported to be the son's and the fiancée's signatures.

The application was fraudulent. It showed that Paguio Jr. and Acosta made \$1,900 and \$1,300 a month in self-employment income from the father's insurance company. That was not true. As part of its routine for loan processing, the bank had to verify employment and income by examining W-2 Forms, or for self-employed people, copies of tax returns. As "verification" the father showed the bank fictitious 1988 and 1989 tax returns and 1099 forms for Paguio Jr. and Acosta. None of these forms had actually been filed with the IRS.

In truth, Paguio Jr. and Acosta were in no position to finance anything for \$200,000 dollars. Acosta had been turned down for an \$18,000 car loan. The bank manager had noted on the denial: "excessive obligations for amount requested. Good credit history. Will reconsider in lesser amount * * * ." Paguio Jr. had asked for forbearance on his \$10,000 dollar student loan because of inability to make the payments. Nevertheless, both Paguio Jr. and Acosta signed the final loan application. Paguio Jr. worked in the computer room of another bank. He was under investigation by the FBI, because the bank had processed a counterfeit computer tape, which caused a \$70 million dollar funds transfer to a Swiss bank. Paguio Jr. was the last person to handle the tape, so the FBI suspected he probably knew something about the computer theft, but he did not provide any useful information. The FBI investigated Paguio Jr.'s financial situation. They discovered the \$204,000 loan and other evidence that Paguio Jr. and his fiancée were not as financially secure as the loan application suggested. The United States Attorney ultimately indicted appellants Paguio Jr. and Acosta in order to pressure Paguio Jr. to tell what the government suspected he knew about the computer theft.

Paguio Jr. and Acosta went to trial on their indictment. The defense was in substance that the house loan was the father's deal, and the son and fiancée lacked mens rea. The jury hung, but the government got convictions when the case was retried.

II. Analysis

* * *

C. The Absent Witness Statement.

Paguio Jr.'s lawyer had obtained a statement from Paguio Sr. that his son had "nothing to do with it." When the case was retried, Paguio Sr. was a fugitive, so the defense tried to get the statement into evidence by means of the absent witness hearsay exception for statements against penal interest, Federal Rule of Evidence 804(b)(3). The district court excluded it, and Paguio Jr. and Acosta appeal this evidentiary ruling.

Paguio Jr.'s lawyer and paralegal assistant interviewed Paguio Sr. Defense counsel advised Paguio Sr. that she was not his attorney, she represented his son, and what he told her was not privileged. He told her that the whole scheme was his, and his son (and by implication, his son's fiancée) had nothing to do with it. The father had refused to testify about this, claiming his Fifth Amendment privilege at the first trial, and he became a fugitive prior to the retrial. The district court ruled that the portions of the evidence in which the father admitted his own criminal responsibility, but not those exonerating the son, could come into evidence.

Certain statements against penal interest have long been admissible as an exception to the hearsay rule, and the common law exception has been codified in the Federal Rules of Evidence * * *. To get a statement against penal interest into evidence under 804(b)(3), the proponent must show that: (1) the declarant is unavailable as a witness; (2) the statement so far tended to subject

the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true; and (3) corroborating circumstances clearly indicate the trustworthiness of the statement.

The government concedes the first requirement, that Paguio Sr. was unavailable. As to the third element, corroboration of trustworthiness, the district court found in favor of appellants. The government challenges this determination. There were factors which cut both ways, and plenty to support the district court decision. The evidence showed that the father initiated the transaction and walked the papers through all the relevant offices. The father's role was so dominant that the escrow officer had some confusion about which Paguio she was dealing with, father or son. She eventually received documentation through the mail confirming that Paguio, Jr. and Acosta were the ultimate buyers, but was suspicious that Paguio Sr. had in fact signed the documents. The loan officer, escrow agent and the tax preparer all testified that their dealings were with the father, not the son. The father had prior business relations with the loan officer and the tax preparer, and the son had none. The father's business generated the false 1099 forms which were used to support the false statement of income. The father distributed the papers to the various parties. And of course the whole point of the transaction was for the father to get his son and the son's prospective wife into the house next door. There is one factor that cuts against the trustworthiness of the father's statement, and that is that the appellant is his son. * * * A motive of love might * * * induce a reasonable father to make a false self-inculpatory statement in order to save his son. The possibility that this noble motive would induce a false statement against penal interest cuts in favor of exclusion. But the district judge reasonably concluded that the loan officer, escrow agent, and accountant all corroborated the proposition that the father and not the son managed the entire transaction, and the circumstances were consistent with that, so the corroboration of trustworthiness requirement was satisfied. While a jury could still conclude that the father was lying to save his son, the corroboration sufficed for admissibility of the evidence. As the district judge correctly decided, it was up to the jury to decide whether the father's statement against penal interest was motivated by truthfulness or a noble motive to lie.

The district court ruled that the father's statement should be parsed, and only the self-inculpatory portions admitted. Thus the jury was permitted to hear that the father had falsified the W-2 forms (really 1099s) and provided the information to the accountant. The jury was not permitted to hear that the father said his son had nothing to do with the negotiations, nothing to do with preparation of the false 1099s, and no involvement with preparing the false tax returns.

* * *

A reasonable person in the father's position would have believed that admitting to preparing false tax returns and engineering an admittedly fraudulent loan application would subject him to criminal liability. The issue arises from the father's statements that his son had "nothing to do with it."

The government argues that the statement should be seen merely as exculpatory of the son, not inculpatory of the father. We disagree, and conclude that the father's statement should have been admitted in its entirety, not parsed and admitted only in part.

"Whether a statement is in fact against interest must be determined from the circumstances of each case," *Williamson*, 512 U.S. at 601, and "can only be determined by viewing it in context." *Id.* at 603. In context, the father's statement that his son had nothing to do with it was inculpatory of the father as well as exculpatory of the son. The father admitted not only participation but leadership, leading his son and daughter-in-law into the abyss. Because leading others into wrongdoing has always been seen as especially bad, there is a sentencing enhancement for it. U.S.S.G. §§ 3B1.1(c) (1993). Also, in context, the inculpatory and exculpatory statements were not practically separable. The government argues that *Williamson* required the district judge to parse the statement and exclude the non-inculpatory parts. That reading is incorrect. * * *

Williamson does not mean that the trial judge must always parse the statement and let in only the inculpatory part. It means that the statement must be examined in context, to see whether as a matter of common sense the portion at issue was against interest and would not have been made by a reasonable person unless he believed it to be true. Sometimes that requires exclusion of part of the statement, sometimes not. A reasonable man caught with a trunk full of cocaine, like the unavailable declarant in *Williamson*, might well imagine that he could advance his own penal interest by fingering someone else. But Paguio Sr.'s statement that "my son had nothing to do with it" was not an attempt to "shift blame or curry favor." *Williamson*, 512 U.S. at 603. * * *

When the prosecution attempts to take advantage of the rule, as in *Williamson*, the statement is typically in the form, "I did it, but X is guiltier than I am." As a matter of common sense, that is less likely to be true of X than "I did it alone, not with X." That is because the part of the statement touching on X's participation is an attempt to avoid responsibility or curry favor in the former, but to accept undiluted responsibility in the latter.

Prosecution use of an unavailable declarant's accusation of the defendant, as in *Williamson*, raises different concerns from a defendant's use of an unavailable declarant's confession which exonerates him. Were it not for the fence around the Confrontation Clause provided by the hearsay rule, prosecution use would implicate the accused's right to be "confronted with the witnesses against him." U.S. Const. amend. VI. The Constitution gives the "accused," not the government, the right of confrontation. When the defendant seeks to introduce the evidence, but is unable to procure the attendance of the witness, the relevant Constitutional right is the accused's right "to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. The accused's right to present witnesses in his own defense may be implicated where an absent declarant's testimony is improperly excluded from evidence. We do not intimate that the exclusion of part of the statement violated appellants' constitutional rights in this case, and we do not need to reach the question. We raise the constitutional asymmetry because it helps

explain why application of the rule of evidence is to some extent asymmetrical between defense and prosecution.

We conclude that the unavailable witness exception for statements against penal interest, Federal Rule of Evidence 804(b)(3) applied, so the parts of Paguio Sr.'s statement exonerating his son should have been admitted. We cannot characterize the error as harmless, because the hung jury at the first trial persuades us that the case was close and might have turned on this evidence. Though Paguio Sr.'s statement that his son had "nothing to do with it" expressly exonerated only Paguio Jr. and not Acosta, the context makes it clear that if the son had nothing to do with it, then the son's fiancée was even more marginal, so the error was prejudicial as to her too.

REVERSED.

NOTES

1. When are statements sufficiently disserving to a declarant's penal interest to qualify for admissibility under Rule 804(b)(3)?

In *United States v. Butler*, 71 F.3d 243 (7th Cir. 1995), a case involving firearms charges, the Court held that the trial court properly excluded a hearsay statement offered by the defendant, made by a person on the premises during a police raid. The hearsay declarant accused the police of planting, on the defendant, guns found in the house, because they knew that the defendant was a felon. The defendant argued that the hearsay statement was disserving to the declarant, because the declarant admitted that he was in the room where the weapons were found, and was thus opening himself up to possible weapons charges. But the Court held that the declarant had not admitted anything remotely criminal; he did not admit that he had possession of or owned any gun. At most, the statement put the declarant at risk of being in some type of constructive possession of a gun, which "is not a risk sufficient to provide the guarantee of reliability or truthfulness the 804(b)(3) exception is based on."

Professors Professors Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (9th ed. 2006), analyze the "against penal interest" requirement as follows:

The Courts are in some disagreement about the degree to which a statement must be disserving to the declarant in order to qualify as a declaration against interest under Rule 804(b)(3). An example of the problem is *United States v. Harwood*, 998 F.2d 91 (2d Cir. 1993). Harwood and McKee were both charged with drug offenses arising from a search of a van in which drugs were found. Both defendants employed blame-shifting defenses, each claiming that he was an unwitting rider and the other defendant was the drug dealer. Harwood offered a statement made by McKee to a newspaper reporter after they were arrested. McKee had stated that Harwood had simply been "at the wrong place at the wrong time," and that the same thing would

have happened to anyone who was driving with McKee at that time. The Trial Court excluded the statement, and the Court of Appeals found no error. Judge McLaughlin concluded that McKee's statement was not sufficiently disserving to qualify under Rule 804(b)(3). He argued that the statement did not "expose McKee to criminal liability" and that it seemed "only to suggest that Harwood was arrested at an inopportune time."

According to the *Harwood* Court, a statement will not be sufficiently disserving to qualify under the Rule unless it squarely and unequivocally implicates the declarant in criminal activity or exposes the declarant to civil liability. See also *United States v. Wilkinson*, 754 F.2d 1427 (2d Cir. 1985) (a statement made by the declarant that the defendant did not know that the declarant was selling drugs was held insufficiently disserving to qualify under Rule 804(b)(3)).

Yet this is not the only possible reading of the Rule; that strict reading conflicts with the Rule's permissive language that a statement need only "tend" to subject the declarant to criminal liability. As the Ninth Circuit has stated: "If Congress had wanted courts to take a restrictive approach to whether a statement is against penal interest, it would not have chosen the broadly worded phrase 'tended to subject' in Rule 804(b)(3)." *United States v. Satterfield*, 572 F.2d 687 (9th Cir. 1978). See also *United States v. Thomas*, 571 F.2d 285 (5th Cir. 1978) (rejecting a government argument that the statement did not qualify as a declaration against interest because the declarant did not expressly confess guilt: "by referring to statements that 'tend' to subject the declarant to criminal liability, the Rule encompasses disserving statements by a declarant that would have probative value in a trial against the declarant").

In fact situations similar to *Harwood*, other courts have found statements exculpating a defendant to be sufficiently disserving to the declarant. See, e.g., *United States v. Barrett*, 539 F.2d 244 (1st Cir. 1976) (statement that Buzzy was not at the robbery inculcates the declarant due to the implication that the declarant was at the robbery). These courts reason that when the declarant says that the defendant was not involved, he is implicitly stating that he, the declarant, *was* involved. This reasoning is, we think in harmony with the permissive language of the Rule.

It is true that McKee did not explicitly state that Harwood was never involved in the drug transaction. He said, more colloquially, that Harwood was in the wrong place at the wrong time. But certainly, a reasonable person in the declarant's position would know what could be taken from that statement. Given the oblique and coded manner in which most people talk in real life, it is unreasonable to limit Rule 804(b)(3) to explicit statements admitting guilt. We think that the Rule was designed for real life, and was not intended to be limited to the statements of masters of locution or students of English composition.

All this is not to say that the context in which a statement is made is irrelevant. A statement that appears to be highly incriminating on its face may in fact be either neutral or self-serving depending on the context in which it was made. For example, in *United States v. Silverstein*, 732 F.2d 1338 (7th Cir. 1984), the defendant was charged with murdering a prison guard. He proffered a statement from another prisoner who confessed to the murder. However, the Court found that the statement was not sufficiently disserving because the declarant was already serving three consecutive life sentences — “and what would a fourth consecutive life sentence add to the three previous ones?” In addition, there was evidence that the declarant was a sympathizer with the prison gang to which the defendant belonged. Accordingly, the Court, correctly we think, held that the statement was only facially and not contextually disserving, and thus was inadmissible even under the liberal “tendency” test set forth in the Rule. *See also United States v. Albert*, 773 F.2d 386 (1st Cir. 1985) (codefendant’s statement accepting total responsibility for a crime was not admissible to exculpate the defendant; the statement was taken at the time of the codefendant’s sentencing, at which point the codefendant had a self-interest in accepting responsibility).

2. How is the “corroborating circumstances” requirement of the rule to be applied?

Professors Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (9th ed. 2006), analyze the corroborating circumstances requirement of Rule 804(b)(3) as follows:

If the defendant in a criminal case offers evidence of a declaration against penal interest to exculpate himself, he must make a showing that corroborating circumstances exist that “clearly indicate the trustworthiness of the statements.” By the terms of the Rule, there is no corroborating circumstances requirement for statements against the declarant’s pecuniary interest. Such a statement is admissible upon a showing that it so tends to disserve the declarant’s pecuniary interest that a reasonable person would not have made the statement unless it were true.

The mere fact that the statement could tend to subject the declarant to criminal liability is not enough if the accused offers it in his favor; the accused must also show other factors supporting the truthfulness of the statement. *See, e.g., United States v. Dean*, 59 F.3d 1479 (5th Cir. 1995) (finding no error in the Trial Court’s exclusion of a hearsay statement by the defendants’ accomplice, made during the accomplice’s plea negotiations, and which exculpated the defendants; the statement was not sufficiently corroborated; the fact that the accomplice admitted guilt did not preclude others’ guilt; the statement contained many questionable claims; and the evidence of the defendants’ involvement in the crime was strong). This is apparently an attempt to respond to the problem of one criminal of dubious credibility trying to exculpate another. *See, e.g., United States v. Mackey*, 117 F.3d 24 (1st Cir. 1997)

(justifying the corroborating circumstances requirement in light of the possibility that “one criminal can make out-of-court statements exculpating another and then rather easily claim the privilege when the government seeks to cross-examine him to discredit the statement”).

Rule 804(b)(3) does not purport to define “corroborating circumstances.” The Advisory Committee on Evidence Rules once considered an amendment to Rule 804(b)(3), and the Advisory Committee Note to the proposed amendment provides a helpful discussion of the corroborating circumstances requirement. That discussion proceeds as follows:

The Committee notes that there has been some confusion over the meaning of the “corroborating circumstances” requirement. See *United States v. Garcia*, 897 F.2d 1413, 1420 (7th Cir. 1990) (“the precise meaning of the corroboration requirement in rule 804(b)(3) is uncertain”). For example, some courts look to whether independent evidence supports or contradicts the declarant’s statement. See, e.g., *United State v. Mines*, 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because other evidence contradicts the declarant’s account). Other courts hold that independent evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. See, e.g., *United States v. Barone*, 114 F.3d 1284, 1300 (1st Cir. 1997) (“The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made.”). The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (see, e.g., *United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995)):

- (1) the timing and circumstances under which the statement was made;
- (2) the declarant’s motive in making the statement and whether there was a reason for the declarant to lie;
- (3) whether the declarant repeated the statement and did so consistently, even under different circumstances;
- (4) the party or parties to whom the statement was made;
- (5) the relationship between the declarant and the opponent of the evidence; and
- (6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the

jury's role in assessing the credibility of testifying witnesses. *United States v. Katsougrakis*, 715 F.2d 769 (2d Cir. 1985).

The corroborating circumstances requirement assumes that the court has already found that the hearsay statement is genuinely dis-serving of the declarant's penal interest. See *Williamson v. United States*, 512 U.S. 594, 603 (1994) (statement must be "squarely self-inculpatory" to be admissible under Rule 804(b)(3)). "Corroborating circumstances" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a corroborating circumstance.

Neither the text of Rule 804(b)(3) nor the legislative history is precise on the *degree* of corroboration required. Some courts have construed the "clearly indicating trustworthiness" requirement very strictly, demanding that "the inference of trustworthiness from the proffered corroborating circumstances must be strong, not merely allowable." *United States v. Salvador*, 820 F.2d 558 (2d Cir. 1987) (independent evidence must corroborate both the declarant's trustworthiness and the truth of the statement). See also *United States v. Silverstein*, 732 F.2d 1338 (7th Cir. 1984) (the fact that the declarant had the opportunity to commit the crime with which the defendant was charged "was not clearly corroborative of his confession, but merely consistent with it"); *United States v. McDonald*, 688 F.2d 224 (4th Cir. 1982) (statement by a declarant that she was involved in the murder of the defendant doctor's family was not sufficiently corroborated, in part because the declarant was a drug addict, even though the defendant's claim was that his family was killed by drug addicts looking for drugs in his home).

Other courts, in consideration of the defendant's constitutional right to due process and an effective defense, have refused to apply the corroboration requirement in so strict a manner. See, e.g., *United States v. Barrett*, 539 F.2d 244 (1st Cir. 1976) (noting that because of constitutional concerns, the standard for corroboration cannot be so strict "as to be utterly unrealistic").

We believe that the burden placed on the accused has in many cases been too high — so high that the exception itself often has little utility. It makes no sense to apply the corroboration standard so strictly that, if the defendant can meet it, he will probably never have been charged or tried in the first place.

On the other hand, the defendant's own protestations of innocence cannot be deemed sufficient corroboration; if that were enough, the corroboration requirement would be read out of the Rule as a practical matter. See, e.g., *United States v. Rodriguez*, 706 F.2d 31 (2d Cir. 1983) (a statement is not admissible where the only corroboration is the defendant's own statements).

3. Does the corroborating circumstances requirement apply to declarations against penal interest offered by the government?

See Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (9th ed. 2006):

Rule 804(b)(3) is striking in its asymmetry. Assume that three people are allegedly involved in a drug conspiracy — Declarant, who is now dead, and Bill and Mike, who are being tried separately. Assume further that Declarant told a friend that he and Bill were selling the drugs as a two-person team. Under the plain meaning of the Rule, assuming this entire statement in context is disserving to Declarant's penal interest, it would be admissible against Bill without more. However, Mike would have to provide corroborating circumstances supporting the trustworthiness of the statement before it could be admitted in his favor. Thus, the Rule on its face imposes an evidentiary burden on the accused, to which the prosecution is not subject for the same statement.

Congress gave no explanation for its discriminatory application of the corroborating circumstances requirement of Rule 804(b)(3). * * * Commentators have argued that it violates due process and equal protection to impose an evidentiary burden on the defendant, but not on the state, for the same statement. See, e.g., Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 Geo. L.J. 851, 990 (1981) (arguing that due process and equal protection are violated by an asymmetrical corroborating circumstances requirement). If anything, the admissibility requirements for a declaration against penal interest should be applied more strictly against the prosecution than against the defendant. The defendant has both a right to confront adverse witnesses, and a right to compulsory process for favorable witnesses. This should mean that as a general matter the defendant should receive at least some slight benefit of the doubt in excluding hearsay offered by the prosecution and in admitting hearsay offered by the defense.

These arguments have led some courts to impose a corroborating circumstances requirement for *all* declarations against penal interest, whether they are offered by the prosecution or the defense. See, e.g., *United States v. Barone*, 114 F.3d 1284 (1st Cir. 1997) (applying a corroborating circumstances requirement for statements offered by the prosecution under Rule 804(b)(3), while noting that the Rule "does not explicitly require" corroboration for such statements); *United States v. Garcia*, 897 F.2d 1413 (7th Cir. 1990) (requiring corroborating circumstances for inculpatory declarations against penal interest); *United States v. Alvarez*, 584 F.2d 694 (5th Cir. 1978) (noting that "by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)").

The problem is that a symmetrical application of the Rule, though reasonable, is contrary to the plain meaning of the Rule; and as indicated in *Salerno*, the Court construes the Rules by their plain meaning without regard to whether they are fair in application — at least so long as the unfairness does not approach absurdity or unconstitutionality. In light of the plain meaning mandate of the Supreme Court cases, some Courts have felt constrained to hold that declarations against penal interest need not be corroborated when offered by the prosecution. See, e.g., *United States v. Bakhtiar*, 994 F.2d 970 (2d Cir. 1993) (an inculpatory declaration against interest was properly admitted even without a showing of corroboration).

The Advisory Committee considered an amendment to Rule 804(b)(3) that would have applied a corroborating circumstances requirement to government-offered statements. But this proposal was ultimately rejected due to strong opposition from the Justice Department. The Department argued that it already had an evidentiary burden beyond that set forth in the Rule — specifically the requirement that the hearsay statement satisfy not only the text of the Rule but also the accused's right to confrontation. The argument was that it would be unduly burdensome to saddle the government with a third evidentiary requirement of corroborating circumstances. This argument no longer has relevance, however, because the Supreme Court has changed the meaning of the Confrontation Clause in *Crawford v. Washington*. As applied to Rule 804(b)(3), *Crawford* means that if a declaration against interest is "non-testimonial" there is no extra requirement of reliability beyond that required by the hearsay exception. So perhaps the proposal to add a corroborating circumstances requirement for against-interest statements offered by the prosecution will be revived.

Another question is whether corroborating circumstances should be required when a declaration against penal interest is offered in civil cases. The Rule does not by its terms require such a showing. Yet at least one Court has held that the requirement must be met. In *American Automotive Accessories, Inc. v. Fishman*, 175 F.3d 534 (7th Cir. 1999), the Court found it important to have a "unitary standard" for declarations against penal interest, no matter in what case and no matter by whom they are offered.

4. Can statements implicating the accused ever be admitted under Rule 804(b)(3) after *Williamson*?

When considering the admissibility of statements of accomplices offered against the accused, lower courts after *Williamson* have tended to distinguish between statements made to police officers in custody (i.e., those found inadmissible in *Williamson*) and statements made to others before the declarant has been arrested. Statements implicating others made to police officers have been found neutral or self-serving, given their context and the likelihood that the declarant may be simply shifting blame or currying favor with law enforcement. Indeed, the very facts and result in *Williamson* indicate

that it is not disserving to the declarant to implicate others by name in a post-arrest confession. *See, e.g., United States v. McCleskey*, 228 F.3d 640 (6th Cir. 2000) (statement by declarant implicating the defendant, made to police officers after arrest, was erroneously admitted; the statement was not admissible under Rule 804(b)(3) because of “the incentive brought to bear upon such an accomplice to shift and spread blame to other persons”).

On the other hand, if the statement is made outside the context of a post-custodial confession, courts are more likely to assume that a statement identifying another as taking part in a crime tends to implicate the declarant as well. A good example is *United States v. Moses*, 148 F.3d 277 (3d Cir. 1998). Moses was a County official who allegedly accepted kickbacks from Gaudelli, a commercial vendor who did business with the County. Moses challenged the admissibility of Gaudelli’s statements implicating Moses in the kickback scheme. At the trial, Gaudelli was unavailable, and Gaudelli’s friend and colleague testified that Gaudelli said on several occasions that he was “taking care” of Moses “moneywise.” The court held that those statements directly implicating Moses were also self-inculpatory of Gaudelli, and therefore were properly admitted under Rule 804(b)(3). The court analyzed the impact of *Williamson* as follows:

Under *Williamson*, the proper approach in cases involving out-of-court statements implicating other people is to examine the circumstances in which the statements are made in order to determine whether they are self-inculpatory or self-serving. In *Williamson*, where the declarant implicated another person while in police custody and after already having confessed to the crime, the Court concluded that the naming of the defendant did little to further implicate the declarant and may have been an effort to secure a lesser punishment through cooperation. *See also United States v. Boyce*, 849 F.2d 833, 836 (3d Cir. 1988) (statement given in custody not reliable because circumstances indicated that it may have been “motivated by a desire to curry favor”). In the instant case, by contrast, Gaudelli made his statements to a friend during lunch conversations that took place long before Gaudelli was arrested. Under these circumstances, there is no reason to believe that Gaudelli was trying to avoid criminal consequences by passing blame to Moses. Moreover, by naming Moses, as well as the place where he was meeting Moses to make payments, Gaudelli provided self-inculpatory information that might have enabled the authorities to better investigate his wrongdoing. *See Williamson* (explaining that a declarant’s statement as to where he hid a gun would be self-inculpatory “if it is likely to help the police find the murder weapon”).

Thus, Gaudelli’s statement “I am paying off Moses” tends to inculpate Gaudelli more than a statement like “I am paying kickbacks.” The specific identification of Moses, as opposed to anyone else, would make it easier for the police to investigate the crime and prosecute Gaudelli if they ever received the information. Moreover, by identifying Moses, who was a government official, Gaudelli implicated himself in a more serious crime of bribery than if he simply admitted making kickbacks to an unidentified person.

See also United States v. Tocco, 200 F.3d 401 (6th Cir. 2000) (in a RICO prosecution of a Mafia leader, it was not error to admit statements made by another Mafia leader to his son that described the roles of the declarant, the defendant and others in the organization; the statements were not inadmissible simply because they identified someone other than the declarant; the declarant's statements linked him to specific coconspirators and thus were against his own penal interest, especially since the statements were not made with the hope of implicating others to gain favor with the police).

In contrast, if the specific identification of Moses occurred in Gaudelli's post-arrest interview, it could not be deemed inculpatory of Gaudelli. Once Gaudelli has been arrested, the incentive to curry favor with authorities would outweigh any self-inculpatory possibility of any statement that could be offered against Moses.

[5] Family History

[a] Federal Rule of Evidence 804(b)(4)

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * *

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

* * *

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

[6] Forfeiture by Wrongdoing

[a] Federal Rule of Evidence 804(b)(6)

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * *

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

* * *

(6) **Forfeiture by wrongdoing.** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

[b] Standards for Finding Forfeiture by Wrongdoing

UNITED STATES v. CHERRY

217 F.3d 811 (10th Cir. 2000)

LUCERO, CIRCUIT JUDGE:

This interlocutory appeal from the district court's grant of a motion to suppress out-of-court statements made by a murdered witness requires us to address the difficult question of how the doctrine of waiver by misconduct and Fed. R. Evid. 804(b)(6) apply to defendants who did not themselves directly procure the unavailability of a witness, but allegedly participated in a conspiracy, one of the members of which murdered the witness. [W]e conclude that co-conspirators can be deemed to have waived confrontation and hearsay objections as a result of certain actions that are in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy. We therefore remand to the district court for findings under our newly-enunciated standard.

I

The government charged five defendants with involvement in a drug conspiracy: Joshua Price ("Joshua"), Michelle Cherry, LaDonna Gibbs, Teresa Price ("Price"), and Sonya Parker. Much of the evidence in their case came from a cooperating witness, Ebon Sekou Lurks. Prior to trial, however, Lurks was murdered. The government moved to admit out-of-court statements by Lurks, pursuant to Fed. R. Evid. 804(b)(6), on the grounds that the defendants wrongfully procured Lurks's unavailability.

In support of their motion, the government offered the following evidence. Lurks's ex-wife told Joshua of Lurks's cooperation with the government in retaliation for his obtaining custody of the Lurks' children. After this, Lurks reported being followed by Joshua and by Price. Approximately one week later, Price arranged to borrow a car from a friend, Beatrice Deffebaugh * * *. Joshua picked up Deffebaugh's car, which a witness noticed near Lurks' home at around 10 p.m. on January 28, 1998. One of Joshua's girlfriends, Kenesha Colbert, testified to receiving a call from him around 10:40 p.m. and hearing Price's voice singing in the background.

Around 11 p.m., several shots were fired in the vicinity of Lurks's home. Two witnesses saw a tall, thin black man (a description consistent with Joshua Price's appearance) chasing a short, stout black man (a description consistent with Lurks's appearance). Another witness stated she saw a car in the vicinity of Lurks's home, resembling the one borrowed by Joshua and Price, immediately after hearing shots fired. Additionally, one witness reported a license plate for the vehicle identical to that of the vehicle borrowed from Deffebaugh,

save for the inversion of two digits. Police found Lurks's body not long after midnight. Price returned the borrowed car to her friend between midnight and 12:30 a.m. on January 29, 1998. Further investigation discovered physical evidence linking Joshua to the murder: "debris" on Joshua's tennis shoes matching Lurks's DNA.

The district court held that Joshua procured the absence of Lurks and hence Lurks's statements were admissible against him. It held, however, that there was insufficient evidence that Price procured Lurks's absence and "absolutely no evidence [that Cherry, Gibbs, and Parker] had actual knowledge of, agreed to or participated in the murder of * * * Lurks." The district court therefore refused to find that those defendants had waived their Confrontation Clause and hearsay objections to the admission of Lurks's statements.

II

* * *

A. Rule 804(b)(6) and the Waiver by Misconduct Doctrine

The Confrontation Clause of the Sixth Amendment protects a criminal defendant's "fundamental right" to confront the witnesses against him or her, including the right to cross-examine such witnesses. "There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege."

The Supreme Court has held repeatedly that a defendant's intentional misconduct can constitute waiver of Confrontation Clause rights. We have applied this principle to conclude that a defendant can waive confrontation rights by threatening a witness's life. "To permit the defendant to profit from such conduct would be contrary to public policy, common sense and the underlying purpose of the confrontation clause."

The recently-promulgated Rule 804(b)(6) of the Federal Rules of Evidence represents the codification, in the context of the federal hearsay rules, of this long-standing doctrine of waiver by misconduct. Although prior to Rule 804(b)(6), there was disagreement as to the proper burden of proof in making a showing of waiver by misconduct, it was established in this Circuit that, "before permitting the admission of grand jury testimony of witnesses who will not appear at trial because of the defendant's alleged coercion, the judge must hold an evidentiary hearing in the absence of the jury and find by a preponderance of the evidence that the defendant's coercion made the witness unavailable." The district court was correct in applying the same burden — preponderance of the evidence — and procedure in a case under the similar terms of Rule 804(b)(6). *See* Fed. R. Evid. 804(b)(6) advisory committee's note ("The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior new Rule 804(b)(6) seeks to discourage.").

At issue in the instant case is whether Rule 804(b)(6) and the Confrontation Clause permit a finding of waiver based not on direct procurement but rather on involvement in a conspiracy, one of the members of which wrongfully

procured a witness's unavailability. The government argues that under the principle of conspiratorial liability articulated in *Pinkerton v. United States*, 328 U.S. 640 (1946), defendants-appellees are responsible for the murder of Lurks as a foreseeable result of the drug conspiracy in which they were allegedly involved, and they thereby waive their Confrontation Clause and hearsay objections to his out-of-court statements.

* * *

[We] read the plain language of Rule 804(b)(6) to permit the admission of those hearsay statements that would be admissible under the constitutional doctrine of waiver by misconduct, and hold that, in the context of criminal proceedings, the Rule permits the admission of hearsay statements by unavailable witnesses against defendants if those statements are otherwise admissible under the doctrine of waiver by misconduct. Our analysis of whether and under what circumstances waiver can be imputed under that doctrine and the acquiescence prong of the Rule is guided by two important but sometimes conflicting principles: the right to confrontation is "a fundamental right essential to a fair trial in a criminal prosecution"; and "courts will not suffer a party to profit by his own wrongdoing."

B. *Pinkerton* Conspiratorial Liability

The government urges us to adopt the principles of conspiratorial liability enunciated in *Pinkerton v. United States*, 328 U.S. 640 (1946), in the context of Rule 804(b)(6) and the Confrontation Clause waiver-by-misconduct doctrine. The *Pinkerton* Court held that evidence of direct participation in a substantive offense is not necessary for criminal liability under the principles holding conspirators liable for the substantive crimes of the conspiracy: "The overt act of one partner in crime is attributable to all * * *. If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense."

This Circuit has * * * described *Pinkerton* liability as follows:

During the existence of a conspiracy, each member of the conspiracy is legally responsible for the crimes of fellow conspirators. Of course, a conspirator is only responsible for the crimes of the conspirators that are committed in furtherance of the conspiracy. As stated by the Supreme Court, conspirators are responsible for crimes committed "within the scope of the unlawful project" and thus "reasonably foreseen as a necessary or natural consequence of the unlawful agreement."

* * * *Pinkerton's* formulation of conspiratorial liability is an appropriate mechanism for assessing whether the actions of another can be imputed to a defendant for purposes of determining whether that defendant has waived confrontation and hearsay objections. It would make little sense to limit forfeiture of a defendant's trial rights to a narrower set of facts than would

be sufficient to sustain a conviction and corresponding loss of liberty. Therefore, we conclude that the acquiescence prong of Fed. R. Evid. 804(b)(6), consistent with the Confrontation Clause, permits consideration of a *Pinkerton* theory of conspiratorial responsibility in determining wrongful procurement of witness unavailability, and we turn to waiver-by-misconduct case law to define the precise contours of such responsibility.

C. Conspiratorial Responsibility and "Acquiescence" Under Rule 804(b)(6)

* * *

Based on our balancing of the aims of the Confrontation Clause with the grave evil the well-established waiver-by-misconduct rule aims to prevent, we hold that the following interpretation of the "acquiescence" prong of Rule 804(b)(6) is consistent with the Confrontation Clause:

A defendant may be deemed to have waived his or her Confrontation Clause rights (and, a fortiori, hearsay objections) if a preponderance of the evidence establishes one of the following circumstances: (1) he or she participated directly in planning or procuring the declarant's unavailability through wrongdoing; or (2) the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy.

D. Application of Rule 804(b)(6)

We therefore examine the district court's order in light of our newly-elucidated standard. We conclude the district court did not abuse its discretion in holding that the government failed to show by a preponderance of the evidence that any of the defendants directly participated in the execution of the murder, but remand for application of the planning and *Pinkerton* tests. We take this opportunity to note that, even if the district court finds the standard for waiver by acquiescence to be met for some or all appellees, and thereby their Confrontation Clause and hearsay objections to be forfeited, the district court is still free to consider concerns of weighing prejudice against probative value under Fed. R. Evid. 403.

1. Scope of Conspiracy, Furtherance, and Reasonable Foreseeability as a Necessary and Natural Consequence

* * * [T]he district court concluded that "the mere fact [that defendants] may have participated in the drug conspiracy did not constitute a waiver of [their] constitutional confrontation rights." This statement is correct, as far as it goes. However, today we hold that participation in an ongoing drug conspiracy may constitute a waiver of constitutional confrontation rights if the following additional circumstances are present: the wrongdoing leading to the unavailability of the witness was in furtherance of and within the scope of the drug conspiracy, and such wrongdoing was reasonably foreseeable as a "necessary or natural" consequence of the conspiracy. We therefore remand

to the district court for findings on the *Pinkerton* factors as to Lurks's murder: whether it was in furtherance and within the scope of the conspiracy, and whether it was reasonably foreseeable as a necessary or natural consequence of that conspiracy. We note that the scope of the conspiracy is not necessarily limited to a primary goal — such as bank robbery — but can also include secondary goals relevant to the evasion of apprehension and prosecution for that goal — such as escape, or, by analogy, obstruction of justice. We further reiterate that, under *Pinkerton*, a defendant is not responsible for the acts of co-conspirators if that defendant meets the burden of proving he or she took affirmative steps to withdraw from the conspiracy before those acts were committed.

We note that the district court found “there is absolutely no evidence” that defendants Cherry, Gibbs, and Parker (although not Teresa Price) “had actual knowledge of, agreed to or participated in the murder of Ebon Sekou Lurks.” After complete review of the record, we conclude that this finding of fact is not clearly erroneous. ~~It does not, however, foreclose the possibility of waiver under a *Pinkerton* theory. Actual knowledge is not required for conspiratorial waiver by misconduct if the elements of *Pinkerton* — scope, furtherance, and reasonable foreseeability as a necessary or natural consequence — are satisfied.~~ A defendant's actual knowledge of a co-conspirator's intent to murder a witness in order to prevent discovery or prosecution of the conspiracy may prove relevant to those elements.

2. Planning

Although the district court found the evidence was “insufficient to show that by a preponderance of the evidence the Defendant Teresa Price procured the absence of Ebon Sekou Lurks,” it did not discuss whether the evidence that she obtained the car used in Lurks's murder under false pretenses, combined with her apparent proximity to Joshua around the time of the murder, would be sufficient circumstantial evidence to support a finding that she participated in the planning of the murder. We therefore remand for specific findings on whether the government can meet its burden of showing that Price participated in the planning of Lurks's murder so as to permit a finding of waiver by misconduct. * * *

III

To summarize, we remand to the district court for findings on the following issues: (1) did Teresa Price participate in the planning or carrying out of Lurks's murder by Joshua Price; (2) was Joshua Price's murder of Lurks within the scope, in furtherance, and reasonably foreseeable as a necessary or natural consequence, of an ongoing drug distribution conspiracy involving the defendants? The district court's order is REVERSED and REMANDED for proceedings consistent with this opinion.

[The dissenting opinion of JUDGE HOLLOWAY is omitted.]

NOTE

Can forfeiture by misconduct be applied to anyone other than a criminal defendant?

Any party who causes or acquiesces in wrongdoing with the intent to render a declarant unavailable forfeits the right to object to the unavailable declarant's hearsay statement. So, for example, if a prosecutor intentionally intimidates a defense witness so that the witness refuses to testify, the prosecution loses the right to interpose a hearsay objection with respect to any statement that the witness may have made. The same goes for parties in civil cases.

PROBLEM 12-1

The plaintiff, Real Estate Agent I, sues the defendant, Home Owner, to collect a real estate commission. Home Owner defends on the theory that he had a real estate sales contract with Real Estate Agent II, not Real Estate Agent I, and owes the commission to Real Estate Agent II, if anyone.

Plaintiff calls a bartender to the stand.

- Plaintiff:** Do you know Real Estate Agent II?
Bartender: Yes, very well.
Plaintiff: Did you ever have a discussion with him about a real estate contract between Home Owner and Real Estate Agent II?
Bartender: Yes. Right there at my bar.
Plaintiff: What did he say?
Defendant: (1) Objection! _____.
The court: Well, let me hear the statement first. Then I'll rule.
Bartender: He said, "Homeowner and I almost had an agreement signed, but then he backed out. All that work I did was for nothing. Somebody is going to get a big commission off that sale."
The court: How do you respond to the defendant's objection?
Plaintiff: (2) _____.
Defendant: (3) I also object because _____.
The court: (4) _____.
Plaintiff: Your Honor, I have here a certified copy from the Bureau of Vital Statistics of the death certificate of Real Estate Agent II. It shows that he died last week.
The court: (5) _____.

PROBLEM 12-2

The plaintiff, Dog Owner, sues the defendant, Next Door Neighbor, for the value of his dog, which he alleges the defendant poisoned. Neighbor defends on the theory that a third party, Dog Hater, poisoned the dog.

Defendant calls Dog Hater to the stand.

Defendant: State your name.
Witness: Dog Hater.
Defendant: Do you know Dog Owner?
Witness: I refuse to answer.
Defendant: Let me ask you again. Do you know Dog Owner?
Witness: Are you deaf? I said I refuse to answer.
Defendant: Your Honor, would you instruct the witness to answer the question?
The court: Mr. Hater, you are ordered to answer the question or I'll find you in contempt of court.
Witness: Go for it, Judge; I've got my rights.
The court: Are you asserting your privilege under the 5th Amendment?
Witness: You bet.
Defendant: Your Honor, this witness obviously is not going to answer questions. So we ask that he be deemed unavailable.
Plaintiff: I object. He's obviously available or he wouldn't be here. The Supreme Court said in the Owens case that a witness is available if he is present in court and can be asked questions.
The court: (1) _____.

Defendant calls a bartender.

Defendant: Do you know Dog Hater?
Witness: Yes.
Defendant: Did he talk to you about Dog Owner's dog?
Witness: He sure did.
Defendant: What did he say?
Plaintiff: (2) Objection! _____.
The court: Let me hear the statement.
Witness: He said, "That damn dog barked its head off so I poisoned the son of a bitch." Then he laughed real loud.
The court: What is the basis for your objection?
Plaintiff: As I said, it's a hearsay statement, obviously offered for its truth, and we have no opportunity to cross-examine the declarant.
Defendant: (3) _____.
The court: (4) _____.

Assume the same facts as in the last problem, except that this time Neighbor has been charged with the crime of cruelty to animals.

Assume that the colloquy is the same, except for the substitution of Prosecutor for Plaintiff, as in the civil suit until the end, when the following exchange occurs:

The court: What is the basis for your objection?
Prosecutor: As I said, it's a hearsay statement, obviously offered for its truth, and we have no opportunity to cross-examine the declarant.
Defendant: It's a declaration against interest.
Prosecutor: (5) _____
The court: (6) _____

PROBLEM 12-3

In the following example, has the defendant established that the declarant is unavailable in either the civil or criminal case arising from the dog poisoning?

Defendant: Your Honor, we tried to subpoena the witness Mr. Hater at the address listed in the telephone book, but it was returned by the Marshal with a notation that the witness no longer lived at that address. Here is the Marshal's return.
Plaintiff: When was the attempt to serve the subpoena made?
Defendant: Three days ago.
Plaintiff: It should have been served long before that. This is not an adequate effort.
The court: Does either party have an address for the witness?
Defendant: No.
Plaintiff: No.
The court: _____

PROBLEM 12-4

Plaintiff sues defendant Hot Foot, Inc. in a civil action for severe injuries sustained when the inflatable tennis shoes he bought from Hot Foot exploded during a 360-degree dunk. The inflatable style shoe was originally developed by High Dunk, Inc. High Dunk has a patent on the design, and Hot Foot produces its shoes pursuant to a license from High Dunk. There is no other corporate connection between the two corporations. High Dunk was sued in a similar incident. At that trial, the chief engineer testified, "We should have warned people about blow-out during 360-degree slam dunks." The parties stipulate that the chief engineer has retired on the island of Bonaire.

- Plaintiff:** Your Honor, at this time we would like to introduce the trial testimony of the chief engineer of High Dunk, Inc. that was given in a trial in this district two years ago.
- Defendant:** Objection! Hearsay.
- Plaintiff:** (1) _____.
- Defendant:** There's no showing this witness is unavailable. He could have been deposed.
- The court:** Could you have taken his deposition?
- Plaintiff:** We could have, but we chose not to.
- The court:** (2) _____.
- Defendant:** I further object that Hot Foot was not a party to the earlier litigation and had no opportunity to examine the chief engineer.
- Plaintiff:** High Dunk was a predecessor in interest, since it had the same motive and opportunity to examine the engineer in the earlier trial.
- Defendant:** Hot Foot and High Dunk are separate entities. They have no legal relationship to each other.
- The court:** How much was at stake in the litigation against High Dunk?
- Plaintiff:** The plaintiff in that case sought a million dollars in damages. And, I might add that there is a relationship between High Dunk and Hot Foot, since Hot Foot is a licensee of High Dunk and produces shoes pursuant to the licensing agreement.
- The court:** (3) _____.

PROBLEM 12-5

Mad Dog Ryan is charged with murdering his ex-partner, Findel Maskov. Maskov was found in the parking lot of an apartment building shot in the chest and head. Several days after the body was found, Detective Webb located an eyewitness, Ryan's ex-roommate, who told Webb that he saw Ryan shoot Maskov after an argument in the parking lot. A week before Ryan's trial is to start, Webb receives an emergency call at 1 a.m. from the ex-roommate who says, "I've just been shot. Ryan was here, out on bail, and I'm not sure I'm going to make it." Webb calls an ambulance to the ex-roommate's apartment and goes there himself. When Webb and the ambulance arrive, the ex-roommate is dead. At Ryan's trial, the police call Webb to testify.

- Prosecutor:** What did you do to investigate the death of Maskov?
- Webb:** I tried to contact people who knew Maskov, and I came upon the defendant's ex-roommate a couple of days after the body was found.
- Prosecutor:** Did the ex-roommate have any information about the death?

- Webb:** Yes, he said that he saw Maskov being shot.
Defense Counsel: Objection! Hearsay. Move to strike.
Prosecutor: We're showing the scope of the investigation and what Detective Webb learned. It's not hearsay.
- Defense Counsel:** It's not relevant unless it's offered for its truth.
Court: (1) _____
Prosecutor: Do you know who shot Maskov?
Webb: The ex-roommate told me that the defendant shot Maskov after an argument in the parking lot.
- Defense Counsel:** Objection! Hearsay. Move to strike.
Prosecutor: This is clearly admissible under Rule 804(b)(6).
Defense Counsel: There is nothing in the testimony of this witness that satisfies the rule.
- Prosecutor:** Maskov is dead and is unavailable. Therefore the statement should be admitted.
Court: (2) _____
Prosecutor: Let me lay the foundation, your Honor. Detective Webb, after your conversation with the ex-roommate a couple of days after the body was found, did you have occasion to speak with him again?
- Defense Counsel:** Objection! Hearsay.
Prosecution: That question cannot call for a hearsay answer.
Court: (3) _____
Webb: Yes, he called me approximately a week ago.
Prosecutor: What were the circumstances?
Webb: I received an emergency call at 1 a.m. from the ex-roommate who said, "I've just been shot. Ryan was here, out on bail, and I'm not sure I'm going to make it."
- Defense Counsel:** Objection! Hearsay. Move to strike.
Prosecutor: It's a dying declaration. We proffer to the court that Detective Webb will testify that he called an ambulance to the ex-roommate's apartment and went there himself. When Webb and the ambulance arrived, the ex-roommate was dead.
- Defense Counsel:** It's blatant hearsay.
Court: (4) _____
Defense Counsel: Objection! Moreover, it is irrelevant and extremely prejudicial. The crime charged is the murder of Maskov not the ex-roommate.
- Prosecutor:** It is highly probative and not unduly prejudicial.
Court: (5) _____
Prosecutor: Now, I ask you again, Detective Webb, what did the ex-roommate tell you two days after Maskov's body was found.
- Defense Counsel:** Objection! Hearsay. This is still hearsay.

Prosecutor: Now it should be clear that this is admissible under Rule 804(b)(6).

Defense Counsel: We have a hearsay statement being used to bootstrap another hearsay statement. That is not permissible.

Court: (6) _____.

The prosecution calls Andi Malis to testify.

Prosecution: Did you know the deceased, Findel Maskov?

Malis: Yes, I knew him well. We served time together in a federal penitentiary and were housed in the same unit.

Prosecution: Do you know of any reason why the defendant would have wanted to kill Maskov?

Malis: Maskov was the defendant's illegitimate son, and Maskov wanted the defendant to bear some financial responsibility for Maskov.

Defense Counsel: Objection! This witness cannot know whether or not Maskov was the defendant's son.

Court: How do you know that Maskov was the defendant's son?

Malis: Maskov told me that several times when we were incarcerated together.

Defense Counsel: My objection stands, and I add that this is inadmissible hearsay. May I ask the witness two questions in support of my objection?

Court: Certainly.

Defense Counsel: Have you ever met the defendant or any member of Maskov's family?

Malis: No.

Defense Counsel: Do you have any way of knowing whether Maskov was telling you the truth?

Malis: No.

Defense Counsel: This is pure hearsay and unreliable.

Prosecution: It is admissible under Rule 804(b)(4).

Court: (7) _____.

Prosecutor: How do you know that Maskov intended to seek support from the defendant?

Malis: He told me several times in prison that he intended to do so as soon as he was released.

Defense Counsel: Objection! Hearsay. This is not part of family history.

Prosecutor: It's admissible.

Court: (8) _____.

As part of the defense case, Ryan calls a bookmaker friend to testify.

Defense Counsel: Did you know Maskov?

Bookmaker: Very well. He placed bets with me all the time.

Defense Counsel: Did you and he ever speak of the defendant?

Bookmaker: Yes, I told him that there was a rumor that he was the defendant's son, and he told me that it was a lie and that the defendant was not his father.

Prosecutor: Objection! Hearsay. Move to strike.

Defense Counsel: It's a declaration against interest.

Prosecutor: It's not clearly against interest.

Court: (9) _____.

Defense Counsel: Additionally, it's admissible under Rule 804 (b)(4).

Court: (10) _____.

Defense Counsel: Did you ever ask the defendant about Maskov?

Bookmaker: I told him there was a rumor that he was Maskov's father, and he told me that it was a lie and that he had no relationship with Maskov.

Prosecutor: Objection! Hearsay. Self-serving. Move to strike.

Defense Counsel: We're back to Rule 804 (b)(4).

Court: (11) _____.

PROBLEM 12-6

Plaintiff sues her brother to stop probate of a will in which their grandmother left everything to the brother. Plaintiff alleges that the will was procured by duress one month before the grandmother died.

Plaintiff calls the grandmother's private nurse to the stand.

Plaintiff: Did you know the grandmother?

Nurse: Yes, I cared for her at the hospice, and she passed away in my arms.

Plaintiff: What was she suffering from?

Nurse: Bad heart. She had been in critical condition for several days. The day she died her doctor came in and told her that she might not see the morning. When he left, the grandmother told me she knew she was dying.

Plaintiff: Did she say anything to you just before she passed away?

Defendant: Objection! Hearsay.

The court: Let me hear it so I can rule.

Nurse: She said, "Brother held a pillow over my head about a month ago to make me sign that will."

The court: Counsel, what is the basis for your objection?

Defendant: The statement is obviously hearsay; it is offered for its truth.

Plaintiff: Sure sounds like a dying declaration to me. She knew she was dying.

Defendant: This is a civil case, not a criminal case.
Plaintiff: It doesn't matter.
The court: (1) _____
Defendant: (2) I still object. _____
The court: (3) _____
Plaintiff: Did the grandmother say anything else to you before she died?
Defendant: Objection! Hearsay.
The court: I need to know the contents of the statement in order to rule.
Nurse: She said, "I've had this heart problem for a long time. But, it was Brother's forcing me to make a will leaving Sister out that is killing me."
The court: Defendant, do you still object?
Defendant: Sure do, the testimony once again is hearsay; it is offered for its truth.
The court: (4) _____

Chapter 13

HEARSAY EXCEPTIONS NOT REQUIRING DECLARANT UNAVAILABILITY

A. PRESENT SENSE IMPRESSION

[1] Federal Rule of Evidence 803(1)

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present Sense Impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

* * *

[2] Illustration

The defendant is charged with killing his wife. He defends on the theory that someone else did it and that he was not even home with her at the time of the killing. The defendant calls a good friend to the stand.

Defendant:	State your name.
Witness:	Good Buddy.
Defendant:	Do you know the victim in this case?
Witness:	Yes, for many years.
Defendant:	Do you recognize her voice?
Witness:	Yes, I've spoken to her many times in person and over the phone.
Defendant:	Did you have a phone conversation with her on the date of her death?
Witness:	Yes, at the exact time of her death.
Defendant:	What did she say?
Plaintiff:	Objection! That's hearsay.
The court:	Let me hear the answer, so that I can rule.
Witness:	Well, we talked for a little bit about who was going to pick the kids up at the park, and then she said, "Hang on just a minute, there's some stranger knocking on the door." I'm sure she could see from the phone that it was a stranger because there's a window by the phone. Anyway, she said, "Hang on a minute," but then she never came back to the phone.

Defendant: This is a civil case, not a criminal case.
Plaintiff: It doesn't matter.
The court: (1) _____
Defendant: (2) I still object. _____
The court: (3) _____
Plaintiff: Did the grandmother say anything else to you before she died?
Defendant: Objection! Hearsay.
The court: I need to know the contents of the statement in order to rule.
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The court: Counsel, what is your response to the
Plaintiff's objection?
Defendant: _____

[3] Event, Perception, and Time Requirements

UNITED STATES v. BREWER

36 F.3d 266 (2d Cir. 1994)

MAHONEY, CIRCUIT JUDGE:

* * * Brewer was convicted for robbing a branch of Chemical Bank located at 1500 Forest Avenue, Staten Island, New York (the "Bank"), on January 30, 1992. The primary evidence against Brewer consisted of eyewitness identification testimony and evidence recovered from a gray 1987 Chevrolet Celebrity bearing New York license plate "G2J 801" (the "Car"). On this appeal, Brewer contends that * * * the district court erred in refusing to allow Brewer to elicit testimony from a government witness concerning five witnesses to the bank robbery who did not select Brewer's photograph from photo arrays that were presented to them.

Background

On January 30, 1992, three men robbed the Bank during the middle of the day and made off with approximately \$ 95,000. During the robbery, one of the malefactors stood by the front door of the Bank displaying a large gun. Acting on information provided by Joseph Calvanese, a bank customer waiting at the bank's drive-through window during the robbery who followed the robbers as they fled in the car and then abandoned it for another vehicle, Special Agent Edward M. McCabe of the Federal Bureau of Investigation found and searched the Car. The search recovered numerous rounds of live ammunition, an empty ammunition box, an owner's manual for an AP-9 firearm, a hand-held radio, a police scanner, an economics textbook, a piece of cardboard, two pullover ski masks, and a copy of a book, the Holy Koran. An envelope was inserted between the book's pages, addressed to Anthony J. Brewer and containing a letter, a card, and a photograph, all signed by "Sherry Ann." Brewer's fingerprints were found on the Holy Koran, the envelope and the photograph inside it, the economics textbook, and the piece of cardboard. The car was registered to an individual named Abdul Mohammed, 190 Wilson Avenue, Brooklyn, New York, whose date of birth was listed as November 3, 1967. It was stipulated that Brewer's birth date was November 3, 1967, and that he had stated on a previous occasion that he resided at the Wilson Avenue address.

This evidence focused suspicion on Brewer, and led McCabe to include Brewer's photograph in one of four six-photograph arrays shown to several witnesses to the Bank robbery. On February 14, 1992, McCabe interviewed the various witnesses and had each of them view the arrays. Each array contained a photograph of a man whom McCabe suspected of participating in the bank robbery, and individual photographs of five other men of like appearance. One

of these arrays included Brewer's photograph. Three Bank employees who had been present during the robbery, Kathleen Cassiliano, Marta Marrano, and Agnes Charzewski (collectively the "Identifying Witnesses"), selected the photograph of Brewer as "resembling" the robber who had been stationed at the front door of the Bank, holding the large gun. Five other eyewitnesses viewed the photo arrays and did not select Brewer's photograph (the "Nonidentifying Witnesses").

Brewer was indicted and charged with the three counts that led to his conviction and this appeal. On September 15, 1993, the Identifying Witnesses viewed a lineup of Brewer and five other men of the same general physical appearance, conducted at Brewer's request, but none of them identified anyone in the lineup as being one of the Bank robbers.

* * *

Brewer argues on appeal that he was improperly denied the opportunity to cross-examine McCabe concerning the failure of five eyewitnesses to the bank robbery to identify Brewer when shown the photo arrays. Brewer relies upon Fed. R. Evid. 803(1), the present sense impression exception to the hearsay rule, in support of his argument that he could elicit this testimony through McCabe, rather than through the witnesses themselves. The district court believed the situation to be controlled by Rule 801(d)(1)(C), and ruled that Brewer could only elicit this testimony by calling the witnesses themselves, which Brewer declined to do.

Under Rule 801(d)(1)(C), a statement of prior identification may be received in evidence only if "the declarant testifies at * * * trial * * * and is subject to cross-examination" concerning the prior identification. Although the rule is not precisely directed to testimony concerning a prior failure to identify, we believe that the purpose and policy of the rule fairly encompasses such situations, as well. Whether or not a prior out-of-court identification is successful, the reliability of, and weight to be accorded to, the evidence can best be assessed by having the declarant available for cross-examination.

Brewer contends, however, that the nonidentifications should have been admitted as a present sense impression through cross-examination of McCabe pursuant to Rule 803(1). Statements may be admitted pursuant to Rule 803(1) without examination of the declarant, "even though the declarant is available as a witness."

Brewer's own description of Rule 803(1) shows why his contention must fail. Quoting 4 Louisell, Federal Evidence § 438 (1980), Brewer describes the rationale of Rule 803(1) as follows: "Statements of present sense impression are considered reliable because the immediacy eliminates the concern for lack of memory and precludes time for intentional deception." The essence of an identification such as at a photo array or a lineup, however, is a comparison between what the witness is contemporaneously viewing and the witness's recollection of a prior event, in this case the bank robbery. As the district court aptly noted: "The heart of a photographic identification [is that] you are asking someone about their perception of a past event * * *. You are asking them to recall[,] by definition[,] what happened in the past." Brewer's characterization of observations made during the viewing of a photo array as "highly

trustworthy because they were made simultaneously with the event being perceived, namely, the photo array," ignores the vital element of memory.

The two cases relied on by Brewer to support his contention that the nonidentifications come within Rule 803(1) are inapposite. In *United States v. Hinton*, 719 F.2d 711 (4th Cir. 1983), the court concluded that a police officer's "contemporaneous response" to a defendant's offer to "cop" to a particular charge came within Rule 803(1), and alternatively, that any error in admitting this statement was harmless. In *MCA, Inc. v. Wilson*, 425 F. Supp. 443, 450-51 (S.D.N.Y. 1976), modified, 677 F.2d 180 (2d Cir. 1981), a copyright infringement case in which the issue was "whether the allegedly infringing work is recognizable by ordinary observation as having been pirated from the copyrighted source," the court concluded that out-of-court declarants' immediate reactions to a musical work were admissible pursuant to Rule 803(1). The statements admitted in both cases were obviously contemporaneous with the events to which they related.

In this case, by contrast, the Nonidentifying Witnesses' memory was at issue, and that is precisely why the statements of nonidentification do not come within Rule 803(1). See *United States v. Parker*, 936 F.2d 950, 954 (7th Cir. 1991) ("The underlying rationale of the present sense impression exception is that substantial contemporaneity of event and statement minimizes unreliability due to defective recognition or conscious fabrication."); see also *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 303 (3d Cir. 1983) (exception for present sense impressions founded on notion that contemporaneity of observation and impression protect against defective memory), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Accordingly, once Brewer had made it clear that he would not be calling the Nonidentifying Witnesses to testify, the district court correctly concluded that Rule 803(1) did not permit Brewer to cross-examine McCabe about the Nonidentifying Witnesses' failure to identify Brewer.

Conclusion

The judgment of the district court is affirmed.

NOTES

1. How long is "immediately thereafter"?

While contemporaneity is critical to admissibility, there is in fact no talismanic time period for admission as a present sense impression. Admissibility is determined on a case by case basis, in which the court investigates the circumstances of the statement to determine whether the declarant had significant time for reflection. See *Hilyer v. Howat Concrete Co.*, 578 F.2d 422 (D.C. Cir. 1978) (statement made fifteen to forty-five minutes after event held not contemporaneous and thus inadmissible under Rule 803(1); but statement

was admissible under Rule 803(2) because made under the stress of excitement). If there is no evidence, circumstantial or otherwise, as to the time lapse, there is no foundation to admit the statement. *See, e.g., United States v. Cruz*, 765 F.2d 1020 (11th Cir. 1985) (statement by a deceased officer to his superiors concerning the source of a cocaine sample was inadmissible where it was unclear how much time passed between the receipt and the statement).

2. Must the offeror of evidence pursuant to this exception establish a foundation that the declarant perceived the event?

In *Meder v. Everest & Jennings, Inc.*, 637 F.2d 1182 (8th Cir. 1981), the Court held that the trial court properly refused testimony by a police officer about what he was told by a witness, because there was insufficient evidence that the witness had actually perceived the event. *See also Bemis v. Edwards*, 45 F.3d 1369 (9th Cir. 1995): Affirming a judgment for police officers alleged to have used excessive force, the court held that a 911 tape recounting the event was properly excluded because the citizen caller apparently lacked personal knowledge of the events which he was reporting. The court stated that "this requirement that a declarant have personal knowledge of the events described applies to the present sense impression exception," and observed that the proponent of a hearsay declaration has "the burden of establishing personal perception by a preponderance of the evidence."

3. Must the proponent of the hearsay statement provide corroborating evidence that the event occurred the way the declarant said it did?

Professors Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (9th ed. 2006), analyze the relationship between the present sense impression and corroboration as follows:

Professor Waltz, in *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 Iowa L. Rev. 869 (1981), carefully traces the present sense impression from early American cases through the early Federal Rules decisions. He indicates that the history supports some sort of corroboration requirement for a present sense impression — that is, a requirement that before the statement is admitted, there must be evidence independent of the statement itself to prove that the event described actually occurred.

Most federal courts are reading a corroboration requirement into Rule 803(1). The corroboration can be found in the in-court testimony of the declarant, or testimony of another person who also saw some of what the declarant saw, or simply circumstantial evidence that the event occurred. Imposing a corroboration requirement is a sensible approach. Under the plain language of the Rule, the proponent must show that the declaration was made at the time of, or immediately after, an event, and that the statements explained or described that event. To satisfy the timing, relationship, and event requirements, the witness in court is probably going to have to be able to corroborate to some extent that the event actually occurred, unless the declarant is present to so testify or there is some other source of corroboration. In the absence of some proof other than the hearsay statement itself,

a trial judge should conclude that the proponent has failed to prove by a preponderance of the evidence that the event occurred the way the declarant described it. Otherwise, the admissibility requirement is proved *solely* through the hearsay statement itself — something that is not allowed, for example, with coconspirator hearsay statements. See Rule 801(d)(2)(E). While the hearsay statement itself may certainly be considered as proof of the admissibility requirement that an event occurred (see Rule 104(a)), some corroboration must be provided for the statement to be admissible under Rule 803(1).

The Advisory Committee Note to Federal Rule 803(1) stresses that present sense impressions are reliable in large part because the witness who testifies to the declarant's statement "may be examined as to the circumstances" described by the declarant. This indicates that the drafters intended a corroboration requirement for this exception, i.e., that the person who heard the declarant's statement was also at the event and could give his own account of it at trial. But this statement should not be taken to mean that a present sense impression is only admissible if an in-court witness can testify that the event occurred exactly as the declarant described it. While a witness who was in the same position to view the event as the declarant would certainly be able to provide sufficient corroboration, a requirement of equal percipience would rob the Rule of much of its practical effect; the declarant's hearsay statement would to some extent be cumulative if the witness could provide the same statement in court. The Rule should be and has been construed to permit corroboration short of equally percipient testimony.

A case that illustrates the correct approach to the corroboration requirement is *United States v. Blakey*, 607 F.2d 779 (7th Cir. 1979). The defendants in *Blakey* were charged with extortion. The government offered the victim's hearsay statement that "stuff like tonight cost me a thousand dollars." The statement was made immediately after the victim and the three defendants came out from a short meeting in the back of the victim's shop. The defendants argued that the statement could not be admitted under Federal Rule 803(1) because there were no witnesses, other than the declarant and the defendants, to the relevant event — the purported exchange of \$1000 in the back of the declarant's shop — and the declarant was no longer available to testify. The Court held, however, that the statement was properly admitted because "there were several witnesses who could testify to the events leading up to and following the meeting" in the back of the shop. These witnesses would testify that the defendants acted in a very intimidating manner before going to the back of the shop with the declarant, and that after the defendants and the declarant briefly met in the back of the shop, the defendants came out looking "satisfied." The Court concluded that "it is not necessary that the witnesses be in the same position to observe as the declarant; it is only necessary that the witnesses be able to corroborate the declarant's statement." In other words, the government, through corroborative witnesses together with the hearsay statement itself, proved by

a preponderance of the evidence that an "event" occurred as the declarant described it, and therefore satisfied that admissibility requirement of Rule 803(1).

B. EXCITED UTTERANCES

[1] Federal Rule of Evidence 803(2)

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(2) **Excited Utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

* * *

[2] Illustration

Plaintiff sues an automobile manufacturer because her husband died in a rear-end collision when the gas tank exploded. The primary issue at trial is whether the tank exploded on impact, as plaintiff alleges, or when the plaintiff's husband got out of the car and flipped a cigarette into a puddle of gasoline that had leaked out from the engine block of the other car. Plaintiff calls a police officer to the stand.

Plaintiff:	State your name.
Witness:	Top Cop.
Plaintiff:	Did you investigate this accident?
Witness:	Yes, I did.
Plaintiff:	Did you see it happen?
Witness:	No, I arrived about 15 minutes after the explosion.
Plaintiff:	Did you talk to a person named Freaked Out?
Witness:	Yes, I did, immediately upon arriving at the scene.
Plaintiff:	Could you describe his condition?
Witness:	He was extremely excited, there were tears in his eyes, and his voice was shaking.
Plaintiff:	What did he tell you?
Defendant:	Objection! That's hearsay.
The court:	Let's hear it so I can decide.

Witness: He said, "Oh my God, that car back there rear-ended the other one and then there was this immediate gigantic explosion, and people were burning to death and we couldn't get to them to save them."

Plaintiff: Did he say anything else?

Witness: No, then he fainted.

Defendant: Your Honor, it's clearly hearsay and due to the excited state of the declarant, it's not reliable anyway.

The court: Counsel, how do you respond to the Defendant's argument?

Plaintiff: _____

[3] Under the Influence of the Startling Event

UNITED STATES v. MARROWBONE

211 F.3d 452 (8th Cir. 2000)

BEAM, CIRCUIT JUDGE:

Orville Marrowbone appeals his conviction for having sex with a person who was incapable of declining participation in or communicating an unwillingness to engage in sex. *See* 18 U.S.C. §§ 1153, 2242(2)(B), 2246(2)(A). * * *

Orville Marrowbone had sex with L.D., a sixteen-year-old, on the Cheyenne River Indian Reservation. At trial, L.D. testified that he got drunk on alcohol supplied by Marrowbone, passed out, and awoke to Marrowbone engaging in anal sex with him. Soon after this encounter, L.D. ran home and told his mother what happened. His mother called the tribal police to have L.D. arrested for unlawful intoxication. The police did not respond. About two hours later, L.D.'s mother again called the police to have him arrested for unlawful intoxication. Officer Donel Henry Takes the Gun then arrived and arrested L.D. Officer Takes the Gun later transferred L.D. to the custody of Officer Harlen E. Gunville, Jr.

While in the police officers' custody, L.D. made statements about his encounter with Marrowbone. Officer Takes the Gun testified that L.D. said Marrowbone had molested him. * * *

Marrowbone objected on hearsay grounds to the police officers' testimony about L.D.'s statements. The district court overruled the objections, and allowed the testimony without any limiting instructions. On appeal, Marrowbone renews his hearsay objection to the admission of this testimony from the officers. The government asserts the excited utterance exception to the hearsay rule allows for admission of this evidence.

Hearsay is an out of court statement offered in evidence to prove the truth of the matter asserted. *See* Fed. R. Evid. 801. Hearsay is generally not admissible, but there is an exception for excited utterances. *See* Fed. R. Evid. 802 and 803(2). Excited utterances are statements relating to a startling event made while under the stress of excitement caused by the event. *See* Fed. R.

Evid. 803(2). The rationale for this exception is that excited utterances are likely to be truthful because the stress from the event caused a spontaneous statement that was not the product of reflection and deliberation. *See Reed v. Thalacker*, 198 F.3d 1058, 1061 (8th Cir. 1999).

To determine whether L.D. was under the stress of excitement when he made these statements, we consider the ~~lapse of time between the startling event and~~ the statements, whether the statements were made in response to an inquiry, his age, the characteristics of the event, his physical and mental condition, and the subject matter of the statements. *See United States v. Moses*, 15 F.3d 774, 777-78 (8th Cir. 1994). The government has the burden of demonstrating that the excited utterance exception is applicable. *See Reed*, 198 F.3d at 1061. * * *

~~These statements~~ do not qualify as excited utterances. The allegations of sexual abuse were made about three hours after the event occurred. In addition, these statements were made by a teenager, not by a small child. *See Reed*, 198 F.3d at 1061-62 (recognizing that some courts allow a longer time period between the event and the statement when a young child alleges sexual abuse). While small children may be less likely to fabricate a story, teenagers have an acute ability to deliberate and fabricate. This particular teenager also had reason to fabricate because making a charge of molestation might enable him to avoid a night in jail for being intoxicated. *See Stidum v. Trickey*, 881 F.2d 582, 585 (8th Cir. 1989) (finding an excited utterance because declarant had no reason to fabricate).

L.D.'s actions also do not show continuous excitement or stress from the time of the event until the time of the statements. *See United States v. Mess*, 544 F.2d 954, 958 (8th Cir. 1976) (showing of continuous unrelieved excitement after event provides evidence that statement was excited utterance). Officer Takes the Gun testified that when he arrived at the house, L.D. was standing with a group of people and, when handcuffed, said nothing about the incident with Marrowbone. It was only when L.D. was about to be placed in the patrol car for transport to jail that he raised a ruckus and began making these statements. Six other witnesses also testified that L.D. did not appear frightened or scared during the time after the encounter with Marrowbone. Based on the lapse of time, age, motive to lie, and known actions of L.D., we are wholly unconvinced these statements were excited utterances. Thus, the district court abused its discretion when it admitted this hearsay evidence.

* * *

[The Court found the error in admitting the hearsay statements to be harmless and affirmed the conviction.]

NOTES

1. What is the relationship between the excited utterance exception and the present sense impression exception?

Rules 803(1) and 803(2) are both derivatives of the common law *res gestae* exception. So it is unsurprising that admissibility of any statement which appears to be spontaneous is often analyzed under both Rules. A critical inquiry under each involves the timing of the event or condition and the declaration. However, the central requirement of Rule 803(2) is that the declarant must be excited; while the central requirement of Rule 803(1) is that the declarant must be speaking so close in time to the event that he has no opportunity for reflection. The respective Rules each prohibit an opportunity to fabricate, but in different ways. Thus, a statement may well be held admissible under both Rules or under only one but not the other. The most significant differences between the two exceptions are that: (1) an excited utterance must relate to a "startling" event or condition while a statement of present sense impression may describe any event or condition; (2) the present sense impression must "describe" the event, while the excited utterance need only "relate" to the event — the excited utterance exception thus allows a broader scope of subject matter coverage than does the present sense impression exception; and (3) the excited utterance exception of Rule 803(2) does not contain an express contemporaneity requirement, as does Rule 803(1). See, e.g., *United States v. Moore*, 791 F.2d 566 (7th Cir. 1986) (statement referring to something which preceded the startling event does not describe the event, but is related to the event and hence admissible under Rule 803(2)); *David v. Pueblo Supermarket*, 740 F.2d 230 (3d Cir. 1984) (statement in slip and fall case that "I told them to clean it up two hours ago" does not describe the slip and fall for purposes of Rule 803(1) but does relate to the event for purposes of Rule 803(2)).

2. When is a statement too far removed in time from the event to qualify as an excited utterance?

Professors Saltzburg, Martin, and Capra analyze the effect of time on an excited utterance in the following excerpt from the *Federal Rules of Evidence Manual* (9th ed. 2006):

There is no hard and fast rule prescribing the amount of time that may elapse between a startling event and an excited utterance. The closer in time the statement is to the startling event, the more likely the declarant is still to be under the influence of the event. Ordinary experience teaches that the stress of excitement tends to dissipate with time. See, e.g., *United States v. Wesela*, 223 F.3d 656 (7th Cir. 2000) (wife made statement to police officers two days after her husband threatened her with a knife; it was error to admit this statement as an excited utterance because of the lengthy time period between the startling event and the statement; the declarant had regained her composure and made the statement while at work); *United States v. Winters*, 33 F.3d 720 (6th Cir. 1994) (statement made by a shooting victim to police officers, two days after the victim was shot, was held not admissible as an excited utterance; the statement was made so far after the shooting that it was "the product of conscious reflection").

The issue, however, is not the passage of time as such but the state of mind of the declarant — specifically whether the declarant has been excited during the entire time between the event and the statement. Even statements made an hour or so after the event can qualify for the exception if the proponent can establish by a preponderance that the declarant was under a continuous state of excitement during the entire period between the startling event and the making of the statement. *See, e.g., United States v. Hefferon*, 314 F.3d 211 (5th Cir. 2002) (statements by child-victim of sexual abuse, made within two hours of the abuse, were properly admitted as excited utterances); *United States v. Scarpa*, 913 F.2d 993 (2d Cir. 1990) (statement of a beating victim was admissible under Rule 803(2); the victim named the defendants as his assailants five or six hours after the beating, while he was being treated in a hospital emergency room and his sister screamed that one of the defendants had come into the emergency room; there was little doubt that the declarant was still under the stress of excitement caused by his beating and by his sister's screams).

There are several circumstances that are relevant to admissibility even though a significant amount of time has passed between the event and the statement. These include:

(1) The nature of the startling event. Some events are more startling than others; a declarant could be expected to be under the influence of a high impact event for a longer period of time. *See, e.g., United States v. Rivera*, 43 F.3d 1291 (9th Cir. 1995) (victim's statement, accusing the defendant of raping her, was properly admitted as an excited utterance; while the statement was made more than 30 minutes after intercourse, the victim was still under the influence of the startling event; the victim was only 15 years old, she reported the rape to her mother at the first opportunity to do so, and she was in a "semi-hysterical" state at the time she made the statement).

(2) Whether the declarant in fact appeared to be excited during the time between the event and the statement. *See, e.g., United States v. Moore*, 791 F.2d 566 (7th Cir. 1986) (statement made 20 minutes after an event was held admissible under Rule 803(2) where the declarant was "running around like a chicken with her head cut off" for the entire time).

(3) The nature of the declarant. Some declarants, especially children, can be expected to be under the influence of a startling event for a longer period than others. *See, e.g., United States v. Sowa*, 34 F.3d 447 (7th Cir. 1994) (statement made by a child-declarant 20 minutes after he was beaten, identifying the defendant as the perpetrator, was properly admitted as an excited utterance; the Court noted that the child had cried for the entire period between the beating and the statement); *Morgan v. Foretich*, 846 F.2d 941, 947 (4th Cir. 1988) (child's statements were held admissible under 803(2) when they were made within three hours of the child's first opportunity to speak with the mother, even though the alleged abuse had occurred more than a day earlier); *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980)

(child's statements concerning sexual assault were admissible when they were made to a police officer between 45 and 75 minutes after the assault; the Court emphasized "the surprise of the assault, its shocking nature and the age of the declarant" to find a continuous state of excitement).

(4) The fact that the statement is self-serving to the declarant, while not dispositive, certainly raises the possibility that the declarant had time to reflect. *See, e.g., United States v. Sewell*, 90 F.3d 326 (8th Cir. 1996) (the defendant was stopped for a traffic violation; when a search of his car uncovered a gun, the defendant said the gun was not his; this statement was not admissible as an excited utterance; where "incriminating evidence is discovered in one's possession, it requires only the briefest reflection to conclude that a denial and a plea of ignorance is the best strategy. This hardly comports with the spirit of disinterested witness which pervades the rule.").

(5) If the statement describing a previous event also predicts a future event (e.g., "something bad is going to happen"), such a prediction generally shows deliberative thought, not excitedness.

3. For excited utterances, what proof is required that the event actually happened?

The hearsay declaration itself may be sufficient to establish that the event occurred. Federal Rule 104(a) permits the judge, in deciding on admissibility issues, to rely on inadmissible evidence, including the proffered evidence itself. *United States v. Moore*, 791 F.2d 566, 570 (7th Cir. 1986). However, courts are understandably reluctant to find that the admissibility requirements for a hearsay exception are met when the only evidence provided is the hearsay statement itself. Ordinarily, more will be required. For example, in addition to the statement itself, the "appearance, behavior, and condition of the declarant may establish that a startling event occurred." *Id.* Also, the proponent may provide independent evidence that the startling event occurred, e.g., eyewitness testimony.

4. Must the event be unexpected?

Some courts have held that an event cannot be startling if the declarant has planned for the event to occur, and the event occurs as planned. *See, e.g., United States v. Knife*, 592 F.2d 472 (8th Cir. 1979) (pre-planned shooting of a police officer cannot be startling when it occurs). This presumes, however, that all the factors leading up to the event are within the declarant's control; if not, the element of surprise may create excitement when the event occurs, since the event may be hoped for, but cannot be planned in advance. *See, e.g., United States v. Moore*, 791 F.2d 566 (7th Cir. 1986) (secretary planned to expose her boss as a bribe taker if and when she found evidence; actually finding the evidence was a startling event because the event was not within the declarant's control; even though hoped for, it was nonetheless a surprise when the event occurred). For example, a person has to plan to win the lottery in order to win, but actually winning the lottery is certainly a startling event.

[4] Unknown Declarant**MILLER v. KEATING**
754 F.2d 507 (3d Cir. 1985)

STERN, DISTRICT JUDGE:

* * *

I.

On January 18, 1982, Carol Miller was driving her white Ford LTD east on U.S. Route 22, a limited access highway, near Easton, Pennsylvania. She carried a passenger named Annette Vay. It is undisputed that Miller and Vay were traveling behind a UPS truck and that both vehicles switched into the lefthand lane to avoid a stalled vehicle in the righthand lane near the 25th Street exit ramp. It is also undisputed that, soon thereafter, the Miller car was struck from behind by defendant Texaco's tractor-trailer driven by co-defendant Lawrence Keating. The force of the collision propelled the Miller car first into the side of a car stopped in the righthand lane and then into the rear of the UPS truck. Mrs. Miller sustained serious injuries in the collision. The driver of the car stopped in the righthand lane was Kenneth Parris. His wife, Elfriede Parris, was a passenger.

One dispute at trial was over the amount of time that elapsed between the moment when Mrs. Miller pulled into the lefthand lane and the moment when her car was struck from the rear. Another conflict focused on whether the Miller car was stopped behind the UPS truck or was still moving when it was hit by the Texaco tractor-trailer.

Both Mrs. Miller and her passenger, Annette Vay, testified at trial that Miller had completely stopped her car before being rammed by the Texaco truck. According to Vay, the Miller car was stopped in the lefthand lane for "a few seconds" before the accident. Later, she testified that the time period could have been longer than "a second or two." Lawrence Keating testified, however, that he was driving his Texaco tractor-trailer in the lefthand lane, slowing down in order to stop, and there was no vehicle between him and the UPS truck. He testified that he never saw the Miller car pull in front of him, and the first time he saw it was when it was in his lane. He said he saw only a "white blur" half or three-quarters of the way into his lane. He claimed that by the time he saw the Miller car in his lane, he was too close to it to avoid the collision.

There were other inconsistencies at trial of less relevance to the issue here, but several deserve mention because they illustrate the profusion of accounts before the jury.* * * The Parrises, who were stopped in the right lane, both testified that the Texaco truck had come to a full stop in the left lane behind the Parris car (and two car lengths behind the UPS truck, according to Mr. Parris), before the Miller car pulled in front of it. However, both Keating and the UPS driver, Neil Rasmussen, Jr., who was watching out of his side view mirror, depicted the Texaco truck as moving continuously toward the rear of

the UPS truck. * * * And Keating said he was making "a gradual rolling stop."

There is also a dispute as to when the Parris car arrived alongside the Miller car. Vay and Miller both testified that the Parris car pulled up next to the Miller car during the few seconds it was stopped before being rammed by the Texaco truck. But the Parrises testified that they were stopped in the right lane for "several minutes" or "two minutes" before the accident.

It is the testimony of the Parrises about an incident occurring after the accident that gives rise to this appeal. After being hit in the left side, Mr. Parris pulled his car over. He testified that he left his car, comforted one of the victims in the Miller car, then walked to the rear of the Miller car where his wife was writing down the license plate number of the Miller car. At that point, a man approached and said, "the bastard tried to cut in." In somewhat inconsistent testimony, Mrs. Parris stated that she and her husband "were running towards the car, and I heard this person that was driving — running towards us — * * * [a]nd said the s.o.b. or some words like that, tried to cut in." Mr. Parris could not identify the declarant beyond saying that he was a white male. Mrs. Parris could do no better. There is no indication in the record why she thought the declarant was a driver or which vehicle he drove. Mr. Parris testified that he did not know what vehicle the declarant was driving.

Over objections, the trial judge allowed the Parrises to relate their versions of the declaration to the jury. He admitted the statements as "*res gestae*." Parenthetically, we note that this terminology is inappropriate. As the trial judge implicitly recognized in his opinion denying post-trial relief, there is no such exception to the prohibition against hearsay. If admissible, the declaration must qualify under one of the genuine exceptions to the hearsay rule. The old catchall, "*res gestae*," is no longer part of the law of evidence.

As the trial judge also recognized, the excited utterance exception of Fed. R. Evid. 803(2) provides the most likely basis for admitting the statement. The question before us, therefore, is whether that statement by the unknown declarant should have been admitted under Fed. R. Evid. 803(2), which defines "excited utterance" as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

II.

* * *

[One] question is whether the excited utterance exception may ever authorize the admission of a statement by an anonymous declarant. Fed. R. Evid. 806 provides that whenever a hearsay statement is admitted, the declarant's credibility may be attacked through cross-examination and the introduction of evidence of inconsistent statements. The rule confers no absolute right to cross-examination, because hearsay statements may often be admitted despite the unavailability of the declarant. For example, Fed. R. Evid. 804 defines various situations where hearsay testimony comes in even though the declarant is unavailable. Among these are dying declarations, former testimony, and

declarations against interest. The unifying trait of all the Rule 803 exceptions is a circumstantial guarantee of trustworthiness sufficient to justify nonproduction of the declarant, whether available or not. Although Rule 806 cannot be read to confer a right to any particular form of attack on the credibility of a hearsay declarant, it does confer a generalized right that is significantly diminished when the hearsay declarant is not only unavailable, but is also unidentified, and the party against whom the hearsay declarant's statement is introduced is thus deprived not only of the right to cross-examine, but of any meaningful prospect of finding evidence of inconsistency or bias.

* * *

At minimum, when the declarant of an excited utterance is unidentified, it becomes more difficult to satisfy the established case law requirements for admission of a statement under Fed. R. Evid. 803(2). Wigmore defines these requirements as: (1) a startling occasion, (2) a statement relating to the circumstances of the startling occasion, (3) a declarant who appears to have had opportunity to observe personally the events, and (4) a statement made before there has been time to reflect and fabricate. There is no doubt that the present case presents a startling occasion and little doubt that the declarant's statement relates to the circumstances of the occurrence. Partly because the declarant is unidentified, however, problems arise with the last two requirements: personal knowledge and spontaneity.

The first of these expresses the familiar principle that a witness may not testify about a subject without personal knowledge. Fed. R. Evid. 602. This rule applies with equal force to hearsay statements.* * * To be admissible, the declarant of an excited utterance must personally observe the startling event. *McLaughlin v. Vinzant*, 522 F.2d 448, 451 (1st Cir. 1975). The burden of establishing perception rests with the proponent of the evidence. *David v. Pueblo Supermarkets of St. Thomas, Inc.*, 740 F.2d 230, 235 (3d Cir. 1984). As in all questions of admissibility, the resolution of any dispute of fact necessary to the question is confided to the trial judge to be decided by a preponderance of the evidence. And while the trial judge is not confined to legally admissible evidence in making the determination, Fed. R. Evid. 104(a), still he must make the findings necessary to support admissibility.

Direct proof of perception, or proof that forecloses all speculation is not required. On the other hand, circumstantial evidence of the declarant's personal perception must not be so scanty as to forfeit the "guarantees of trustworthiness" which form the hallmark of all exceptions to the hearsay rule. Fed. R. Evid. 803 advisory committee note. When there is no evidence of personal perception, apart from the declaration itself, courts have hesitated to allow the excited utterance to stand alone as evidence of the declarant's opportunity to observe.* * * In some cases, however, the substance of the statement itself does contain words revealing perception. A statement such as, "I saw that blue truck run down the lady on the corner," might stand alone to show perception if the trial judge finds, from the particular circumstances, that he is satisfied by a preponderance that the declarant spoke from personal perception.

* * *

In the present case, however, the record is empty of any circumstances from which the trial court could have inferred * * * that the declarant saw Miller "cut in." The disputed declaration itself does not proclaim it. Indeed, the district judge acknowledged as much in his opinion denying plaintiffs' motion for a new trial. Nevertheless, he drew an inference of perception, reasoning that "the declarant would have made the declaration only if he was in a position to observe the collision." Yet the statements reported by the Parrises — "the bastard tried to cut in" and "the s.o.b., or some words like that, tried to cut in" — alone, do not show more likely than not that the declarant saw the event. The declarant might have been drawing a conclusion on the basis of what he saw as he approached the scene of the accident. He might have been hypothesizing or repeating what someone else had said. It is even possible that the declarant was talking about some other driver who had just cut in front of him. It is far from unlikely that the declarant was a participant in the accident, for the Parrises could never identify or exclude anyone as the speaker. And the tenor of the declaration, *i.e.*, "the bastard tried to cut in," suggests at least the possibility that the declarant was a participant with a natural degree of bias. The self-serving exclamation by a participant in an auto accident "it was the other guy's fault," is hardly likely to qualify as trustworthy.

The circumstances external to the statement itself not only fail to demonstrate that the declarant was in a position to have seen what happened, they also fail to show that the declarant was excited when he spoke. No one so testified, and the trial judge made no finding of excitement. Thus, this last prong of the test for admissibility is also unsatisfied. The assumption underlying the hearsay exception of Rule 803(2) is that a person under the sway of excitement temporarily loses the capacity of reflection and thus produces statements free of fabrication.* * * Since lack of capacity to fabricate is the justification for excited utterances, courts have recognized that the length of time separating the event from the statement may be considerably longer than for statements qualifying under the present sense impression exception of Rule 803(1), which is based on the lack of time to fabricate.* * * In *McCurdy v. Greyhound Corporation*, 346 F.2d 224, 226 (3d Cir. 1965), for example, this Court approved admission of a statement made ten or fifteen minutes after an accident, recognizing that there can be no arbitrary time limits on the operation of Rule 803(2). Thus, even if several minutes elapsed between the exciting event and the utterance, it is not necessarily an abuse of discretion to admit the statement so long as the trial court explicitly finds it was not the product of conscious reflection. There is no such finding in this case.

We have considered appellants' other contentions and find them to be without merit. The judgment of the district court will be reversed and the case remanded for a new trial.

NOTE

Can the statement of an unidentified declarant ever be admitted?

See Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (9th ed. 2006):

One question that has arisen concerning admissibility of present sense impressions and excited utterances is whether the declarant must be an identifiable person. The Advisory Committee's Note on Federal Rules 803(1) and 803(2) mentions cases in which Courts had refused to admit the hearsay statement of an unidentified bystander.

There are two possible concerns that a court might have when a witness testifies that a present sense impression or excited utterance was made by an unidentified declarant. One is that if the declarant cannot be identified as a real person, there is a possibility that the declarant never even existed; ~~the witness may be creating a "phantom declarant"~~ in order to manufacture a hearsay statement ready-made to fit the present sense impression or excited utterance exception. For example, a plaintiff in a personal injury action might testify to an unidentified bystander's contemporaneous description of an accident, which just happens to track the plaintiff's version of the events, and the defendant may do likewise.

We submit, however, that any concern over fabricated hearsay statements does not present a hearsay problem, and therefore it should not result in exclusion of present sense impressions or excited utterances made by unidentified declarants. The concern over phantom declarants is that the *in-court witness* may be lying, i.e., testifying about hearsay statements that were never really made. This raises a question concerning the credibility of the in-court witness. Credibility of trial witnesses can be assessed by the traditional methods of oath, cross-examination and the jury's opportunity to view the demeanor of the witness. Consequently, a statement proffered under Rules 803(1) or 803(2) should not be excluded simply because of the possibility that an unidentified declarant has been fabricated. The hearsay rule does not prohibit all lying; it simply provides that if a person is going to lie, it must be done on the witness stand so that he or she can be tested by the in-court guarantees of trustworthiness.

A more legitimate concern with respect to unidentified declarants is that it may be difficult to determine whether the declarant had personal knowledge of the event described. See, e.g., *Meder v. Everest & Jennings*, 637 F.2d 1182 (8th Cir. 1981) (a portion of a police officer's report concerning the cause of an accident was not admissible under Rule 803(1), where the officer was unable to identify the source of the information, making it impossible to determine whether the declarant was an eyewitness to what occurred at the scene). If the declarant does not have personal knowledge of the event, then the statement describing the event is inadmissible under Rules 803(1) and 803(2). See, e.g., *Bemis v. Edwards*, 45 F.3d 1369 (9th Cir. 1995) (911 tape was not admissible either as an excited utterance or as a present sense

impression, because the citizen-caller apparently lacked personal knowledge of the events that he was reporting; the Court noted that the proponent of a hearsay declaration has "the burden of establishing personal perception by a preponderance of the evidence"). This is because Rule 803(1) requires that the statement must be made "while the declarant was perceiving the event or condition, or immediately thereafter," and Rule 803(2) requires that the declarant must be "under the influence" of the startling event. These requirements cannot be met in the absence of the declarant's personal knowledge of the event. More fundamentally, hearsay declarants in general must have personal knowledge of the facts related in their statements (with the exception of admissions).

Identification of the declarant will often be helpful in establishing that he or she had personal knowledge of the event described. But this does not mean that identification of the declarant is a precondition to admissibility. The statement itself, or circumstantial evidence, may create an inference that the declarant perceived the event. Illustrative is *United States v. Medico*, 557 F.2d 309 (2d Cir. 1977), where a bystander relayed the license plate number of a getaway car to a security guard who was locked inside a bank that had just been robbed. The bystander was never identified, but his personal knowledge was established by the fact that the guard saw him look in the direction of the getaway car as he relayed the license number. The Court held that the bystander's statement was admissible as a present sense impression.

In sum, if the declarant's personal knowledge can be established, the declarant need not be an identifiable person for purposes of Rules 803(1) and 803(2).

C. STATEMENT OF EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION

[1] Federal Rule of Evidence 803(3)

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will.

[2] Illustration

In a custody battle, the mother wishes to show that her toddler becomes sick after every visit with the father. The mother is on the stand.

Plaintiff: Now Ma'am, does the child say anything to you after each and every visit with the father?
 Mother: Yes, she does.
 Plaintiff: What does she say?
 Defendant: Objection! Hearsay.
 The court: Let me hear what she said so I can rule.
 Mother: "I feel sick at my stomach and the bruises hurt."
 The court: That's pretty powerful hearsay, counselor. How can it be admissible?
 Plaintiff: _____.

[3] Statements Offered to Prove Conduct

**MUTUAL LIFE INSURANCE CO. OF NEW YORK v.
 HILLMON
 145 U.S. 285 (1892)**

On July 13, 1880, Sallie E. Hillmon, a citizen of Kansas, brought an action against the Mutual Life Insurance Company, a corporation of New York, on a policy of insurance, dated December 10, 1878, on the life of her husband, John W. Hillmon, in the sum of \$10,000, payable to her within sixty days after notice and proof of his death. On the same day the plaintiff brought two other actions, the one against the New York Life Insurance Company, a corporation of New York, on two similar policies of life insurance, dated respectively November 30, 1878, and December 10, 1878, for the sum of \$5,000 each; and the other against the Connecticut Mutual Life Insurance Company, a corporation of Connecticut, on a similar policy, dated March 4, 1879, for the sum of \$5,000.

In each case the declaration alleged that Hillmon died on March 17, 1879, during the continuance of the policy, but that the defendant, though duly notified of the fact, had refused to pay the amount of the policy, or any part thereof; and the answer denied the death of Hillmon, and alleged that he, together with John H. Brown and divers other persons, on or before November 30, 1878, conspiring to defraud the defendant, procured the issue of all the policies, and afterwards, in March and April, 1879, falsely pretended and represented that Hillmon was dead, and that a dead body which they had procured was his, whereas in reality he was alive and in hiding.

* * *

At the trial plaintiff introduced evidence tending to show that on or about March 5, 1879, ~~Hillmon and Brown left Wichita, in the state of Kansas, and traveled together through southern Kansas in search of a site for a cattle ranch, that on the night of March 18th, while they were in camp at a place~~

called Crooked Creek, Hillmon was killed by the accidental discharge of a gun; that Brown at once notified persons living in the neighborhood; and that the body was thereupon taken to a neighboring town, where, after an inquest, it was buried. The defendants introduced evidence tending to show that the body found in the camp at Crooked Creek on the night of March 18th was not the body of Hillmon, but was the body of one Frederick Adolph Walters. Upon the question whose body this was there was much conflicting evidence, including photographs and descriptions of the corpse, and of the marks and scars upon it, and testimony to its likeness to Hillmon and to Walters.

The defendants introduced testimony that Walters left his home at Ft. Madison, in the state of Iowa, in March, 1878, and was afterwards in Kansas in 1878, and in January and February, 1879; that during that time his family frequently received letters from him, the last of which was written from Wichita; and that he had not been heard from since March, 1879. The defendants also offered the following evidence:

Elizabeth Rieffenach testified that she was a sister of Frederick Adolph Walters, and lived at Ft. Madison; and thereupon, as shown by the bill of exceptions, the following proceedings took place:

Witness further testified that she had received a letter written from Wichita, Kansas, about the 4th or 5th day of March, 1879, by her brother Frederick Adolph; that the letter was dated at Wichita, and was in the handwriting of her brother; that she had searched for the letter, but could not find the same, it being lost; that she remembered and could state the contents of the letter.

Thereupon the defendants' counsel asked the question: "State the contents of that letter." To which the plaintiff objected, on the ground that the same is incompetent, irrelevant, and hearsay. The objection was sustained, and the defendants duly excepted. The following is the letter as stated by witness:

Wichita, Kansas,

March 4th or 5th or 3d or 4th, — I don't know, — 1879.

Dear sister and all: I now in my usual style drop you a few lines to let you know that I expect to leave Wichita on or about March the 5th, with a certain Mr. Hillmon, a sheep trader, for Colorado or parts unknown to me. I expect to see the country now. News are of no interest to you, as you are not acquainted here. I will close with compliments to all inquiring friends. Love to all.

I am truly your brother,

FRED. ADOLPH WALTERS.

Alvina D. Kasten testified that she was 21 years of age, and resided in Ft. Madison; that she was engaged to be married to Frederick Adolph Walters; that she last saw him on March 24, 1878, at Ft. Madison; that he left there at that time, and had not returned; that she corresponded regularly with him, and received a letter about every two weeks until March 3, 1879, which was the last time she received a letter from him; that this letter was dated at

Wichita, March 1, 1879, and was addressed to her at Ft. Madison, and the envelope was postmarked "Wichita, Kansas, March 2, 1879;" and that she had never heard from or seen him since that time.

The defendants put in evidence the envelope with the postmark and address, and thereupon offered to read the letter in evidence. The plaintiff objected to the reading of the letter. The court sustained the objection, and the defendants excepted.

This letter was dated "Wichita, March 1, 1879," was signed by Walters, and began as follows:

Dearest Alvina: Your kind and ever welcome letter was received yesterday afternoon about an hour before I left Emporia. I will stay here until the fore part of next week, and then will leave here to see a part of the country that I never expected to see when I left home, as I am going with a man by the name of Hillmon, who intends, to start a sheep ranch, and, as he promised me more wages than I could make at anything else, I concluded to take it, for a while at least, until I strike something better. There is so many folks in this country that have got the Leadville fever, and if I could not of got the situation that I have now I would have went there myself; but as it is at present I get to see the best portion of Kansas, Indian Territory, Colorado, and Mexico. The route that we intend to take would cost a man to travel from \$150 to \$200, but it will not cost me a cent; besides, I get good wages. I will drop you a letter occasionally until I get settled down. Then I want you to answer it.

* * *

The jury, being instructed by the court to return a separate verdict in each case, returned verdicts for the plaintiff against the three defendants respectively for the amounts of their policies and interest, upon which separate judgments were rendered.

* * *

MR. JUSTICE GRAY, after stating the case as above, delivered the opinion of the court.

* * *

There is, however, one question of evidence so important, so fully argued at the bar, and so likely to arise upon another trial, that it is proper to express an opinion upon it.

This question is of the admissibility of the letters written by Walters on the first days of March, 1879, ~~which were offered in evidence~~ by the defendants, and excluded by the court. * * *

The position taken at the bar that the letters were * * * memoranda made in the ordinary course of business, cannot be maintained, for they were clearly not such.

But upon another ground suggested they should have been admitted. A man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture, or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen. When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention. But whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party.

The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact as his own testimony that he then had that intention would be. After his death there can hardly be any other way of proving it; and while he is still alive his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation.

The letters in question were competent not as narratives of facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon than if there had been no proof of such intention. In view of the mass of conflicting testimony introduced upon the question whether it was the body of Walters that was found in Hillmon's camp, this evidence might properly influence the jury in determining that question.

* * *

Upon an indictment of one Hunter for the murder of one Armstrong at Camden, the court of errors and appeals of New Jersey unanimously held that Armstrong's oral declarations to his son at Philadelphia, on the afternoon before the night of the murder, as well as a letter written by him at the same time and place to his wife, each stating that he was going with Hunter to Camden on business, were rightly admitted in evidence. CHIEF JUSTICE BEASLEY said: "In the ordinary course of things, it was the usual information that a man about leaving home would communicate, for the convenience of his family, the information of his friends, or the regulation of his business. At the time it was given, such declarations could, in the nature of things, mean harm to no one; he who uttered them was bent on no expedition of mischief or wrong, and the attitude of affairs at the time entirely explodes the idea that such utterances were intended to serve any purpose but that for which they were obviously designed. If it be said that such notice of an intention of leaving home could have been given without introducing in it the name of Mr. Hunter, the obvious answer to the suggestion, I think, is that a reference to the companion who is to accompany the person leaving is as natural a part of the transaction as is any other incident or quality of it. If it is legitimate

to show by a man's own declarations that he left his home to be gone a week, or for a certain destination, which seems incontestable, why may it not be proved in the same way that a designated person was to bear him company?"

* * *

Upon principle and authority, therefore, we are of [the] opinion that the two letters were competent evidence of the intention of Walters at the time of writing them, which was a material fact bearing upon the question in controversy; and that for the exclusion of these letters, as well as for the undue restriction of the defendants' challenges, the verdicts must be set aside, and a new trial had.

* * *

Judgment reversed, and case remanded to the circuit court, with directions to set aside the verdict and to order a new trial.

NOTES

1. What is the justification for the state of mind exception?

Rule 803(3) provides an exception for statements of present state of mind, emotion, or physical condition. The theory of trustworthiness supporting the admissibility of these statements is that they are based on unique perception; that is, the declarant has a unique perspective into his own feelings and emotions. There is also an argument that state of mind statements are spontaneous, because in order to be admissible under the exception they must be reflective of a "then existing state of mind." However, as applied to statements of a declarant's state of mind, the spontaneity requirement does not really guarantee sincerity. It is impossible to tell how spontaneous a state of mind statement really is, because it describes an internal event; a declarant's "then existing" state of mind could well be the product of days of contemplation and fabrication. *See, e.g., United States v. Lawal*, 736 F.2d 5 (2d Cir. 1984) (the defendant's statement of anger at being "set up," made at the time drugs were found in his suitcase in a Customs search, was admissible under Rule 803(3) as a statement of a then existing state of mind even though there was a likelihood of fabrication; the defendant had time during a long airplane trip to think up a story should he be caught). This is unlike, for instance, the present sense impression, where it can be determined through reference to an external event that the declarant did or did not have time to fabricate.

2. Can a statement of the declarant's state of mind be admitted to prove the subsequent conduct of a person other than the declarant?

See Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (9th ed. 2006):

The legislative history of Rule 803(3) fails to resolve whether, as in the famous *Hillmon* dictum, a declarant's statement of state of mind

can be used to prove the subsequent conduct of someone other than the declarant. For example, if the declarant says, "I am going to meet Joe to buy some drugs from him," can the statement be used to prove the subsequent conduct of both the declarant *and* Joe?

The answer should be "no." The rationale for extending the state of mind exception to prove the subsequent conduct of a nondeclarant is dubious. Recall that the basis for admitting state of mind statements is that the declarant has a unique perspective into his own state of mind. This rationale obviously does not apply to the declarant's conclusion about the state of mind of someone else. A declarant might have unique perception of his own state of mind, but he has no special perspective into the thoughts and feelings of another person.

It is true that the Court in *Hillmon* stated that the letters were competent evidence to prove that Walters went to Colorado with Hillmon. However, the actual precedential import of that extension of the state of mind exception is subject to doubt. All of the cases relied upon by the *Hillmon* Court, except one, were cases in which the state of mind exception was used to prove only the conduct of the declarant (e.g., to prove that the declarant took a certain train at a certain time). Almost all of the analysis in the *Hillmon* opinion considers the use of the state of mind exception to prove the declarant's conduct. Discussion of using this exception to prove the conduct of someone other than the declarant is clearly an afterthought. Finally, the entire evidentiary discussion in *Hillmon* is, at least technically, dictum, because the Court reversed judgments for the plaintiff not on the ground that evidence was improperly excluded, but rather on the ground that the insurer-defendants were entitled to separate verdicts.

The Court in *Hillmon* cited the old New Jersey case of *Hunter v. State*, 40 N.J.L. 495 (1878), where that Court allowed the state of mind exception to prove that a meeting between two people took place. But the reasoning in that case was peculiar, to say the least. The *Hunter* court stated that "a reference to the companion who is to accompany the person leaving is as natural a part of the transaction as is any other incident or quality of it. If it is legitimate to show by a man's own declarations that he left his home to be gone a week, or for a certain destination, which seems incontestable, why may it not be proved in the same way that a designated person was to bear him company?" This "analysis" amounts to an assertion that if one part of a statement is reliable, all parts of a statement must be admitted, no matter how unreliable those parts may be. Such a proposition has been rejected time and again by the United States Supreme Court, and would amount to an exception to the hearsay rule for "partly reliable narratives." See *Williamson v. United States*, 512 U.S. 594 (1994) (rejecting the notion that an entire narrative can be admissible simply because part of the narrative is reliable, and noting that "one of the most effective ways to lie is to mix falsehood with truth").

Finally, even if *Hillmon* were a holding that state of mind statements can be used to prove the conduct of a nondeclarant, this is a

holding based on the common law. It is not a controlling discussion of the Federal Rules of Evidence, enacted almost 100 years later.

The report of the House Judiciary Committee stated that the Committee intended that Rule 803(3) be construed to limit the *Hillmon* doctrine "so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person." The Senate Report made no mention of this limitation.

The Federal Courts have interpreted this ambiguous legislative history in differing ways. Some Courts have adopted the House limitation and refused to admit a statement that the declarant intended to meet with a third party as proof that the declarant and the third party did indeed meet. *See, e.g., Gual Morales v. Hernandez Vega*, 579 F.2d 677 (1st Cir. 1978) (excluding a witness' statement that "I intend to see [the defendant]" when offered to prove that the witness met with the defendant).

One Court has permitted the declarant's statement to be used to show another's conduct, at least where the trial court gives a limiting instruction that the statement cannot be used to prove the intent or conduct of another but can only be used for the inference that the declarant carried out his intended action (though that instruction seems to work at cross-purposes with the holding that the state of mind statement can be used to prove the conduct of a nondeclarant). *See, e.g., United States v. Astorga-Torres*, 682 F.2d 1331 (9th Cir. 1982).

The Second Circuit has taken a compromise approach, allowing a declarant's statement of intent to be admitted to prove the conduct of a nondeclarant only "when there is independent evidence which connects the declarant's statement with the non-declarant's activities." *See, e.g., United States v. Delvecchio*, 816 F.2d 859 (2d Cir. 1987) (an informant's statement that he was going to meet Delvecchio to complete a drug transaction was inadmissible where there was no independent evidence of Delvecchio's presence at the meeting). Compare *United States v. Sperling*, 726 F.2d 69 (2d Cir. 1984) (an informant's statement that he planned to meet Sperling to complete a drug transaction was admissible where the declarant's statement of intent to meet with the defendant was confirmed by later eyewitness testimony that the meeting actually took place).

It will often occur that the declarant's statement will refer to another person, directly or indirectly, but the statement is not in fact offered to show that the nondeclarant had a certain state of mind or acted in accordance with a particular mental state. For instance, a statement of the victim that he planned to go to the defendant's house to deliver a package contains a *reference* to a third party, but it does not refer directly or indirectly to that third party's *state of mind or action*. In such cases, the statement is admissible under any view of Rule 803(3) to prove that the declarant went to the defendant's house,

because the statement is offered only to show that the declarant acted in accordance with his or her own mental state. As a result, there is no reliability problem of determining the state of mind of a nondeclarant, as to which the declarant has no unique perception. *See, e.g., United States v. Donley*, 878 F.2d 735 (3d Cir. 1989) (in a first-degree murder prosecution a government witness testified that the victim said, in the presence of her husband the defendant, that she was moving out of the marital home and separating from him; shortly thereafter, the victim was found dead; the testimony was properly admitted to show the existence of her intention and plan and the defendant's awareness of it, from which could be inferred a motive for the killing; the statement did not purport to express an opinion about the defendant's state of mind).

3. What is the relationship between the *Hillmon* doctrine and Rule 403?

Evidence of a declarant's state of mind is admissible only when it creates some inference with respect to a disputed issue, and then only if the probative value of the statement in proving the declarant's state of mind is not substantially outweighed by unfair prejudice suffered by the non-offering party. The most likely form of prejudice from a statement reflecting a state of mind is that created when the statement offered is one which can be used for the truth of an event other than the declarant's state of mind. For example, in a murder case, a victim's statement that she fears the defendant may properly be offered to show that the victim would not have acted the way the defendant contends (e.g., the defendant alleges that he and the victim were playing with guns and one accidentally misfired). However, such a statement is also subject to misuse — e.g., for the impermissible purpose of showing that the victim's fear of the defendant was justified. This is not a problem in terms of Rule 803(3), under which the statement is being offered and admitted only to prove the declarant's state of mind. Rather, exclusion, if it is to occur, must be under Rule 403: the statement would be excluded when the probative value of the evidence as to the declarant's state of mind is substantially outweighed by the impermissible uses to which the evidence could be put. Thus, if the defendant claims that he and the victim were cleaning guns together when a gun accidentally went off and killed the victim, the victim's prior statement of fear would be admissible. The statement creates a strong inference that the victim would not have put himself in the position of cleaning guns with the defendant in a friendly manner if he was in fear of the defendant. *United States v. Green*, 680 F.2d 520 (7th Cir. 1982) (prosecution for kidnaping with intent to commit murder; statements by the victim concerning her attitude toward the defendant were properly admitted because they tended to negate the defendant's contention that she accompanied the defendant voluntarily). On the other hand, if the defendant claims that he was out of town when the murder occurred, then the victim's statement of fear of the defendant should be excluded under Rule 403, because there is no dispute about the declarant's conduct as to which his state of mind of fear would be relevant.

The D.C. Circuit has set forth the analysis that must be undertaken when a victim's expression of fear of the defendant is offered under *Hillmon*:

The threshold requirement of admissibility of such hearsay statements of fear of defendant in homicide cases is some substantial degree of relevance to a material issue in the case. While there are undoubtedly a number of possible situations in which such statements may be relevant, the courts have developed three rather well-defined categories in which the need for such statements overcomes almost any possible prejudice. The most common of these involves the defendant's claim of self-defense as justification for the killing. When such a defense is asserted, a defendant's assertion that the deceased first attacked him may be rebutted by the extrajudicial declarations of the victim that he feared the defendant, thus rendering it unlikely that the deceased was in fact the aggressor in the first instance. Second, where defendant seeks to defend on the ground that the deceased committed suicide, evidence that the victim had made statements inconsistent with a suicidal bent are highly relevant. A third situation involves a claim of accidental death, where, for example, defendant's version of the facts is that the victim picked up defendant's gun and was accidentally killed while toying with it. In such cases, the deceased's statements of fear as to guns or of defendant himself (showing he would never go near defendant under any circumstances) are relevant in that they tend to rebut his defense. Of course, even in these cases, where the evidence is of a highly prejudicial nature, it has been held that it must be excluded in spite of a significant degree of relevance.

United States v. Brown, 490 F.2d 758 (D.C. Cir. 1973).

[4] Past Acts

SHEPARD v. UNITED STATES 290 U.S. 96 (1933)

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The petitioner, Charles A. Shepard, a major in the medical corps of the United States Army, has been convicted of the murder of his wife, Zenana Shepard, at Fort Riley, Kan., a United States military reservation. The jury having qualified their verdict by adding thereto the words "without capital punishment" (18 U.S.C. § 567), the defendant was sentenced to imprisonment for life. * * *

The crime is charged to have been committed by poisoning the victim with bichloride of mercury. The defendant was in love with another woman, and wished to make her his wife. There is circumstantial evidence to sustain a finding by the jury that to win himself his freedom he turned to poison and murder. Even so, guilt was contested, and conflicting inferences are possible. The defendant asks us to hold that by the acceptance of incompetent evidence the scales were weighted to his prejudice and in the end to his undoing.

The evidence complained of was offered by the government in rebuttal when the trial was nearly over. On May 22, 1929, there was a conversation in the

absence of the defendant between Mrs. Shepard, then ill in bed, and Clara Brown, her nurse. The patient asked the nurse to go to the closet in the defendant's room and bring a bottle of whisky that would be found upon a shelf. When the bottle was produced, she said that this was the liquor she had taken just before collapsing. She asked whether enough was left to make a test for the presence of poison, insisting that the smell and taste were strange. And then she added the words, "Dr. Shepard has poisoned me."

The conversation was proved twice. After the first proof of it, the government asked to strike it out, being doubtful of its competence, and this request was granted. A little later, however, the offer was renewed; the nurse having then testified to statements by Mrs. Shepard as to the prospect of recovery. "She said she was not going to get well; she was going to die." With the aid of this new evidence, the conversation already summarized was proved a second time. There was a timely challenge of the ruling.

She said, "Dr. Shepard has poisoned me." The admission of this declaration, if erroneous, was more than unsubstantial error. As to that the parties are agreed. The voice of the dead wife was heard in accusation of her husband, and the accusation was accepted as evidence of guilt. If the evidence was incompetent, the verdict may not stand.

1. Upon the hearing in this court the Government finds its main prop in the position that what was said by Mrs. Shepard was admissible as a dying declaration. This is manifestly the theory upon which it was offered and received. The prop, however, is a broken reed. To make out a dying declaration, the declarant must have spoken without hope of recovery and in the shadow of impending death. The record furnishes no proof of that indispensable condition. So, indeed, it was ruled by all the judges of the court below, though the majority held the view that the testimony was competent for quite another purpose, which will be considered later on.

* * *

2. We pass to the question whether the statements to the nurse, though incompetent as dying declarations, were admissible on other grounds.

The Circuit Court of Appeals determined that they were. Witnesses for the defendant had testified to declarations by Mrs. Shepard which suggested a mind bent upon suicide, or at any rate were thought by the defendant to carry that suggestion. More than once before her illness she had stated in the hearing of these witnesses that she had no wish to live, and had nothing to live for, and on one occasion she added that she expected some day to make an end to her life. This testimony opened the door, so it is argued, to declarations in rebuttal that she had been poisoned by her husband. They were admissible, in that view, not as evidence of the truth of what was said, but as betokening a state of mind inconsistent with the presence of suicidal intent.

(a) The testimony was neither offered nor received for the strained and narrow purpose now suggested as legitimate. It was offered and received as proof of a dying declaration. What was said by Mrs. Shepard lying ill upon her death bed was to be weighed as if a like statement had been made upon the stand. The course of the trial makes this an inescapable conclusion. The

Government withdrew the testimony when it was unaccompanied by proof that the declarant expected to die. Only when proof of her expectation had been supplied was the offer renewed and the testimony received again. For the reasons already considered, the proof was inadequate to show a consciousness of impending death and the abandonment of hope; but inadequate though it was, there can be no doubt of the purpose that it was understood to serve. There is no disguise of that purpose by counsel for the Government. They concede in all candor that Mrs. Shepard's accusation of her husband, when it was finally let in, was received upon the footing of a dying declaration, and not merely as indicative of the persistence of a will to live. Beyond question the jury considered it for the broader purpose, as the court intended that they should. A different situation would be here if we could fairly say in the light of the whole record that the purpose had been left at large, without identifying token. There would then be room for argument that demand should have been made for an explanatory ruling. Here the course of the trial put the defendant off his guard. The testimony was received by the trial judge and offered by the Government with the plain understanding that it was to be used for an illegitimate purpose, gravely prejudicial. A trial becomes unfair if testimony thus accepted may be used in an appellate court as though admitted for a different purpose, unavowed and unsuspected. * * * Such at all events is the result when the purpose in reserve is so obscure and artificial that it would be unlikely to occur to the minds of uninstructed jurors, and even if it did, would be swallowed up and lost in the one that was disclosed.

(b) Aside, however, from this objection, the accusatory declaration must have been rejected as evidence of a state of mind, though the purpose thus to limit it had been brought to light upon the trial. The defendant had tried to show by Mrs. Shepard's declarations to her friends that she had exhibited a weariness of life and a readiness to end it, the testimony giving plausibility to the hypothesis of suicide. By the proof of these declarations evincing an unhappy state of mind, the defendant opened the door to the offer by the government of declarations evincing a different state of mind, declarations consistent with the persistence of a will to live. The defendant would have no grievance if the testimony in rebuttal had been narrowed to that point. What the Government put in evidence, however, was something very different. It did not use the declarations by Mrs. Shepard to prove her present thoughts and feelings, or even her thoughts and feelings in times past. It used the declarations as proof of an act committed by some one else, as evidence that she was dying of poison given by her husband. This fact, if fact it was, the Government was free to prove, but not by hearsay declarations. It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.* * *

These precepts of caution are a guide to judgment here. There are times when a state of mind, if relevant, may be proved by contemporaneous declarations of feeling or intent. *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 295. Thus, in proceedings for the probate of a will, where the issue is undue influence, the declarations of a testator are competent to prove his feelings for his relatives, but are incompetent as evidence of his conduct or of theirs. In suits for the alienation of affections, letters passing between the spouses are admissible in aid of a like purpose. In damage suits for personal injuries, declarations by the patient to bystanders or physicians are evidence of sufferings or symptoms, but are not received to prove the acts, the external circumstances, through which the injuries came about. Even statements of past sufferings or symptoms are generally excluded, though an exception is at times allowed when they are made to a physician. So also in suits upon insurance policies, declarations by an insured that he intends to go upon a journey with another may be evidence of a state of mind lending probability to the conclusion that the purpose was fulfilled. *Mutual Life Ins. Co. v. Hillmon*, *supra*. The ruling in that case marks the high-water line beyond which courts have been unwilling to go. It has developed a substantial body of criticism and commentary. Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.

The testimony now questioned faced backward and not forward. This at least it did in its most obvious implications. What is even more important, it spoke to a past act, and, more than that, to an act by some one not the speaker. Other tendency, if it had any, was a filament too fine to be disentangled by a jury.

The judgment should be reversed and the cause remanded to the District Court for further proceedings in accordance with this opinion.

Reversed.

NOTE

What is the relationship between *Hillmon*, which permits state of mind statements offered to prove the subsequent conduct of the declarant, and *Shepard*, which prohibits state of mind statements offered to prove the prior conduct of anyone?

See Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (9th ed. 2006):

Rule 803(3) does not permit a statement of memory or belief to prove the fact remembered or believed. The "statement of memory or belief" exclusion is a codification of the holding in *Shepard v. United States*, 290 U.S. 96 (1933), where the Court held that a statement of the defendant's wife, accusing him of poisoning her, could not be admitted under the state of mind exception when offered to prove that the

defendant had actually poisoned her. The *Shepard* exclusion is considered necessary "to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind." Advisory Committee Note to Fed. R. Evid. 803(3). *See also United States v. Cardascia*, 951 F.2d 474 (2d Cir. 1991) (Rule 803(3) could not be applied to admit statements of the declarant's state of mind with regard to conduct that occurred eight months earlier; a contrary rule would significantly erode the hearsay rule, beyond the intended breadth of the hearsay exception).

Under the Rule, a statement of memory can be offered to prove a fact relating to the execution, revocation, identification, or term of the declarant's will. There are no particular assurances of trustworthiness that justify creating an exception for will cases. But as the Advisory Committee Note states, this provision represents an *ad hoc* judgment that finds ample support in the decisions, and rests on practical grounds of necessity and expediency. Not surprisingly, the "will exception" receives minimal application in the Federal Courts.

While a state of mind statement cannot be offered to prove that a past event occurred, it can be offered in some cases to prove the occurrence of an event *subsequent* to the statement. *See, e.g., United States v. Tokars*, 95 F.3d 1520 (11th Cir. 1996) (statements of one defendant's wife that she intended to divorce the defendant were admissible to show a motive for the defendant to murder her). The Advisory Committee states that Rule 803(3) preserves the rule of *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285 (1892), allowing a hearsay statement by a declarant to prove the declarant's state of mind, when probative that the declarant subsequently acted in accordance with that state of mind. In *Hillman*, evidence a declarant's hearsay statement about his intent to go to a certain place was held admissible to prove that the declarant actually went there.

An example may help to illustrate what is included within the exception and what is not. If a declarant (*D*) states, "I am going to New York tomorrow," and subsequently disappears, the statement may be introduced as probative that *D* went to New York; intent to do an act in the future is probative that the act occurred. If, on the other hand, *D* states "Two years ago I went to New York," the statement may be said to reflect the state of mind called "memory," but the statement is not admissible under the state of mind exception, because that exception precludes a statement of memory when offered to prove that the fact remembered is actually true. If *D* says, "I am going to New York tomorrow because Joe stole my money and I have to get it back from him," the statement cannot be used to prove that Joe stole money from *D*, because that would be using the state of mind statement to prove the truth of a past fact, which is prohibited by *Shepard*. But it could be used to prove that *D* went to New York, because that is permitted by *Hillmon*.

Where the state of mind statement is offered to prove future conduct of the declarant, the hearsay rule poses no bar, but the declarant's statement must be scrutinized under Rule 403 (and of course a specific objection must be made under that Rule to preserve a claim of error on appeal). Exclusion under Rule 403 could occur if the inference from state of mind to subsequent action by the declarant is weak (see, e.g., *United States v. Williams*, 704 F.2d 315 (6th Cir. 1983) (statement of the defendant that he intended to satisfy a tax indebtedness when his mother sold her house, offered to explain his possession of a large amount of cash upon arrest, was admissible under Rule 803(3) as a statement of intent to prove subsequent conduct; however, the statement was properly excluded on relevance grounds because the intent to perform the future act was conditioned on the sale of the house, and this condition had not been met); or if there is no dispute about the declarant's subsequent conduct; or if prejudice, confusion, or delay is created that substantially outweighs the statement's probative value as to the declarant's future course of action. See generally the discussion in *United States v. Brown*, 490 F.2d 758 (D.C. Cir. 1973) (principal danger is that the jury will consider the declarant's statement for the truth of an out-of-court event, such as a prior threat by the defendant; such inferences are improper, and must be weighed against the probative value of the declarant's statement as tending to prove the declarant's subsequent course of action).

The most obvious risk of prejudice is that the jury will consider the hearsay statement not as proof of state of mind and the subsequent conduct of the declarant, but rather for the truth of the facts that are related in the statement. For instance, in *State v. Charo*, 156 Ariz. 561, 754 P.2d 288 (1988), a state case decided under a rule identical to Federal Rule 803(3), the defendant was accused of murder. The defendant denied the murder and presented evidence of an alibi. The prosecution offered the victim's out-of-court statement to the effect that she feared the defendant as the result of the defendant's prior sexual attack upon her. The Arizona Supreme Court held that if the statement was offered under Rule 803(3) to prove that the prior sexual attack occurred, it was clearly inadmissible under the "memory or belief" limitation of the Rule. To the extent the statement was offered to show the declarant's fearful state of mind, the Court held that the statement was inadmissible under Rule 403. The victim's state of mind was not at issue in the case; nor was the statement probative for any inference that could be drawn about the victim's subsequent course of conduct. There was no dispute about the victim's conduct in the case. The Court stated: "While there may be times when fear of the defendant is both admissible hearsay and relevant, the victim's statement in the present case is irrelevant unless the defendant asserts a defense which makes her feeling relevant."

In contrast to the facts of *Charo*, it is possible that a statement by the victim putting blame on the defendant might be admissible to prove the declarant's subsequent conduct if that conduct is in dispute and if the statement is relevant to prove that conduct. For example,

assume a murder case in which the defendant claims that he killed the victim by accident. The defense is that the defendant and the victim were rabbit hunting together; the victim was walking ahead of the defendant to scare up rabbits; and the defendant tripped on a log and his gun accidentally discharged, killing the victim. The prosecution proffers a hearsay statement from the victim, made three days before his death, in which the victim told his mother that he was afraid the defendant was going to kill him because the victim still owed the defendant a large sum of money from a drug deal. This statement should be admitted under Rules 803(3) and 403, with an instruction that the jury is not to use the statement for the fact that the victim owed the defendant money from a drug deal or that the victim had reason to fear the defendant. Rather, it is admissible to show that the victim feared the defendant, whether that fear was reasonable or not. This fearful state of mind is probative of the victim's subsequent conduct; it makes it much less likely that the victim would be walking voluntarily ahead of a person he feared while that person was carrying a loaded gun. The hearsay statement is prejudicial because the jury may use it for the truth of the facts related even though instructed not to do so. But, a trial court would certainly be within its discretion in finding that the prejudicial effect does not substantially outweigh the probative value of the statement in proving the victim's disputed actions. See, e.g., *United States v. Hartmann*, 958 F.2d 774 (7th Cir. 1992) (a homicide victim's wife and others were charged with defrauding life insurance companies by, *inter alia*, fraudulently listing the wife as the husband's beneficiary on life insurance policies, and subsequently killing the husband; the husband's statements describing the dismal state of his marriage, his desire to replace his wife as beneficiary on his insurance policies, and his fear of being murdered by his wife and her lover were admissible as evidence of his state of mind and were relevant to prove that the declarant would not have listed his wife as beneficiary); *United States v. Green*, 680 F.2d 520 (7th Cir. 1982) (in a prosecution for kidnaping with intent to commit murder, statements by the victim concerning her attitude toward the defendant were properly admitted because they tended to negate the defendant's contention that she accompanied the defendant voluntarily).

PROBLEM 13-1

(a) Billy Bob tells Tattle Tale, "I'm going to the bank tomorrow to meet with the bank manager." Billy Bob disappears. Tattle Tale takes the stand. Assuming relevance in the pending litigation, is the statement admissible under the state of mind exception:

- (1) to show Billy Bob intended to go to the bank?

(2) to show Billy Bob went to the bank?

(3) to show the office manager was at the bank the next day?

(b) Billy Bob tells Tattle Tale, "I was at the bank yesterday and talked to the office manager." Billy Bob disappears. Tattle Tale takes the stand. Assuming relevance in the pending litigation, is the statement admissible under the state of mind exception:

(1) to show Billy Bob made an appointment with the office manager before seeing him?

(2) to show Billy Bob was at the bank?

(3) to show that the office manager was at the bank?

(c) Billy Bob tells Tattle Tale, "You remember when I wrote my will, the witnesses weren't really there when I signed it." Billy Bob dies. Tattle Tale takes the stand in a probate contest. Is the statement admissible under Rule 803(3) to show the witnesses weren't there when the will was signed?

D. STATEMENT FOR TREATMENT OR DIAGNOSIS

[1] Federal Rule of Evidence 803(4)

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

* * *

[2] Illustration

Dead Guy passed away four weeks after surgery for an ulcer. His estate sues the treating physician and the hospital, alleging malpractice. One of the issues at trial is whether the decedent suffered any excruciating abdominal pain after surgery. To prevail, the estate must show that he did. The only evidence on this issue comes from the decedent's widow. She takes the stand.

Plaintiff:	State your name.
Widow:	Mrs. Dead Guy.
Plaintiff:	Did you have a conversation with your husband just before he passed away?
Widow:	Yes, he looked like he was feeling really awful, so I suggested he get a second opinion.

Plaintiff: What did you do?
Widow: I called a doctor I've known for years, but my husband couldn't even come to the phone, so I acted as a go between for the phone call.
Plaintiff: What did your husband tell you to tell the doctor?
Defendant: Objection! That's hearsay.
The court: Let me hear it so I can rule.
Widow: He told me to tell the doctor that he had been suffering excruciating pain in his abdomen for the last four weeks and that there must have been something wrong with the surgery.
Defendant: Your Honor, this statement is clearly being offered to prove the truth of the matter asserted and there is no exception that could apply. The statement wasn't made to a doctor; the statement deals with past history, not a current condition. Further, it wasn't conveyed to a treating physician and it deals with causation.
Plaintiff: _____
The court: _____

[3] Causation

ROCK v. HUFFCO GAS & OIL CO.
922 F.2d 272 (5th Cir. 1991)

THORNBERRY, CIRCUIT JUDGE:

An employee for an offshore catering business brought ~~this negligence suit~~ for injuries allegedly suffered during his employment. The employee has died since the instigation of this litigation, and his family members have been substituted as plaintiffs for the purposes of continuing the action. Two of the defendants, Huffco Petroleum Corporation and Dual Drilling Company, filed a motion for summary judgment, which the district court granted. ~~The court~~ ruled that the evidence tendered by the plaintiffs constituted hearsay, which was not admissible under any of the exceptions to the hearsay rule. The plaintiffs appeal the district court's determination that none of the proffered evidence is admissible and its decision to grant the summary judgment.

Finding no error, we AFFIRM.

I. Facts and Procedural History

This litigation stems from two accidents allegedly suffered by Richard D. Rock while employed as a steward/cook for Offshore Food Service, Inc. of Houma, Louisiana. Offshore Food Service provides food catering services to offshore drilling platforms and vessels in the Gulf of Mexico.

On July 13, 1987, Rock was assigned to work on the Huffco Fixed Platform 206A, which was located in the High Island Region off the coast of Galveston,

Texas. On the morning following his arrival, as he was leaving his sleeping quarters, Rock claimed that his foot fell through a rusted part of a step located just outside of his doorway causing him to sprain his ankle. There were no witnesses to the accident, which occurred between 5:00 and 6:00 a.m. as Rock was making his way to the galley to prepare breakfast. Rock reported the incident to the chief supervisor on the platform at the time, Joe Lee Satsky. Satsky asked Rock if he wanted a doctor to examine the ankle, but Rock responded that he did not think the sprain was that bad and that he wanted to stay and work. Satsky did not prepare an accident report form.

The ankle continued to bother Rock over the next two days, and when shifts changed and a new chief supervisor came on board the platform, Rock again reported the incident. At this time, the new supervisor, Donald Earl Christian, decided to complete an accident report form. The form was completed in both Rock's handwriting and Christian's handwriting. Among the statements written by Christian was a description of the accident. Christian wrote that Rock's "foot slipped to bad part of porch." Christian also investigated the site of the accident and confirmed the rusted condition of the step and the existence of a hole and noted that he had not seen the hole during previous inspections.

Christian then decided that Rock should consult a physician about the sprain and arranged to have Rock transported by helicopter to St. Mary's hospital in Galveston, Texas. Doctors reported that Rock had a tender and swollen right ankle and described the injury as a moderate sprain. The ankle was placed in a six inch plaster splint, and Rock was instructed not to put any weight on the ankle, to walk with crutches, and to elevate the ankle when possible.

On July 21, 1987, after a few days of rest, Rock returned to work. Rock worked on three different assignments before arriving on a jack-up rig owned by the Dual Drilling Company (Dual Rig No. 41) on August 26, 1987. Within hours of arriving on the drilling rig, Rock claimed to have re-injured his ankle by slipping in some grease on the floor of the rig's galley. The only potential witness to the accident was Barry Breaux, another Offshore Food's employee assigned to work with Rock. During his deposition, Breaux reported that he was in the galley at the time of the accident but did not see Rock fall. In fact, Breaux claims that Rock had previously advised him of a plan to fake such an accident. For his cooperation in remaining silent, Rock promised Breaux that he would report back to Offshore Food that Breaux was a "good worker."

Another Offshore Food's employee, Carl Trahan, was friendly with Rock and corroborated Breaux's story. Trahan was not on board the Dual 41 when the accident happened, but Trahan claims that Rock later told him that he had a bad ankle and had staged a slip-and-fall accident: "he told me that he was going to keep on walking on it and make sure it stayed swollen so he could get some money out of it."

Following the alleged re-injury on the Dual 41, the foreman on board, John Gardner, filed an accident report with information provided to him by Rock. In the space provided for a description of the accident, Gardner wrote that Rock had "stepped in greasy [sic] spot on floor and slipped and twisted right ankle." Gardner also questioned Breaux about the accident, but Breaux said nothing about the accident being staged.

Rock was treated for a sprained ankle on the day following the alleged accident on the Dual 41. Rock continued working on various offshore vessels in the Gulf of Mexico after the alleged incident and eventually obtained a light-duty job in the Offshore Food's office in Houma, Louisiana. Rock finally quit working for Offshore Food altogether on April 18, 1988.

Because of his ankle's worsening condition, Rock consulted Dr. A. Delmar Walker on September 17th and 27th of 1987. As part of those examinations, Rock provided the doctor with a history of the injury to his ankle including a description of the two incidents discussed above. On October 1, 1987, Dr. Walker referred Rock to a vascular surgeon, Dr. Fritz J. Rau, who again asked Rock for a history of the injury to his ankle. These medical histories are contained in office notes and medical reports.

Apparently, as a result of the injury to his ankle, Rock was suffering from a condition known as venous insufficiency. This occurs when the veins in the lower legs fail to return blood to the torso. Several surgeries were performed on Rock in an attempt to restore normal blood flow, but his condition deteriorated. In addition to his vascular condition, Rock developed infections, possibly resulting from the surgical procedures themselves. Rock died from a heart attack on December 12, 1988.

* * * On October 5, 1989, the court entered judgment in favor of the defendants, and dismissed Rock's complaint. Specifically, the court concluded that the evidence offered by plaintiffs constituted hearsay, which did not fall within any of the recognized exceptions to the hearsay rule.

* * *

II. Discussion

A. Inadmissibility of Hearsay

* * *

1. Statements to Physicians

Appellants first suggest that written and testimonial evidence concerning the history of Rock's alleged accidents, which were given by Rock to the doctors treating his ankle, should be admissible under Federal Rule of Evidence 803(4). This rule provides that otherwise inadmissible hearsay should not be excluded if the statement was initially "made for purposes of medical diagnosis or treatment and describ[es] medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as *reasonably pertinent to diagnosis or treatment.*" Fed. R. Evid. 803(4) (emphasis added).

Admissibility of a statement made to one's physician turns on the guarantee of the * * * declarant's trustworthiness. See Fed. R. Evid. 803(4) advisory committee's note. Therefore, before admitting such hearsay statements, the court should determine whether the statements were reasonably considered by the declarant as being pertinent to the diagnosis or treatment sought.



Details of the injury not necessary for treatment but serving only to suggest fault “would not ordinarily qualify” as an exception to the hearsay rule under Rule 803(4). A case cited by plaintiffs, *Ramrattan v. Burger King Corp.*, 656 F. Supp. 522 (D. Md. 1987), illustrates the application of this rule. In *Ramrattan*, the district court held that a statement made to a physician that the defendant’s car struck his vehicle was admissible under Rule 803(4), but that “statements concerning who ran the red light or the fault of the parties are not pertinent to diagnosis or treatment.”

The plaintiffs argue that Drs. Walker and Rau considered the cause of Rock’s injury pertinent to their diagnosis, however, deposition transcripts do not bear this out. For instance, Dr. Walker explained that “what caused [Rock] to fall is important from [a legal] standpoint but certainly not from a medical treatment standpoint.” Although Dr. Rau was not as explicit, his comments suggest that the history of Rock’s injury was pertinent only to the extent that he was aware that Rock’s foot had, at some point, sustained an injury caused by a trauma to his ankle:

Q: [I]s it significant that he fell through a steel plate as opposed to a wooden porch, as opposed to a hole in the log or anything like that?

A: [Rau]: No. I’d have to say no to that.

* * *

Q: So what you were looking for is that something happened that could explain the condition that he had?

A: [Rau]: That’s correct.

Q: And the fact that he fell — he stated he fell through a steel plate really was not — those words and that description was not significant as far as your treatment and diagnosis was concerned?

A: [Rau]: That’s correct, other than it does sort of give you a general idea of what the injury was.

The doctors stated that they only needed to know that Rock had twisted his ankle; they did not need to know the additional detail that Rock may have twisted the ankle while stepping through a rusted-out or defective step or by slipping in some grease in order to diagnose or treat Rock’s injury.

The plaintiffs cite two additional cases that they claim support the admissibility of Rock’s statements to his physicians. See *United States v. Renville*, 779 F.2d 430 (8th Cir. 1985) and *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980). In both cases the Eighth Circuit applied a more liberal interpretation of the Rule 803(4) exception to the hearsay rule; however, both cases dealt with statements made by victims of child abuse to their treating physicians. In *Renville*, the court explained why statements, which ordinarily may not be admitted under Rule 803(4), may be admitted in a child abuse case: physicians must consider not only the physical harm involved but also the psychological and emotional injuries that accompany the crime of child abuse. Statements of fault may dictate the extent of the psychological injury and suggest the appropriate treatment. Rock’s statements would not qualify under this broader application of the Rule 803(4) exception.

For the foregoing reasons, the district court was correct in ruling Rock's statements to his doctors as inadmissible under Federal Rule of Evidence 803(4).

* * *

Affirmed.

NOTES

1. Must the statement be made to a physician?

Statements to family members and social workers have been held admissible under the medical diagnosis or treatment exception, so long as the statements were made for the purposes of obtaining medical treatment or diagnosis. *Davignon v. Clemmey*, 322 F.3d 1 (1st Cir. 2003).

2. Is the exception broad enough to cover statements of medical history, or statements attributing causation or fault?

Professors Saltzburg, Martin, and Capra describe the applicability of Rule 803(4) to such statements in *Federal Rules of Evidence Manual* (9th ed. 2006):

Rule 803(4) breaks with prior practice by admitting statements regarding past symptoms, medical history, and those that relate to the cause of the injury, whenever these statements are pertinent to treatment or diagnosis. Traditionally, statements of past symptoms and medical history were admissible only as part of the factual basis of expert testimony. Statements of cause (e.g., "my back hurts because I slipped on some ice") were excluded as inherently unreliable. The Advisory Committee took the position that statements of medical history and causation are likely to be reliable at least insofar as reasonably pertinent to treatment or diagnosis, given the motive for making the statements, and the reliance thereon by medical personnel. *See, e.g., United States v. Pollard*, 790 F.2d 1309 (7th Cir. 1986) (a statement of a patient describing how his arm was twisted was admissible because the cause of arm pain was reasonably pertinent to treatment, and the declarant made the statement with a motive to obtain treatment). Compare *Cook v. Hoppin*, 783 F.2d 684 (7th Cir. 1986) (a statement that a patient fell from a third-story stairway while wrestling was not admissible under Rule 803(4) to prove that the patient was wrestling; the cause of the accident was not pertinent to treatment because the doctor would treat a patient who fell from three stories the same way no matter what the cause of the fall).

On the other hand, statements attributing fault (e.g., "my back hurts because I slipped on some ice at a poorly maintained bus stop") are ordinarily excluded under the Rule, because they do not further and are not pertinent to the patient's treatment or diagnosis. The Advisory Committee provided a pertinent hypothetical: "A patient's statement

that he was struck by an automobile would qualify, but not his statement that a car was driven through a red light." Adding the reference to the red light will not affect the treatment, nor would the patient expect it to have any effect on treatment.

A major exception has developed to the principle that statements attributing fault are not within the exception: cases involving child abuse. A statement from the child-declarant to medical personnel concerning abuse is ordinarily held admissible under the Rule even when the declarant identifies the abuser. The rationale is that the "pertinence" prong of the Rule is satisfied because a statement of identification is pertinent to treatment of the child-victim; the doctor must be concerned not only with the child's current physical condition, but also with the child's future welfare and safety and psychological well-being. *See, e.g., United States v. Yazzie*, 59 F.3d 807, 812 (9th Cir. 1995):

Generally, statements of fault are not admissible under this exception. However, this Circuit has adopted a special rule for sexual abuse cases because sexual abuse involves more than physical injury; the physician must be attentive to treating the victim's emotional and psychological injuries, the exact nature and extent of which often depend on the identity of the abuser. Thus, a child victim's statements about the identity of the perpetrator are admissible under the medical treatment exception when they are made for the purposes of medical diagnosis and treatment.

See also United States v. Provost, 875 F.2d 172 (8th Cir. 1989) (a statement identifying the defendant as the perpetrator was pertinent to treatment where the defendant occasionally lived in the victim's home).

As to the "treatment motive" prong of the Rule, many courts require a showing that the child understood that she was speaking to medical personnel and needed to tell the truth in order to get properly treated. *See, e.g., United States v. Renville*, 779 F.2d 430 (8th Cir. 1985) (child's statement attributing fault is admissible under Rule 803(4) only "where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding."). *See also United States v. Sumner*, 204 F.3d 1182 (8th Cir. 2000) (child's statement to doctor accusing the defendant of sexual abuse was erroneously admitted under Rule 803(4): "Although Dr. Zitzlow explained that he was a doctor, he did not discuss with [the victim] the need for truthful revelations or emphasize that the identification of the abuser was important to Dr. Zitzlow's attempts to help her overcome any emotional trauma resulting from the abuse to which she had been subjected."). Compare *United States v. Pacheco*, 154 F.3d 1236 (10th Cir. 1998) (placing the burden on the defendant to provide evidence that the child-declarant did not understand she was being treated by doctors and needed to be truthful). Other courts are more flexible and look to the circumstances to determine whether the child was seeking

treatment or diagnosis. *See, e.g., Danaipour v. McLarey*, 386 F.3d 289 (1st Cir. 2004) (rejecting as “unnecessary inflexible” the rule that statements by children are admissible only where the physician makes clear to the child that truthfully identifying the abuser is necessary to diagnosis and treatment: “there are many ways in which a party wishing to enter into evidence as statement under Rule 803(4) can demonstrate that the statement was made for the purpose of diagnosis and treatment.”).

Courts have occasionally extended the principles established in child abuse cases to other cases involving domestic abuse, allowing statements from an adult-declarant identifying the perpetrator to be admitted under Rule 803(4). As the Court put it in *United States v. Joe*, 8 F.3d 1488, 1494 (10th Cir. 1993):

[T]he identity of the abuser is reasonably pertinent to treatment in virtually every domestic sexual assault case, even those not involving children. All victims of domestic sexual abuse suffer emotional and psychological injuries, the exact nature and extent of which depend on the identity of the abuser. The physician generally must know who the abuser was in order to render proper treatment because the physician’s treatment will necessarily differ when the abuser is a member of the victim’s family or household. * * * [T]he domestic sexual abuser’s identity is admissible under Rule 803(4) where the abuser has such an intimate relationship with the victim that the abuser’s identity becomes reasonably pertinent to the victim’s proper treatment.

Similarly, the principle from the child sex abuse cases can be applied to cases involving sexual abuse of adult-victims. Because of the possibility of sexually communicated diseases, the victim’s identification of the perpetrator is pertinent to the victim’s treatment.

3. Are statements made to medical experts for purposes of litigation admissible under the exception?

Federal Rule 803(4) marks a departure from the analogous common law exception in its treatment of statements made to nontreating physicians. Under common law, statements made to a doctor consulted solely for diagnostic purposes (such as in anticipation of litigation) were not considered sufficiently trustworthy to escape hearsay proscription. Rule 803(4), however, permits testimony of a nontreating physician as substantive evidence. The reasoning is that the doctor consulted for litigation purposes would at any rate testify to the nature of statements given to him by the patient as a basis for forming his or her opinion, as is permitted by Rule 703. While the jury would be instructed that those facts are to be used only to determine the weight accorded the opinion, the Advisory Committee believed that despite instructions to the contrary, juries tended to treat evidence admitted under Rule 703 as proof of the facts stated. This rationale carries less power after the 2000 amendment to Rule 703, which substantially circumscribes the ability of a proponent to introduce hearsay under the guise of offering it solely to illustrate

the basis of the expert's opinion. If not for Rule 803(4), there would be a good chance today that the jury would never hear statements made to a litigation doctor.

A trial court understandably might be reluctant to admit statements to medical personnel who are retained by the party solely to prepare a case. But most courts have held consistent with the Rule that even if the doctor is retained solely to testify as a witness, statements made to that doctor are admissible under Rule 803(4) because the doctor is retained for "diagnosis," and the Rule abolishes all distinctions between doctors consulted for treatment and those consulted for diagnosis. *See, e.g., United States v. Whitted*, 11 F.3d 782 (8th Cir. 1993) (statements admissible even where doctor was consulted only for the purpose of providing expert testimony in a criminal prosecution); *Morgan v. Foretich*, 845 F.2d 941 (4th Cir. 1988) (the term "diagnosis" is intended to refer to a doctor who is consulted only in order to testify as a witness). *See also* Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. Rev. 257, 260 (1989) ("The rule admits statements made to a doctor consulted only for the purpose of diagnosis, when no treatment is anticipated by the declarant. The archetypal statement involved here is one made to a physician who is consulted for the purpose of the doctor giving expert testimony at trial."). The fact that a statement was made to a doctor for purposes of litigation is a matter of weight and not admissibility.

4. Can a statement made by someone other than the patient be admitted under the exception?

A statement offered under Rule 803(4) need not refer to the declarant's own medical condition. If the declarant relays information about another person for purposes of treating or diagnosing that person, then the same guarantees of trustworthiness exist as when the declarant is seeking treatment for himself. Accordingly, statements by bystanders, family members, and others, made for purposes of treating an injured person and pertinent to that treatment, should be admissible under Rule 803(4). *See, e.g., Cook v. Hoppin*, 783 F.2d 684 (7th Cir. 1986) (statements by non-patients can qualify under Rule 803(4) where they are pertinent to the patient's treatment or diagnosis); *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260 (5th Cir. 1991) (hospital record reporting a statement by the plaintiff's sister to a social worker that the plaintiff had always been a habitual liar was properly admitted; this was helpful background information that would assist in psychological treatment).

E. HEARSAY WITHIN HEARSAY

[1] Federal Rule of Evidence 805

Rule 805. Hearsay within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

[2] Illustration

Defendant is sued in a wrongful death action. She defends on the theory that someone else did it. There was a witness, but she died. The plaintiff calls the first witness.

Plaintiff: State your name.
 Witness: Party Line.
 Plaintiff: Did you know the victim?
 Witness: Yes.
 Plaintiff: Did you see the attack on the victim?
 Witness: No.
 Plaintiff: Did you talk to someone who saw the attack?
 Witness: No.
 Plaintiff: Well, let's try this one. Did you talk to someone who happened to talk to someone who saw the attack?
 Witness: You bet.
 Plaintiff: What did they see?
 Defendant: Objection! What did who see? That's hearsay. Actually, it's double hearsay.
 The court: Let me hear it before I rule on the objection.
 Witness: I was watching football and Billy Bob, I could see him out my front window, came running out of his house — like bees were chasing him, and came to my house and pounded on the door. So I opened the door and he was, like, shaking all over, and he said: "I just got off the phone with Jimmy Lee and he said he was looking out the window while he was talking to me and was actually seeing the defendant choking the gal who died."
 The court: You really think you can justify this one, counsel?
 Plaintiff: _____

[3] The Non-Hearsay Problem

UNITED STATES v. DOTSON
 821 F.2d 1034 (5th Cir. 1987)

PER CURIAM:

Defendant-appellant Frederick Leon Dotson requests that this court rehear his appeal, challenging this court's analysis of the evidentiary issues presented therein. Because we find merit in one of Dotson's contentions, we grant rehearing to the extent necessary for the revisions set forth below; otherwise, we deny Dotson's petition.

In our opinion reported at 817 F.2d 1127 (5th Cir. 1987), ~~we rejected~~ Dotson's contention that a lengthy police report detailing the statement of a

government witness to police, admitted below as a prior consistent statement, was inadmissible hearsay not falling within any exception to the hearsay rule. We concluded that

Dotson's objection that the report constituted "hearsay within hearsay" is misplaced. According to the terms of rule 801(d)(1), prior consistent statements are not hearsay; the hearsay-within-hearsay principle contained in rule 805 simply does not apply to prior consistent statements."

Upon reconsideration, we find the line of reasoning expressed above to be misplaced, and therefore vacate that portion of our opinion. For the purposes of the hearsay-within-hearsay principle expressed in rule 805, "non-hearsay" statements under rule 801(d), such as prior consistent statements, should be considered in analyzing a multiple-hearsay statement as the equivalent of a level of the combined statements "that conforms with an exception to the hearsay rule." Fed. R. Evid. 805; see *Southern Stone Co. v. Singer*, 665 F.2d 698, 703 (Former 5th Cir. 1982) (even if one level of double-hearsay statement was not hearsay according to Fed. R. Evid. 801(d)(2)(A), second level of hearsay was not excepted from hearsay rule and document was inadmissible). That is, the mere fact that one level of a multiple-level statement qualifies as "non-hearsay" does not excuse the other levels from rule 805's mandate that each level satisfy an exception to the hearsay rule for the statement to be admissible.

For the purposes of our rule 805 analysis, the report contains two levels of hearsay: the report says that Sergeant Anderson said (first level) that Young said that he carried marijuana for Dotson two or three times a week (second level). Even though the second level qualifies as non-hearsay under rule 801(d)(1)(B) (prior consistent statement), the first level remains, and does not qualify under any exception to the hearsay rule. The report was thus inadmissible, and the district court erred in allowing the jury to consider it. We therefore vacate our holding in Part IV of the opinion.

* * *

The application for rehearing is GRANTED to the extent necessary for the revision specified above; otherwise the application for rehearing is DENIED.

NOTE

Although hearsay within hearsay is covered in this Chapter as a prelude to the business records exception, note that the analysis also applies to exceptions where declarant unavailability is required, and also applies to the Rule 801 exemptions to the hearsay rule, as held in *Dotson*.

F. BUSINESS RECORDS EXCEPTION

Editor's Note: The related exception for past recollection recorded is discussed in Chapter 3 in the materials on competency, because that exception is dependent on the witness having a lack of memory, and recollection is an aspect of foundational competence. The reader may wish to revisit the Rule 803(5) exception for past recollection recorded at this point.

[1] Federal Rule of Evidence 803(6)

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(6) Records of regularly conducted activity. A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the ordinary course of regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

* * *

[2] Illustration

Plaintiff, Slum Lord, sues defendant, Naive Guy, for non-payment of rent. Slum Lord's bookkeeper moved to Tulsa and is unavailable to testify about the old accounts. Slum Lord takes the stand.

Plaintiff's counsel:	State your name.
Slum Lord:	Slum Lord.
Plaintiff's counsel:	Did you enter into a lease with Naive Guy?
Slum Lord:	Yes, here it is. (The document is marked and admitted.)
Plaintiff's counsel:	What is your business?
Slum Lord:	I am a landlord of over 200 properties and have been in business for fifteen years.
Plaintiff's counsel:	Do you keep a book of accounting in the ordinary course of your business?
Slum Lord:	Yes I do. I developed the system.
Plaintiff's counsel:	How are the books kept?

Slum Lord: Every day all checks from tenants are given to the bookkeeper who enters the receipts in the ledger and dates the entry. If there is no entry then no payment has been made on that particular account.

Plaintiff's counsel: Have the accounts been trustworthy?

Slum Lord: Yes, over the last fifteen years we've been audited on several occasions and haven't had any problems.

Plaintiff's counsel: I offer the book of accounts, marked as Exhibit A, into evidence.

Defendant: Objection! Hearsay.

Plaintiff's counsel: _____

[3] Recording Information from Other Sources

JOHNSON v. LUTZ 170 N.E. 517 (N.Y. 1930)

HUBBS, J.

This action is to recover damages for the wrongful death of the plaintiff's intestate, who was killed when his motorcycle came into collision with the defendants' truck at a street intersection. There was a sharp conflict in the testimony in regard to the circumstances under which the collision took place. A policeman's report of the accident filed by him in the station house was offered in evidence by the defendants under section 374-a of the Civil Practice Act, and was excluded. The sole ground for reversal urged by the appellants is that said report was erroneously excluded. That section reads: "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind."

* * *

The purpose of the Legislature in enacting section 374-a was to permit a writing or record, made in the regular course of business, to be received in evidence, without the necessity of calling as witnesses all of the persons who had any part in making it, provided the record was made as a part of the duty of the person making it, or on information imparted by persons who were under a duty to impart such information. The amendment permits the introduction of shopbooks without the necessity of calling all clerks who may

have sold different items of account. It was not intended to permit the receipt in evidence of entries based upon voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto. It was said, in *Mayor, etc., of New York City v. Second Ave. R. Co.*, 102 N.Y. 572, at page 581, 7 N.E. 905, 909, 55 Am. Rep. 839: "It is a proper qualification of the rule admitting such evidence that the account must have been made in the ordinary course of business, and that it should not be extended so as to admit a mere private memorandum, not made in pursuance of any duty owing by the person making it, or when made upon information derived from another who made the communication casually and voluntarily, and not under the sanction of duty or other obligation."

An important consideration leading to the amendment was the fact that in the business world credit is given to records made in the course of business by persons who are engaged in the business upon information given by others engaged in the same business as part of their duty.

* * *

Judgment affirmed.

UNITED STATES v. VIGNEAU
187 F.3d 70 (1st Cir. 1999)

BOUDIN, CIRCUIT JUDGE:

Two brothers, Patrick and Mark Vigneau, were convicted after a lengthy trial on charges growing out of their participation in a drug distribution scheme. In this opinion, we consider Patrick Vigneau's claims of error; * * *

From around February 1995 to at least the end of that year, Patrick Vigneau and Richard Crandall conducted a venture to acquire marijuana and steroids in the Southwest and resell them in the Northeastern United States. Crandall obtained the marijuana and steroids from suppliers in El Paso, Texas, and in Mexico, and sent the drugs to Patrick Vigneau in Rhode Island and southeastern Massachusetts. Patrick Vigneau, who distributed the drugs to retail dealers, used others to assist him, including his brother Mark Vigneau and one Joseph Rinaldi.

Some of the proceeds from these Northeastern sales had to be sent to Crandall in Texas so that he could pay suppliers and share in the profits. Patrick Vigneau transmitted funds to Crandall primarily through Western Union money orders. The money orders were sent by Patrick Vigneau or others, sometimes in the sender's true name but often using false or borrowed names. Timothy Owens, who assisted Crandall in acquiring drugs, frequently picked up the checks from Western Union, cashed them, and gave the money to Crandall.

* * *

The jury convicted Patrick Vigneau of participating in a continuing criminal enterprise, 21 U.S.C. § 848; possession of marijuana and attempted possession of marijuana (both with intent to distribute) and conspiracy to distribute

marijuana, id. §§ 841, 846; and 21 counts of money laundering on specific occasions and conspiracy to launder money, 18 U.S.C. § 1956. Patrick Vigneau was later sentenced to 365 months in prison. He now appeals, challenging his conviction but not his sentence.

On this appeal, Patrick Vigneau's strongest claim is that the district court erred in allowing the government to introduce, without redaction and for all purposes, Western Union "To Send Money" forms, primarily in support of the money laundering charges. These forms, as a Western Union custodian testified, are handed by the sender of money to a Western Union agent after the sender completes the left side of the form by writing (1) the sender's name, address and telephone number; (2) the amount of the transfer; and (3) the intended recipient's name and location. The Western Union clerk then fills in the right side of the form with the clerk's signature, date, amount of the transfer and fee, and a computer-generated control number; but at least in 1995, Western Union clerks did not require independent proof of the sender's identity.

Western Union uses the control number affixed by the clerk to correlate the information on the "To Send Money" form with the corresponding "Received Money" form and with the canceled check issued by Western Union to pay the recipient. The original forms are usually discarded after six months, but the information provided by the sender, as well as the information from all records associated with the money transfer, are recorded in a computer database. In this case, for some transfers the government had the forms completed by the sender, but for most it had only the computer records.

The government introduced over 70 records of Western Union money transfers. Patrick Vigneau's name, address and phone number appeared as that of the sender on 21 of the "To Send Money" forms (11 other names, including fictional names and those of Mark Vigneau and of other defendants, appeared as those of the senders on the other forms), and those 21 forms corresponded to the 21 specific counts of money laundering on which Patrick Vigneau was ultimately convicted by the jury. Patrick Vigneau's most plausible objection, which was presented in the district court and is renewed on appeal, is that his name, address and telephone number on the "To Send Money" forms were inadmissible hearsay used to identify Patrick Vigneau as the sender.

Hearsay, loosely speaking, is an out-of-court statement offered in evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c). Whoever wrote the name "Patrick Vigneau" on the "To Send Money" forms was stating in substance: "I am Patrick Vigneau and this is my address and telephone number." Of course, if there were independent evidence that the writer was Patrick Vigneau, the statements would constitute party-opponent admissions and would fall within an exception to the rule against hearsay, Fed. R. Evid. 801(d)(2) (the rule says admissions are "not hearsay," but that is an academic refinement). However, the government cannot use the forms themselves as bootstrap-proof that Patrick Vigneau made the admission.

Instead, the government argues that the "To Send Money" forms and the computerized information reflecting those forms and the correlated material were admissible under the business records exception. Fed. R. Evid. 803(6).

~~Rule 803(6) provides that business records are admissible~~ where shown to be business records by a qualified witness, "unless the source of information or the method and circumstances of preparation indicate lack of trustworthiness." The district judge accepted the view that the Western Union records were trustworthy and admitted the "To Send Money" forms (or equivalent computer records) without redaction and for all purposes, advising the jury that "[w]hat weight you give to them will be your choice."

The district judge was correct that the "To Send Money" forms literally comply with the business records exception because each form is a business record, and in this case, the computer records appeared to be a trustworthy account of what was recorded on the original "To Send Money" forms. The difficulty is that despite its language, the business records exception does not embrace statements contained within a business record that were made by one who is not a part of the business if the embraced statements are offered for their truth. The classic case is *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (N.Y. 1930), which excluded an unredacted police report incorporating the statement of a bystander (even though the police officer recorded it in the regular course of business) because the informant was not part of that business. The Advisory Committee Notes to Rule 803(6) cite *Johnson v. Lutz* and make clear that the rule is intended to incorporate its holding.

Johnson v. Lutz is not a technical formality but follows directly from the very rationale for the business records exception. When a clerk records the receipt of an order over the telephone, the regularity of the procedure, coupled with business incentives to keep accurate records, provide reasonable assurance that the record thus made reflects the clerk's original entry. Thus the business record, although an out-of-court statement and therefore hearsay, is admitted without calling the clerk to prove that the clerk received an order.

But no such safeguards of regularity or business checks automatically assure the truth of a statement to the business by a stranger to it, such as that made by the bystander to the police officer or that made by the money sender who gave the form containing his name, address, and telephone number to Western Union. Accordingly, the *Johnson v. Lutz* gloss excludes this "outsider" information, where offered for its truth, unless some other hearsay exception applies to the outsider's own statement. This gloss on the business records exception, which the Federal Rules elsewhere call the "hearsay within hearsay" problem, Fed. R. Evid. 805, is well-settled in this circuit. Other circuits are in accord. * * *

Of course, "hearsay within hearsay" is often trustworthy but hearsay is not automatically admissible merely because it is trustworthy. A residual hearsay exception exists based on case-specific findings of trustworthiness, but it is more stringent and requires, among other things, advance notice not here provided by the government. Fed. R. Evid. 807 (combining former Fed. R. Evid. 803(24) and Fed. R. Evid. 804(b)(5)). And precisely because hearsay law is now codified for the federal courts, the former freedom of federal judges to create new exceptions is now curtailed. Fed. R. Evid. 807 and Fed. R. Evid. 803(24), 1974 Advisory Committee Notes to 1974 Enactment.

~~Not does the reference to "trustworthiness" in the business records rule~~ comprise an independent hearsay exception. That reference was not designed

to limit *Johnson v. Lutz* to untrustworthy statements — after all, the statement to the police officer was probably trustworthy — but rather to exclude records that would normally satisfy the business records exception (e.g., the clerk's computerized record of calls received) where inter alia the opponent shows that the business record or system itself was not reliable (e.g., the computer was defective).

Of course, in some situations, the statement by the “outsider” reflected in the business record may be admissible not for its truth but for some other purpose, but the disputed “To Send Money” forms here were admitted by the district court for all purposes, including as proof of the sender's identity. Possibly, the government could have argued as to Patrick Vigneau (it would be harder as to Mark) that other evidence of Patrick Vigneau's activities comprised circumstantial evidence that would permit a jury to conclude that he sent the specific forms bearing his name, Fed. R. Evid. 104(b); but apart from the need for a limiting instruction, Fed. R. Evid. 105, this presents a difficult issue that has not been argued and is not here resolved.

No doubt, the “To Send Money” forms were relevant to the government's case regardless of whether Patrick Vigneau (or any other named sender) was the person who made an individual transfer: they showed transfers of money from Rhode Island directed to Crandall and others that tended to support the general description of the drug and money laundering activities described by the government's witnesses. Thus, the forms could have been offered in redacted form, omitting the information identifying Patrick Vigneau as the sender of 21 of the forms. But that is not what happened.

Some cases have admitted under the business records exception “outsider” statements contained in business records, like the sender's name on the Western Union form, where there is evidence that the business itself used a procedure for verifying identity (e.g., by requiring a credit card or driver's license). Probably the best analytical defense of this gloss is that in such a case, the verification procedure is circumstantial evidence of identity that goes beyond the mere bootstrap use of the name to establish identity. While this gloss may well represent a reasonable accommodation of conflicting values, verification was not Western Union's practice at the time. * * *

The hearsay rule is an ancient and, even to most lawyers, a counter-intuitive restriction now riddled with many exceptions. However, the drafters chose to retain the hearsay rule, * * * and any trial lawyer who has tried to cross-examine a witness whose story depends on the hearsay statements of others understands why. These are reasons enough to tread cautiously, quite apart from the Supreme Court's intermittent reliance on the Confrontation Clause to make the use of hearsay a potentially constitutional issue in criminal trials. We thus conclude, in accord with the Tenth Circuit, *United States v. Cestnik*, 36 F.3d 904, 908 (10th Cir. 1994), that the sender name, address and telephone number on the forms should not have been admitted for their truth. [The Court reversed the convictions for money-laundering but affirmed all other convictions.]

NOTES

1. How do the Federal Rules handle the problem of information recorded by the business where the source of information has no duty to report the information accurately?

According to the Advisory Committee's Note, Federal Rule 803(6) requires that the informant have knowledge and be acting under a duty to report accurately when he reports the information. Many courts have found, however that the problem of information coming from outside the "business" is solved if the person recording the information from the outsider can verify that information for accuracy. A good example of verification arose in *United States v. Bland*, 961 F.2d 123 (9th Cir. 1992). The government sought to prove that the defendant had a handgun owned by Ann Rippetoe in his possession. The government proffered ATF Form 4473 from Dooley's Hardware Store, which identified Ann Rippetoe as the purchaser of the handgun. This form was held properly admitted under Rule 803(6). Proper foundation testimony was given by the manager of the sporting goods department at Dooley's Hardware, who testified that the employee completing the form had knowledge of the transaction at the time it occurred, and that the form was maintained in the course of regularly conducted activity. The fact that the qualifying witness could not identify the person who completed the record, or when the record was completed, was a question of weight and not admissibility. The Court recognized that when the record was offered to prove that Ann Rippetoe was, in fact, the buyer of the gun, a double hearsay question was presented, because there was no indication that the preparer of the record had personal knowledge of the name of the purchaser. However, since federal regulations required sellers of firearms to verify the name of each purchaser, and purchasers are under a legal duty to provide truthful information for Form 4473, the information transmitted by the buyer to the recorder was considered by the court to be reliable enough to satisfy any double hearsay concerns. Compare *United States v. Patrick*, 959 F.2d 991 (D.C. Cir. 1992), where the Court reversed a conviction in which the government offered a sales receipt to prove the defendant's address. The receipt was prepared by the merchant, and the government made no showing that the merchant had personal knowledge of the defendant's address, or that the merchant had verified the address in any way. There was no obligation of the buyer to give a correct address. See also *United States v. McIntyre*, 997 F.2d 687 (10th Cir. 1993) (motel records from two different motels were offered to show that the registrant stayed in the motel; one record was improperly admitted where there was no testimony that the name was verified, and no guarantee of trustworthiness in the giving of the name; the other record was properly admitted where there was testimony of verification). Note that the Court in *Vigneau*, *supra* was dubious about the verification solution; and there is merit to this skepticism, given the prevalence of Photoshop and the ease with which a fake i.d. can be produced.

2. Is there any other way to qualify a record if the statement recorded comes from an outsider with no "business duty" to report?

Professors Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (9th ed. 2006), analyze the cases involving business records and double hearsay as follows:

The concern addressed by the business duty requirement is that the person with personal knowledge of an event may not be reporting accurately to the person who eventually records the information. If the reporter is operating under the same or similar "business" duty (i.e., duty to report accurately) as the recorder, then the risk of inaccuracy is substantially reduced — the same guarantees of reliability apply to the observer and the recorder. *See, e.g., United States v. Turner*, 189 F.3d 712 (8th Cir. 1999) (hearsay upon hearsay problem was excused where both the source of information and the recorder were acting in the regular course of the organization's business).

However, the existence of a business duty is not the only way to solve the double hearsay problem created when a business record is prepared by one who is relying on the personal knowledge of one outside the "business." One possible solution is verification [discussed immediately above].

Second, if the underlying statement satisfies an independent hearsay exception, the double hearsay problem is satisfied. *See, e.g., Sana v. Hawaiian Cruises, Ltd.*, 181 F.3d 1041 (9th Cir. 1999) (memorandum contained several levels of hearsay; to be admissible, "each level of hearsay must satisfy an exception to the hearsay rule"; in this case, each level was satisfied; some statements to the recorder were admissible under Rule 803(3) and some were admissible under Rule 801(d)(2)(D)); *Bondie v. Bic Corp.*, 947 F.2d 1531 (6th Cir. 1991) (medical report was admissible because it was made and kept in the ordinary course of business and the included statement of the mother of the patient was a party admission; Rule 803(6) does not require that the underlying declarant have a business duty to supply the information recorded, so long as that declarant's statements come within a hearsay exception or exemption and recording such statements is part of the regularly conducted activity).

Third, if the underlying statement is offered for a non-hearsay purpose, there is no double hearsay problem at all. The record is admissible if the proponent establishes a regular recording of regularly conducted activity. A good example is provided by *United States v. Cestnik*, 36 F.3d 904 (10th Cir. 1994). In a prosecution for narcotics and money-laundering offenses, the government introduced Western Union "to-send-money" forms to support its charges that the defendant laundered money. The forms did not reveal the defendant's name as the sender. But, the government introduced independent evidence to show that the senders' names were aliases of the defendant. The Court held that the forms were properly admitted under the business records exception. To the extent the records were offered to prove the amount of money spent on a specific date, they were qualified under the Rule by the custodian of records for Western Union. The Court noted that the records would not have been admissible if offered to prove that the person named on the form was the *actual* sender, because "Western Union agents do not verify the information filled out by the sender." However, since the government offered the senders' names

“not to prove the identity of the sender but as circumstantial evidence linking the false names to the money transfers,” the names were not hearsay and therefore the records did not present a “source of information” problem. In other words, the fact that *someone* knew enough to use the defendant’s aliases in wiring the money was itself evidence of a conspiratorial association; the government did not offer the record to prove that the defendant himself actually wired the money. *See also Hoselton v. Metz Baking Co.*, 48 F.3d 1056 (8th Cir. 1995) (an accountant’s notes containing statements made by others during a negotiation session were admissible as business records; as to the statements included in the notes, the Federal Rules “do not require each level of hearsay to meet the requirements of the same exception”; the statements in the accountant’s record were not hearsay because they were not offered to prove the truth of the matters asserted; rather, they were offered to show that the plaintiffs were on notice of certain expectations that the defendants had in negotiations).

3. What are the foundation requirements for business records? Who is competent to establish these requirements?

See Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (9th ed. 2006):

While a records custodian is a proper witness for establishing the foundation requirements of a business record, Rule 803(6) provides for a much more expansive class of witnesses who can establish this foundation. A witness is a “qualified witness” if he or she has acquired knowledge of how the records are kept, and can testify that they are kept in the ordinary course of regularly conducted activity. *See, e.g., United States v. Lauerson*, 343 F.3d 604 (2d Cir. 2003) (doctor was a qualified witness to establish the admissibility requirements for medical records; the doctor designed the procedures for maintaining the records and observed them being implemented); *United States v. Childs*, 5 F.3d 1328 (9th Cir. 1993) (“The phrase ‘other qualified witness’ is broadly interpreted to require only that the witness understand the recordkeeping system.”); *United States v. Jakobetz*, 955 F.2d 786 (2d Cir. 1992) (toll receipts incorporated into corporate expense records could be authenticated by a custodian of the corporation that prepared the expense records: “Even if the document is originally created by another entity, its creator need not testify when the document has been incorporated into the business records of the testifying entity”; here the custodian testified that toll receipts were regularly submitted in expense reports and regularly incorporated into the business records of the corporation for general accounting purposes; the custodian was a qualified witness within the meaning of the Rule).

For cases in which a foundation witness was found unqualified under the Rule, *see, e.g., United States v. Riley*, 236 F.3d 982 (8th Cir. 2001) (lab reports erroneously admitted; foundation witness could identify the reports but had no knowledge of how they were prepared

or maintained and thus could not testify that the reports had been kept in the ordinary course of regularly conducted activity); *Collins v. Kibort*, 143 F.3d 331 (7th Cir. 1998) (hospital records erroneously admitted; the Rule does not require a foundation witness to have prepared the record or to have personal knowledge of the entries in the record; however, in this case the witness did not have knowledge of the hospital's regular business practices in making and keeping the record); *Belber v. Lipson*, 905 F.2d 549 (1st Cir. 1990) (one doctor is not a qualified witness with respect to the records of another doctor, where he merely received the records from an attorney who knew nothing about the other doctor's recordkeeping process).

The foundation witness must know something about the recordkeeping process, but the witness need not have personal knowledge of any particular recording or how it was made. As the Court put it in *United States v. Franco*, 874 F.2d 1136 (7th Cir. 1989):

A qualified witness is not required, however, to have personally participated in or observed the creation of the document * * * or know who actually recorded the information. * * * We broadly interpret the term "qualified witness" as requiring only someone with knowledge of the procedure governing the creation and maintenance of the type of records sought to be admitted.

See also Dyno Constr. Co. v. McWane, Inc., 198 F.3d 567 (6th Cir. 1999) (person laying the foundation need not have personal knowledge concerning the preparation of the records: "All that is required of the witness is that he or she be familiar with the recordkeeping procedures of the organization.").

Moreover, the foundation witness can obtain knowledge about the recordkeeping process from the statements of others who are familiar with the recordkeeping. That this may be hearsay information is not disqualifying, because Rule 104 allows the trial court to consider hearsay in determining whether admissibility requirements are met. *See, e.g., Franco* (a witness was held qualified where he learned about recordkeeping through conversations with others familiar with the process: "The court relied on hearsay to determine whether Agent Garza understood the accounting system * * * but that is clearly permissible under the Federal Rules of Evidence"). It follows that a finding that records were recorded in the ordinary course of business activity can be based at least in part on the records themselves, e.g., that they were organized, precise, and looked routinely recorded. *United States v. Draiman*, 784 F.2d 248 (7th Cir. 1986) (entries in the document itself may help to establish foundation).

The foundation requirements of the Rule need not be established by in-court testimony. Under an amendment effective December 1, 2000, the qualified witness may establish the foundation "by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification." The amendment is intended to limit unnecessary cost and inconvenience, by permitting a qualified witness to provide

the foundation for business records by way of affidavit in lieu of in-court testimony. The amendment does not eliminate the need for a qualified witness, nor does it change the type of qualifications that have been found necessary for a witness to be able to establish a foundation for business records. It simply provides that the qualified witness can establish the foundation without being called to testify.

The Advisory Committee considered it necessary to amend the Rule to provide for a unified practice in the Federal Courts. Before the amendment, foreign business records offered in criminal cases could be qualified by affidavit under the terms of 18 U.S.C. § 3505. However, qualified witnesses were required to testify before foreign records could be admitted in civil cases and before domestic records could be admitted in any case. This disparity in the practice made little sense; the amendment provides for a unitary practice along the terms of section 3505.

The amendment to Rule 803(6) provides for an alternative means of establishing admissibility under the hearsay exception. It does not, of course, purport to solve any problem of authentication. Authenticity questions are considered under Rule 902. Whether the affidavit procedure comports with the accused's right to confrontation in criminal cases is a question taken up at the end of this Editorial Explanatory Comment.

To qualify a business record, it must be shown that the information recorded is the type of information that is recorded in the ordinary course of a regularly conducted activity, and that it is the regular practice of the business to record such an event. *See, e.g., Wilander v. McDermott Int'l, Inc.*, 887 F.2d 88 (5th Cir. 1989) (statement concerning an accident, taken on an *ad hoc* basis by a barge captain, was not recorded in the ordinary course of regularly conducted activity; it was not the regular practice of the barge captain to make such a report).

If the event recorded is an isolated incident, or if it is a recurring event that is not recorded as a matter of regular practice, the guarantees of reliability supporting the business records exception do not exist. *See, e.g., Waddell v. Commissioner*, 841 F.2d 264 (9th Cir. 1988) (an appraisal report was inadmissible where no showing was made that it was the regular practice of the preparer to prepare such a report).

Some courts have applied the "ordinary course" and "regular practice" requirements liberally. These courts state that while Rule 803(6) does not extend to activity or recording that is "casual or isolated," some degree of discontinuity or selectivity is permissible, and affects only the weight of the evidence. *See, e.g., Kassel v. Gannett Co.*, 875 F.2d 935 (1st Cir. 1989) (contact reports of complaints are admissible even though a report is not filled out every time a complaint is made). Most courts, however, strictly construe the requirements of "ordinary course" and "regular practice," on the ground that this language was carefully considered by the drafters of the Rule and the requirements

are important guarantees of the trustworthiness of the record. In these courts, the record is excluded if the event recorded is unusual, or if the event when it occurs is not recorded in the ordinary course of the organization's activity. See, e.g., *Pierce v. Atchison T. & S.F. Ry.*, 110 F.3d 431 (7th Cir. 1997) (memorandum recording an "unusual" incident "was not created with the kind of regularity or routine which gives business records their inherent reliability"); *United States v. Strother*, 49 F.3d 869 (2d Cir. 1995) (a bank memorandum indicating that an overdrawn check for \$82,000 was covered by the bank was held inadmissible as a business record; this type of event was not one which routinely recurred; the Court stated that it was "reluctant to adopt a rule that would permit the introduction into evidence of memoranda drafted in response to unusual or isolated events").

[4] Records Prepared in Anticipation of Litigation

PALMER v. HOFFMAN

318 U.S. 109 (1943)

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case arose out of a grade crossing accident which occurred in Massachusetts.* * * On the question of negligence the trial court submitted three issues to the jury — failure to ring a bell, to blow a whistle, to have a light burning in the front of the train. The jury returned a verdict in favor of respondent individually for some \$25,000 and in favor of respondent as administrator for \$9,000. The District Court entered judgment on the verdict. The Circuit Court of Appeals affirmed, one judge dissenting.* * *

* * * The accident occurred on the night of December 25, 1940. On December 27, 1940, the engineer of the train, who died before the trial, made a statement at a freight office of petitioners where he was interviewed by an assistant superintendent of the road and by a representative of the Massachusetts Public Utilities Commission. This statement was offered in evidence by petitioners under the Act of June 20, 1936, 28 U.S.C. § 695. [This was the statutory precursor to Rule 803(6).] They offered to prove (in the language of the Act) that the statement was signed in the regular course of business, it being the regular course of such business to make such a statement. Respondent's objection to its introduction was sustained.

We agree with the majority view below that it was properly excluded.

We may assume that if the statement was made "in the regular course" of business, it would satisfy the other provisions of the Act. But we do not think that it was made "in the regular course" of business within the meaning of the Act. The business of the petitioners is the railroad business. That business like other enterprises entails the keeping of numerous books and records essential to its conduct or useful in its efficient operation. Though such books and records were considered reliable and trustworthy for major decisions in the industrial and business world, their use in litigation was greatly circumscribed or hedged about by the hearsay rule — restrictions which greatly

increased the time and cost of making the proof where those who made the records were numerous. * * *

The engineer's statement which was held inadmissible in this case falls into quite a different category. It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made "in the regular course" of the business within the meaning of the Act. If it did, then any law office in the land could follow the same course, since business as defined in the Act includes the professions. We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports under the Act. * * * Preparation of cases for trial by virtue of being a "business" or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule.* * * We cannot so completely empty the words of the Act of their historic meaning. If the Act is to be extended to apply not only to a "regular course" of a business but also to any "regular course" of conduct which may have some relationship to business, Congress not this Court must extend it. Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication. Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight not its admissibility. That provision comes into play only in case the other requirements of the Act are met.

In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.

* * *

Affirmed.

NOTES

1. Is the court's analysis that an accident report is not a business record supported by the language of the statute?

Most courts have read *Palmer* not as a strict definition of an organization's "ordinary course of business," but rather as precluding records prepared in anticipation of litigation, where the records are favorable to the party who prepared them. Under these circumstances there is suspect motivation in the preparation of the records that renders them untrustworthy. See *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200 (4th Cir. 2000) (report not admissible under Rule 803(6) where "the primary motive for initially preparing the report was to prepare for litigation"). But if the report is unfavorable to the party who prepared it, it will be admissible because no inference of suspect motivation can be drawn. See, e.g., *Yates v. Bair Transp., Inc.*, 249 F. Supp. 681 (S.D. N.Y. 1965) (reports of doctors retained by defendant in personal injury litigation are admissible where they are favorable to the plaintiff).

2. Does the trustworthiness requirement in the rule mean that records are admissible whenever they are determined to be trustworthy?

Rule 803(6) authorizes a trial court to exclude a record where the circumstances of its preparation indicate that the record is untrustworthy. But the rule does not support the converse proposition, that a record is admissible simply because it is trustworthy. Even a trustworthy record must satisfy the other admissibility requirements of the rule; there must be a regular practice of recording an event which occurs in the ordinary course of a regularly conducted activity. If a record is not one of a routine recording of a routine event, it cannot be admitted under Rule 803(6) even if the particular record is trustworthy. *United States v. Freidin*, 849 F.2d 716 (2d Cir. 1988) (isolated document inadmissible under Rule 803(6) even though there is no reason to think that the document is untrustworthy; trustworthiness is not the only precondition to admissibility). This is because the federal rules have established admissibility requirements for each exception, which must be met. The rules specifically reject an approach to hearsay that admits a statement whenever it happens to be trustworthy under the circumstances. Such an argument is permissible only under the residual exception. See, e.g., *United States v. Blackburn*, 992 F.2d 666 (7th Cir. 1993) (even though a report is trustworthy, it may not be admitted under Rule 803(6) where it was prepared in anticipation of litigation rather than in the ordinary course of business; however, the report was admissible under the residual exception).

3. Are computerized records admissible under the business records exception?

See Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (9th ed. 2006):

Courts generally do not require any extra foundation testimony for computerized records. See, e.g., *United States v. Briscoe*, 896 F.2d 1476 (7th Cir. 1990) (foundation requirements for computerized records are the same as those for other records; proponent is not required to show

that computers are tested for internal programming errors); *United States v. Sanders*, 749 F.2d 195 (5th Cir. 1984) (foundation requirements for computerized records are no different from requirements for other business records); *United States v. Young Bros.*, 728 F.2d 682 (5th Cir. 1984) (accuracy of software need not be specifically established); *United States v. Catabran*, 836 F.2d 453 (9th Cir. 1988) (presence of inaccuracies in computer records, as in other records, is a question of weight). Despite the fact that computerized records are often easier to tamper with than traditional records, the standards for admitting computer-generated records are ordinarily no more stringent than those for admitting other business records. See Peritz, *Computer Data and Reliability: A Call for Authentication of Business Records under the Federal Rules of Evidence*, 80 Nw. U. L. Rev. 956 (1986) (critical of the fact that "federal judges substantially agree that computer output should be qualified like any other business record," and expressing concern that "computer systems store, retrieve, and manipulate information in ways significantly different from earlier manual or mechanical systems"). However, testimony by a witness about the accuracy of the software and reliability of the computerization will certainly bolster the minimal foundation that ordinarily suffices for both computerized and noncomputerized records.

If the record is a computer printout, it is not problematic that the printout was made in anticipation of litigation, so long as the data compiled in the printout was entered into the computer at a time when there was no suspect motivation. See, e.g., *United States v. Briscoe*, 896 F.2d 1476 (7th Cir. 1990):

We note that the fact that the actual computer printouts presented at trial were prepared specifically for this case * * * does not preclude their admission under Rule 803(6). It is sufficient that the data compiled in the printouts was entered into the computer contemporaneous with the placing of each call and maintained in the regular course of business.

See also *United States v. Hernandez*, 913 F.2d 1506 (10th Cir. 1990) (so long as the original computer data compilation was prepared pursuant to a business duty in accordance with regular business practice, the fact that the hard copy offered as evidence was printed for purposes of litigation does not affect its admissibility).

Information taken off the Internet can potentially qualify as a business record. While the medium for the information is different, the same foundation requirements apply. For example, if information is found on a website and is offered for its truth, the proponent will have to establish through a qualified witness that the information is the type that is ordinarily posted in the course of regularly conducted organizational activity. At least one Court has held that postings to a website cannot be admitted as the business record of the Internet service provider, because such providers are simply conduits and not recordkeepers. See, e.g., *United States v. Jackson*, 208 F.3d 633 (7th Cir. 2000) ("The fact that the Internet service providers may be able

to retrieve information that its customers posted or email that its customers sent does not turn that material into a business record of the Internet service provider.”).

4. Note that there are three hearsay exceptions that overlap to some extent with the business records exception.

The exception for public records, Rule 803(8), is discussed in the next section. The exception for past recollection recorded is set forth in Rule 803(5), which covers:

(5) Recorded recollection. — A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

The exception for past recollection recorded is discussed in Chapter 3 in the section on witness recollection.

Rule 803(7) provides for admissibility of the absence of an entry from a business record. The exception covers:

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). — Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

Rule 803(7), unlike Rule 803(6), does not specifically require foundation testimony from a custodian or other qualified witness. But the first step in any analysis under Rule 803(7) is to determine whether the record qualifies under Rule 803(6) since, if it does not, Rule 803(7) cannot be used. That is, unless the record is admissible under the standards of Rule 803(6), evidence of a failure of recording or absence of an entry in the record cannot be admitted. Thus, admissibility is dependent upon adequate foundation testimony concerning the records from a witness sufficiently familiar with them.

G. PUBLIC RECORDS

[1] Federal Rule of Evidence 803(8)

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

* * *

[2] Illustration

Plaintiff's wife died in an airplane crash. Plaintiff sues the airplane manufacturer, alleging negligent design and production. At the beginning of the trial, plaintiff's counsel produces two impressive documents.

Plaintiff's counsel: Your Honor, I have two documents, both duly authenticated, that I'd like to introduce at this time. The first document is the FAA record on malfunctions of the type of aircraft involved in this incident. The second document is the FAA investigative report which concludes that this particular type of plane was designed with an insufficient lift to weight ratio.

Defendant: Objection! Hearsay.

Plaintiff's counsel: _____.

[3] Opinions and Factual Findings

BEECH AIRCRAFT CORP. v. RAINEY

488 U.S. 153 (1988)

JUSTICE BRENNAN delivered the opinion of the Court.

In this action we address a longstanding conflict among the Federal Courts of Appeals over whether Federal Rule of Evidence 803(8)(C), which provides an exception to the hearsay rule for public investigatory reports containing "factual findings," extends to conclusions and opinions contained in such reports. * * *

I

This litigation stems from the crash of a Navy training aircraft at Middleton Field, Alabama, on July 13, 1982, which took the lives of both pilots on board, Lieutenant Commander Barbara Ann Rainey and Ensign Donald Bruce Knowlton. The accident took place while Rainey, a Navy flight instructor, and

Knowlton, her student, were flying "touch-and-go" exercises in a T-34C Turbo-Mentor aircraft, number 3E955. Their aircraft and several others flew in an oval pattern, each plane making successive landing/takeoff maneuvers on the runway. Following its fourth pass at the runway, 3E955 appeared to make a left turn prematurely, cutting out the aircraft ahead of it in the pattern and threatening a collision. After radio warnings from two other pilots, the plane banked sharply to the right in order to avoid the other aircraft. At that point it lost altitude rapidly, crashed, and burned.

Because of the damage to the plane and the lack of any survivors, the cause of the accident could not be determined with certainty. The two pilots' surviving spouses brought a product liability suit against petitioners Beech Aircraft Corporation, the plane's manufacturer, and Beech Aerospace Services, which serviced the plane under contract with the Navy. The plaintiffs alleged that the crash had been caused by a loss of engine power, known as "rollback," due to some defect in the aircraft's fuel control system. The defendants, on the other hand, advanced the theory of pilot error, suggesting that the plane had stalled during the abrupt avoidance maneuver.

At trial, the only seriously disputed question was whether pilot error or equipment malfunction had caused the crash. Both sides relied primarily on expert testimony. One piece of evidence presented by the defense was an investigative report prepared by Lieutenant Commander William Morgan on order of the training squadron's commanding officer and pursuant to authority granted in the Manual of the Judge Advocate General. This "JAG Report," completed during the six weeks following the accident, was organized into sections labeled "finding of fact," "opinions," and "recommendations," and was supported by some 60 attachments. The "finding of fact" included statements like the following:

"13. At approximately 1020, while turning crosswind without proper interval, 3E955 crashed, immediately caught fire and burned."

* * *

"27. At the time of impact, the engine of 3E955 was operating but was operating at reduced power."

Among his "opinions" Lieutenant Commander Morgan stated, in paragraph 5, that due to the deaths of the two pilots and the destruction of the aircraft "it is almost impossible to determine exactly what happened to Navy 3E955 from the time it left the runway on its last touch and go until it impacted the ground." He nonetheless continued with a detailed reconstruction of a possible set of events, based on pilot error, that could have caused the accident. The next two paragraphs stated a caveat and a conclusion:

"6. Although the above sequence of events is the most likely to have occurred, it does not change the possibility that a 'rollback' did occur.

7. The most probable cause of the accident was the pilots [*sic*] failure to maintain proper interval."

The trial judge initially determined, at a pretrial conference, that the JAG Report was sufficiently trustworthy to be admissible, but that it "would be admissible only on its factual findings and would not be admissible insofar as any opinions or conclusions are concerned." The day before trial, however, the court reversed itself and ruled, over the plaintiffs' objection, that certain of the conclusions would be admitted. Accordingly, the court admitted most of the report's "opinions," including the first sentence of paragraph 5 about the impossibility of determining exactly what happened, and paragraph 7, which opined about failure to maintain proper interval as "[t]he most probable cause of the accident."* * *

Following a 2-week trial, the jury returned a verdict for petitioners. A panel of the Eleventh Circuit reversed and remanded for a new trial. Considering itself bound by the Fifth Circuit precedent of *Smith v. Ithaca Corp.*, 612 F.2d 215 (1980), the panel agreed with Rainey's argument that Federal Rule of Evidence 803(8)(C), which excepts investigatory reports from the hearsay rule, did not encompass evaluative conclusions or opinions. Therefore, it held, the "conclusions" contained in the JAG Report should have been excluded. One member of the panel, concurring specially, urged however that the Circuit reconsider its interpretation of Rule 803(8)(C), suggesting that "*Smith* is an anomaly among the circuits."

* * *

II

* * *

Controversy over what "public records and reports" are made not excludable by Rule 803(8)(C) has divided the federal courts from the beginning. In the present litigation, the Court of Appeals followed the "narrow" interpretation of *Smith v. Ithaca Corp.*, which held that the term "factual findings" did not encompass "opinions" or "conclusions." Courts of Appeals other than those of the Fifth and Eleventh Circuits, however, have generally adopted a broader interpretation. For example, the Court of Appeals for the Sixth Circuit, in *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 557-558 (1978), held that "factual findings admissible under Rule 803(8)(C) may be those which are made by the preparer of the report from disputed evidence * * * ." The other Courts of Appeals that have squarely confronted the issue have also adopted the broader interpretation. We agree and hold that factually based conclusions or opinions are not on that account excluded from the scope of Rule 803(8)(C).

Because the Federal Rules of Evidence are a legislative enactment, we turn to the "traditional tools of statutory construction," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987), in order to construe their provisions. We begin with the language of the Rule itself. Proponents of the narrow view have generally relied heavily on a perceived dichotomy between "fact" and "opinion" in arguing for the limited scope of the phrase "factual findings." *Smith v. Ithaca Corp.* contrasted the term "factual findings" in Rule 803(8)(C) with the language of Rule 803(6) (records of regularly conducted activity), which

expressly refers to "opinions" and "diagnoses." "Factual findings," the court opined, must be something other than opinions.

For several reasons, we do not agree. In the first place, it is not apparent that the term "factual findings" should be read to mean simply "facts" (as opposed to "opinions" or "conclusions"). A common definition of "finding of fact" is, for example, "[a] conclusion by way of reasonable inference from the evidence." *Black's Law Dictionary* 569 (5th ed. 1979). To say the least, the language of the Rule does not compel us to reject the interpretation that "factual findings" includes conclusions or opinions that flow from a factual investigation. Second, we note that, contrary to what is often assumed, the language of the Rule does not state that "factual findings" are admissible, but that "reports * * * setting forth * * * factual findings" (emphasis added) are admissible. On this reading, the language of the Rule does not create a distinction between "fact" and "opinion" contained in such reports.

Turning next to the legislative history of Rule 803(8)(C), we find no clear answer to the question of how the Rule's language should be interpreted. Indeed, in this litigation the legislative history may well be at the origin of the dispute. Rather than the more usual situation where a court must attempt to glean meaning from ambiguous comments of legislators who did not focus directly on the problem at hand, here the Committees in both Houses of Congress clearly recognized and expressed their opinions on the precise question at issue. Unfortunately, however, they took diametrically opposite positions. Moreover, the two Houses made no effort to reconcile their views, either through changes in the Rule's language or through a statement in the Report of the Conference Committee.

The House Judiciary Committee, which dealt first with the proposed rules after they had been transmitted to Congress by this Court, included in its Report but one brief paragraph on Rule 803(8):

The Committee approved Rule 803(8) without substantive change from the form in which it was submitted by the Court. The Committee intends that the phrase 'factual findings' be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule." H.R. Rep. No. 93-650, p. 14 (1973).

The Senate Committee responded at somewhat greater length, but equally emphatically:

"The House Judiciary Committee report contained a statement of intent that the phrase factual findings in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule. The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection * * * . We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, 'the sources of information or other circumstances indicate lack of trustworthiness.'"

* * *

The Advisory Committee's comments are notable, first, in that they contain no mention of any dichotomy between statements of "fact" and "opinions" or "conclusions." What was on the Committee's mind was simply whether what it called "evaluative reports" should be admissible. * * * Nowhere in its comments is there the slightest indication that it even considered the solution of admitting only "factual" statements from such reports. Rather, the Committee referred throughout to "reports," without any such differentiation regarding the statements they contained. What the Committee referred to in the Rule's language as "reports * * * setting forth * * * factual findings" is surely nothing more or less than what in its commentary it called "evaluative reports." Its solution as to their admissibility is clearly stated in the final paragraph of its report on this Rule. That solution consists of two principles: First, "the rule * * * assumes admissibility in the first instance * * * ." Second, it provides "ample provision for escape if sufficient negative factors are present."

That "provision for escape" is contained in the final clause of the Rule: evaluative reports are admissible "unless the sources of information or other circumstances indicate lack of trustworthiness." This trustworthiness inquiry — and not an arbitrary distinction between "fact" and "opinion" — was the Committee's primary safeguard against the admission of unreliable evidence, and it is important to note that it applies to all elements of the report. Thus, a trial judge has the discretion, and indeed the obligation, to exclude an entire report or portions thereof — whether narrow "factual" statements or broader "conclusions" — that she determines to be untrustworthy.¹

Moreover, safeguards built into other portions of the Federal Rules, such as those dealing with relevance and prejudice, provide the court with additional means of scrutinizing and, where appropriate, excluding evaluative reports or portions of them. And of course it goes without saying that the admission of a report containing "conclusions" is subject to the ultimate safeguard — the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions.

Our conclusion that neither the language of the Rule nor the intent of its framers calls for a distinction between "fact" and "opinion" is strengthened by the analytical difficulty of drawing such a line. It has frequently been remarked that the distinction between statements of fact and opinion is, at

¹ The Advisory Committee proposed a nonexclusive list of four factors it thought would be helpful in passing on this question: (1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation (citing *Palmer v. Hoffman*, 318 U.S. 109 (1943)). Advisory Committee's Notes on Fed. Rule Evid. 803(8), 28 U.S.C. App., p. 725; see Note, *The Trustworthiness of Government Evaluative Reports under Federal Rule of Evidence 803(8)(C)*, 96 Harv. L. Rev. 492 (1982).

In a case similar in many respects to these, the trial court applied the trustworthiness requirement to hold inadmissible a JAG Report on the causes of a Navy airplane accident; it found the report untrustworthy because it "was prepared by an inexperienced investigator in a highly complex field of investigation." *Fraleigh v. Rockwell Int'l Corp.*, 470 F. Supp. 1264, 1267 (SD Ohio 1979). In the present litigation, the District Court found the JAG Report to be trustworthy. As no party has challenged that finding, we have no occasion to express an opinion on it.

best, one of degree. * * * E. Cleary, McCormick on Evidence 27 (3d ed. 1984) ("There is no conceivable statement however specific, detailed and 'factual,' that is not in some measure the product of inference and reflection as well as observation and memory"); R. Lempert & S. Saltzburg, *A Modern Approach to Evidence* 449 (2d ed. 1982) ("A factual finding, unless it is a simple report of something observed, is an opinion as to what more basic facts imply"). Thus, the traditional requirement that lay witnesses give statements of fact rather than opinion may be considered, "[l]ike the hearsay and original documents rules * * * a 'best evidence' rule." McCormick, *Opinion Evidence in Iowa*, 19 Drake L. Rev. 245, 246 (1970).

In the present action, the trial court had no difficulty in admitting as a factual finding the statement in the JAG Report that "[a]t the time of impact, the engine of 3E955 was operating but was operating at reduced power." Surely this "factual finding" could also be characterized as an opinion, which the investigator presumably arrived at on the basis of clues contained in the airplane wreckage. Rather than requiring that we draw some inevitably arbitrary line between the various shades of fact/opinion that invariably will be present in investigatory reports, we believe the Rule instructs us — as its plain language states — to admit "reports * * * setting forth * * * factual findings." The Rule's limitations and safeguards lie elsewhere: First, the requirement that reports contain factual findings bars the admission of statements not based on factual investigation. Second, the trustworthiness provision requires the court to make a determination as to whether the report, or any portion thereof, is sufficiently trustworthy to be admitted.

A broad approach to admissibility under Rule 803(8)(C), as we have outlined it, is also consistent with the Federal Rules' general approach of relaxing the traditional barriers to "opinion" testimony. Rules 702-705 permit experts to testify in the form of an opinion, and without any exclusion of opinions on "ultimate issues." And Rule 701 permits even a lay witness to testify in the form of opinions or inferences drawn from her observations when testimony in that form will be helpful to the trier of fact. We see no reason to strain to reach an interpretation of Rule 803(8)(C) that is contrary to the liberal thrust of the Federal Rules. We hold, therefore, that portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report. As the trial judge in this action determined that certain of the JAG Report's conclusions were trustworthy, he rightly allowed them to be admitted into evidence. We therefore reverse the judgment of the Court of Appeals in respect of the Rule 803(8)(C) issue.

* * *

IV

We hold that statements in the form of opinions or conclusions are not by that fact excluded from the scope of Federal Rule of Evidence 803(8)(C). We

therefore reverse the judgment of the Court of Appeals in that respect. * * *

The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

NOTES

1. Why is there a special exception for public records when there is already an exception for records of regularly conducted activity?

See Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (9th ed. 2006):

There are two reasons for creating a special hearsay exception for public records. First, it is assumed that public officials perform their duties properly and that, given their multiple duties, it is unlikely that they will be able to remember the details of individual transactions independently of their records. Second, the exception often eliminates the need for public officials to testify or prepare for a trial, freeing them to spend more time performing their public duties. These twin rationales account for the major differences in admissibility requirements between Rules 803(8) and 803(6): (1) public records may be reliable and admissible even though they do not satisfy the regularity and contemporaneity requirements of business records, see, e.g., *United States v. Versaint*, 849 F.2d 827 (3d Cir. 1988) (a public record prepared one month after the event described in the report was admissible, so long as no affirmative showing was made that the report was untrustworthy; Rule 803(8) does not require that a report be made at or near the time of the event it is describing); and (2) public records may be admitted without the testimony or even the affidavit of a foundation witness. See, e.g., *United States v. Loyola-Dominguez*, 125 F.3d 1315 (9th Cir. 1997) (Rule 803(8) does not require a foundation by a qualified witness).

2. What is the scope of the exclusion for law enforcement reports in criminal cases?

In the famous case of *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977), a defendant was convicted of possession of heroin with intent to distribute and of conspiracy. On appeal, these convictions were reversed because the Court was convinced that the trial judge erred in allowing the government to introduce two documentary exhibits purporting to be the official report and the accompanying worksheet of the United States Customs Service chemist who analyzed a white powdery substance seized from appellant's codefendant. The Court held that the report was a record of matters observed by law enforcement personnel, excluded under the language of Rule 803(8)(B), and also that it was a law enforcement report excluded under Rule 803(8)(C).

Most courts have read the Rule 803(8)(B) and (C) exclusionary language in a far more limited fashion than that provided by the court in *Oates*. Under

the predominant view, laboratory reports and the like are admissible, because the rule is designed to exclude a different type of report, i.e., police-generated reports that are prepared under adversarial circumstances, which are conducive to manipulation by authorities bent on convicting a criminal defendant. *See, e.g., United States v. Enterline*, 894 F.2d 287 (8th Cir. 1990) (“It is clear that the exclusion concerns matters observed by the police at the scene of the crime. Such observations are potentially unreliable since they are made in an adversary setting, and are often subjective evaluations of whether a crime was committed.”) Where the risk of manipulation and untrustworthiness is minimal — such as where the report contains unambiguous factual matter made under non-adversarial circumstances — courts have held that the report should be admitted despite the apparently absolute language of Rule 803(8)(B). *United States v. Dancy*, 861 F.2d 77 (5th Cir. 1988) (fingerprint card in penitentiary packet, offered to show that defendant was a convicted felon, was admissible under Rule 803(8)(B) because it was prepared outside the context of a criminal investigation; the Rule excludes only records that report the observation or investigation of crimes). Even the Second Circuit, in which *Oates* was decided, has held that a routine tabulation of serial numbers prepared by law enforcement personnel was admissible against a criminal defendant. *United States v. Grady*, 544 F.2d 598 (2d Cir. 1976) (admitting reports on firearms serial numbers on the ground that they were records of routine factual matters prepared in a nonadversarial setting).

While a report that is ministerial in nature and made without contemplation of specific litigation is ordinarily held admissible, those law enforcement reports that are adversarial and evaluative in nature are ordinarily excluded, consistent with the exclusionary intent of Rule 803(8)(B) and (C). *United States v. Pena-Gutierrez*, 222 F.3d 1080 (9th Cir. 2000) (trial court erred in admitting into evidence “the on-the-scene investigative report of a crime by an INS official whose perceptions might be clouded and untrustworthy”); *United States v. Bohrer*, 807 F.2d 159 (10th Cir. 1986) (I.R.S. contact card excluded under Rule 803(8) because prepared under adversarial circumstances and because information included therein is not ministerial in nature, thus subject to manipulation).

It should also be noted that some public reports can be offered in a criminal case because they are reports of “matters observed” by public officials *other than law enforcement personnel*. Neither the terms nor the concerns of the exclusionary language will apply to reports prepared by officials without law enforcement responsibilities. The problem with law enforcement reports is that police officers are in the competitive enterprise of ferreting out crime; in the heat of battle, a law enforcement officer might shade or falsify a report in such a way as to prejudice a particular criminal defendant. But this concern does not arise with officials outside law enforcement; it cannot be presumed that *every* government official has an adversary motive against a criminal defendant. So for example, autopsy reports prepared by public medical personnel have been held to be admissible against criminal defendants under Rule 803(8)(B) because these medical personnel have no law enforcement objectives. *See, e.g., United States v. Rosa*, 11 F.3d 315 (2d Cir. 1993), holding that a medical examiner’s autopsy report was properly admitted under Rule

803(8)(B). The Court in *Rosa* reasoned that a medical examiner is not “law enforcement personnel” as that term is used under the Rule:

Unlike Customs, which has responsibility for enforcement of, inter alia, customs and narcotics laws, the Medical Examiner’s Office is required simply to investigate unnatural deaths; it refers a death bearing any indicium of criminality to the appropriate district attorney and has no responsibility for enforcing any laws.* * * Further, though law enforcement activities are typically accusatory and adversarial in nature, a medical examiner’s reported observations as to a body’s condition are normally made as part of an independent effort to determine a cause of death.”

The admissibility of law enforcement reports in criminal cases must now be assessed in light of the Supreme Court’s decision in *Crawford v. Washington*, 541 U.S. 36 (2004). The Court in *Crawford* held that the admission of “testimonial” hearsay violates the defendant’s right to confrontation unless the defendant has been able to cross-examine the declarant. While the Court did not explicitly define the term “testimonial,” it is clear that the term encompasses hearsay prepared by a law enforcement officer in anticipation of its use against a particular criminal defendant. It is unlikely, however, that the term “testimonial” applies to law enforcement reports that amount to simple tabulation of routine information. Consequently, the line drawn between admissibility and inadmissible reports under Rule 803(8) — as discussed in this Note — is likely to be the dividing line used for admissibility and inadmissibility under the Confrontation Clause after *Crawford*. See, e.g., *United States v. Valdez-Matos*, 443 F.3d 910 (5th Cir. 2006) (warrant of deportation held admissible under Rule 803(8), and not testimonial; “the official preparing the warrant had no motivation other than mechanically register an unambiguous factual matter.”)

3. What is the relationship between Rule 803(6) and Rule 803(8)? If a report is inadmissible under Rule 803(8), can it be admitted as a business record?

In criminal cases, the argument has sometimes been made that a report that is inadmissible due to the exclusionary language of Rule 803(8)(B) and (C) can nonetheless be admitted as a record of regularly conducted activity under Rule 803(6). However, if the exclusionary language is properly applied so as to exclude only those law enforcement reports made under adversarial circumstances — which is the position taken by most courts, as discussed above — then there is no conflict between the rules. This is because records that are prepared in anticipation of litigation are excluded under the trustworthiness criterion of Rule 803(6); and those are, in effect, the only records that are excluded under the prevailing view of Rule 803(8). *United States v. Bohrer*, 807 F.2d 159 (10th Cir. 1986) (I.R.S. contact card excluded under Rule 803(8) because prepared under adversarial circumstances, is also excluded under Rule 803(6) because adversarial circumstances of preparation show lack of trustworthiness). Accordingly, under the predominant approach to Rule 803(8), the issue of whether a law enforcement report excluded under Rule 803(8) can nonetheless be admitted under Rule 803(6) does not arise. Such

a report is by definition untrustworthy and inadmissible under both rules. *United States v. Brown*, 9 F.3d 907 (11th Cir. 1993) (property receipt properly held admissible under Rule 803(6); while Rule 803(6) cannot be used to evade the exclusionary language of Rule 803(8), a property receipt is not the type of law enforcement report that is excluded under Rule 803(8): "The police custodian in the instant case had no incentive to do anything other than mechanically record the relevant information on the property receipt. We believe that this is the type of reliable public record envisioned by the drafters of Rule 803(8).").

4. What limitations exist on the admissibility of investigative reports in civil cases?

See Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (9th ed. 2006):

After *Beech Aircraft v. Rainey*, a court may not exclude an opinion in an investigative report merely because it is an opinion. Yet even after *Rainey*, there are several limitations on the admissibility of opinions, as well as factual findings, contained in investigative reports. Most of these limitations are imposed by the courts pursuant to the trustworthiness clause of Rule 803(8). See, e.g., *Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 299 (11th Cir. 1989) (opinions in an OSHA investigator's report concerning a construction site accident could not be automatically excluded; however, opinions still must be trustworthy, and the Trial Court can take into account the expertise of the reporting official, whether a hearing was held, whether the conclusion was a legal conclusion, and other pertinent factors to determine whether the opinion is trustworthy).

The most important limitations are:

(1) An opinion, to be admissible, must be made by a qualified person using reliable methods, and must be based upon sufficient information and investigation. As applied to opinions of public officials, the standard of trustworthiness in Rule 803(8) is parallel to those contained in Federal Rules 702-704, which regulate the opinions of experts testifying at trial. The reason for imposing these requirements is that the opinion of a government investigator is likely to be treated by the factfinder as tantamount to an expert opinion. The proponent should not be better off by introducing the report instead of live testimony from an expert. If the government official would not be able to satisfy the standards for expert testimony at trial, there is little reason to admit the official's hearsay statement. See, e.g., *Jenkins v. Whittaker Corp.*, 785 F.2d 720 (9th Cir. 1986) (conclusions in a report respecting the cause and responsibility for explosion of an atomic simulator were properly excluded where the person who made the report had no competence or experience with atomic simulators and did very little investigation); *Matthews v. Ashland Chem., Inc.*, 770 F.2d 1303 (5th Cir. 1985) (conclusions in a report respecting the cause of a fire were properly excluded due to insufficient investigation and the public official's lack of qualifications). Compare *Simmons v. Chicago & N.W.*

Transp. Co., 993 F.2d 1326 (8th Cir. 1993) (state trooper's accident investigation report was admissible in a FELA action, because the trooper was experienced and skilled, and the report was prepared after an investigation shortly after the accident so the underlying information was fresh).

(2) For similar reasons, opinions that are nothing more than legal conclusions are ordinarily excluded. The Court in *Rainey* expressed no view on the admissibility of legal conclusions contained in public reports. However, most Courts have excluded such conclusions, as they would with similar in-court testimony, on the ground that legal conclusions are unhelpful to the jury and usurp the role of the Judge in instructing the jury on the law. See, e.g., *Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 299 (11th Cir. 1989): "Rule 803(8)(C) does not provide for the admissibility of the legal conclusions contained within an otherwise admissible public report. * * * Legal conclusions are inadmissible because the jury would have no way of knowing whether the preparer of the report was cognizant of the requirements underlying the legal conclusion and, if not, whether the preparer might have a higher or lower standard than the law requires."

(3) If the report is not a final report, but is merely preliminary or tentative, the report is not admissible, because it is not considered to contain "factual findings" as that term is used in the Rule. In other words, "factual findings" are final statements made at the end of the investigative process. Otherwise, an entire agency determination process would be piggy-backed into a trial. See, e.g., *Smith v. Isuzu Motors, Ltd.*, 137 F.3d 859 (5th Cir. 1998) (staff report not admissible under Rule 803(8)(B) because the agency declined to accept the position set forth in the staff report; the Court notes that its conclusion was "in accord with other circuits that have held that interim agency reports or preliminary memoranda do not satisfy Rule 803(8)(C)'s requirements"); *Smith v. M.I.T.*, 877 F.2d 1106 (1st Cir. 1989) (internal memoranda of EEOC investigators are not factual findings within the meaning of the rule); *City of New York v. Pullman Inc.*, 662 F.2d 910 (2d Cir. 1981) (where a report "did not embody the findings of an agency, but the tentative results of an incomplete staff investigation," it was not admissible under Rule 803(8)(C)). Compare *Vining v. Enterprise Fin. Group, Inc.*, 148 F.3d 1206 (10th Cir. 1998) (report prepared by staff of the state insurance department concerning the defendant's business practices was properly admitted under Rule 803(8)(C); the report was sufficiently final because it was attached to and incorporated by reference into an order subsequently issued by the Insurance Commissioner, who was head of the agency).

(4) If the report has been revoked or superseded by the agency that prepared it, it no longer contains factual findings within the meaning of the Rule. See, e.g., *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261 (7th Cir. 1988) (FAA release concerning ice buildup

on certain planes was not admissible where release had been cancelled ten years earlier).

(5) Exclusion of the report is possible if the report appears to have been made under a suspect motivation. For example, if the public official or body who prepared the report has an institutional or political bias, and the final report is consistent with that bias, the report is subject to exclusion for untrustworthiness. *See, e.g., New Jersey Turnpike Auth. v. PPG Indus.*, 197 F.3d 96 (3d Cir. 1999) (directives issued by the State Department of Environmental Protection, notifying the defendant that it was responsible for hazardous substances that needed to be removed, were not admissible under Rule 803(8)(C); the Directives were in the nature of notice pleading, and thus were prepared in anticipation of litigation); *Pearce v. E.F. Hutton Group, Inc.*, 653 F. Supp. 810 (D.D.C. 1987) (the plaintiff in a libel suit could not rely on a draft report of a congressional subcommittee in opposing a summary judgment motion; the Court commented that it was dealing “with documents produced by the Congress — a politically motivated, partisan body”; the report was not based upon an adjudicatory proceeding and was not drafted to resolve a factual dispute; the report lacked trustworthiness because of the political nature of the investigating body). Compare *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613 (8th Cir. 1983) (no error to admit reports of epidemiological studies conducted by the Centers for Disease Control and various state agencies that analyzed the statistical relationship between tampon use and Toxic Shock Syndrome; the Court relied upon “the timeliness of the investigations, the special skills of the agencies conducting them, and their lack of any motive for conducting the studies other than to inform the public fairly and adequately.”).

(6) Factual findings and conclusions made after a hearing are, for good reason, considered more trustworthy than findings made without a hearing. While the lack of a hearing is not dispositive, it does cut against admissibility. *See, e.g., Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 299 (11th Cir. 1989) (on remand, the District Court “might consider how the fact that no hearing was held in making the report affects its trustworthiness”); *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816 (10th Cir. 1981) (Civil Rights Commission’s findings on discrimination were properly excluded where the *ex parte* investigation lacked formal procedures such as the opportunity to cross-examine witnesses). And if the report is based on *ex parte* submissions to which an adversary has no opportunity to respond, such one-sidedness is a strong indication that the report is untrustworthy. *See, e.g., Anderson v. City of New York*, 657 F. Supp. 1571 (S.D.N.Y. 1987) (report by a Subcommittee of the House of Representatives that summarized testimony concerning police misconduct in New York City was inadmissible; only one side’s evidence was heard, the Subcommittee lacked personal knowledge of the events that were the subject of testimony, and the witnesses were self-interested; the Court observed that “hearings and subsequent

reports are frequently marred by political expediency and grandstanding”).

(7) The timeliness of an investigation is a factor in any inquiry into trustworthiness. If the time between the event and the investigation is so long as to render the underlying information stale or untrustworthy, the public report is subject to exclusion. *See, e.g., O'Dell v. Hercules, Inc.*, 904 F.2d 1194 (8th Cir. 1990) (EPA investigative report on a chemical manufacturing plant, implicating the defendant, was held inadmissible because the investigation was not conducted until ten years after the defendant had terminated its operations at the plant, and others had operated the plant in the interim).

(8) Even if an investigative report is otherwise admissible under *Rainey*, it may be excluded by a special statute. For instance, probable cause determinations and other conclusions by the National Transportation Safety Board are excluded from all actions for damages pursuant to 49 U.S.C. § 1441(e). *See, e.g., Travelers Ins. Co. v. Riggs*, 671 F.2d 810 (4th Cir. 1982) (conclusions in a National Transportation Safety Board report could not be admitted because 49 U.S.C. § 1441(e) explicitly prohibits the use of conclusions in such a report in an action for damages).

5. How should a court deal with an official report that relies on information from sources outside the government?

A public official usually does not have personal knowledge of all of the facts reported in an investigative report. An official who investigates the cause of a car accident may determine the angle of impact through her own personal investigation; but she is not likely to have personal knowledge about how the cars looked and sounded at the time of the accident. Often the official must rely on information from bystanders and others with personal knowledge pertinent to the investigation. The question is whether this reliance renders the official's factual findings and opinions untrustworthy.

Where the official who prepared the report receives his or her information from others, a hearsay-within-hearsay problem exists. As applied to second-hand information contained in public reports, Rule 805 would seem to require that the statements by private persons to public officers must ordinarily be found independently reliable and admissible. So, for example, in *Bemis v. Edwards*, 45 F.3d 1369 (9th Cir. 1995), the Court affirmed a judgment for police officers alleged to have used excessive force, holding that a 911 tape describing the beating was properly excluded because the citizen-caller's statement was not independently admissible or verifiable. The Court recognized that hearsay statements on a 911 tape can be admitted into evidence as part of a public record. But it noted that citizen-callers are not under any duty to report correctly (unlike public officials who have such a duty) and that the official who made the record could not verify the accuracy of the citizen's description of the event. In the absence of a duty to report or some means of verification that the caller's statement was true, the Court concluded that “a recorded statement by a citizen must satisfy a separate hearsay exception.”

Yet it can be fairly stated that most courts have taken a flexible attitude toward the multiple hearsay problem under Rule 803(8), given the strong presumption that public reports are reliable. Thus, if the court finds that the person with firsthand knowledge had no reason under the circumstances to misrepresent information to the public official, the report will probably be found admissible — even though there was, strictly speaking, no duty to report to the public agency or means of verification, and even though no specific hearsay exception or non-hearsay use is applicable.

For example, in *Ellis v. International Playtex Inc.*, 745 F.2d 292 (4th Cir. 1984), a report by the Centers for Disease Control and Prevention concerning toxic shock syndrome was held properly admitted, even though it was based upon information compiled from doctors throughout the country concerning the symptoms suffered by their patients. The court recognized that the reporting doctors had no absolute duty to report reliably to the Centers for Disease Control, that the doctors' reports were not verified for accuracy by the CDC, and that the doctors' statements were not subject to a specific hearsay exception. Nonetheless the Court found that under the circumstances, there was no conceivable motive for the reporting doctors to misrepresent information or to lie to the CDC. Therefore the defendant could not overcome the strong presumption of trustworthiness attached to the public report. Compare *United States v. Lanese*, 890 F.2d 1284 (2d Cir. 1989) (an exculpatory statement by a biased declarant, recorded in a police report, was held not admissible under Rule 803(8) because the source of the underlying information indicated lack of trustworthiness).

A flexible approach to secondhand information makes good sense, because a public report is treated at trial as tantamount to an expert's conclusion, and experts at trial are permitted under Rule 703 to rely on hearsay if that reliance is reasonable. As the court stated in *Moss v. Ole South Real Estate Inc.*, 933 F.2d 1300, 1310 (5th Cir. 1991):

[Many] government reports, as with many expert witnesses, have to rely in part on hearsay evidence, and the reports are not generally excluded for this reason. Under Rule 703, experts are allowed to rely on evidence inadmissible in court in reaching their conclusions. There is no reason that government officials preparing reports do not have the same latitude.

In contrast, where a report is based on statements from persons who are biased or politically motivated, it will ordinarily be excluded because of the unreliable sources on which the report is based. Thus, in *Faries v. Atlas Truck Body Mfg. Co.*, 797 F.2d 619 (8th Cir. 1986), the court held that an accident report prepared by a police officer was inadmissible under Rule 803(8). The report was untrustworthy because the officer prepared his report after talking to only one of the drivers.

6. Note that the Federal Rules provide a hearsay exception for the absence of a public record.

Rule 803(10) describes the evidence covered by this exception:

10) **Absence of public record or entry.** — To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or

data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

This exception is used to prove that a public record was never made. For example, assume the defendant is charged with possessing a firearm without a license. His defense is that he was issued a license for the firearm — though he can't produce it right now because his dog ate it. To prove that no license was ever issued, the government can offer the affidavit of a public official who checked the records of firearm licenses issued, and found no record of any license issued to the defendant. The public official need not testify — an affidavit is sufficient if it shows that a diligent search for the record was conducted.

The key to satisfying Rule 803(10) is evidence that a diligent search failed to disclose the existence of the absent record. The diligence requirement insures reliability, and reliability is the basis for the hearsay exception. If there is a substantial doubt as to the diligence of the search for the record, evidence of the absence of that record is subject to exclusion. *United States v. Yakubov*, 712 F.2d 20, 24 (2d Cir. 1983) (where defendant's name is misspelled in the certificate, the certificate on its face shows that the search of the records was casual and unlikely to uncover the relevant record, and it was therefore inadmissible). If proof is by way of affidavit from a public official who checked the records, a conclusory statement that a diligent search was conducted tells the court little about the breadth and reliability of the search. At a minimum, the affidavit should describe factually the method of the search, and the safeguards undertaken to prevent an error. It is not necessary that a Rule 803(10) certificate be prepared in any particular form or specifically employ the phrase "diligent search failed to disclose the record." It is necessary, however, that the relevant circumstances are set forth in the certificate and reflect that a diligent search was made. *United States v. Wilson*, 732 F.2d 404, 414 (5th Cir. 1984) (although preferable, the affidavit by the public official need not contain the specific statement that a "diligent search failed to disclose the record:" "It suffices that the affidavit, and all relevant circumstances, reflect an adequate search.").

PROBLEM 13-2

Plaintiff sues the defendant's estate for personal injury as a result of a traffic accident. Plaintiff says the decedent, who was killed in the collision, ran a stop sign. There were no witnesses to the accident.

The only evidence the defendant has that the plaintiff was at fault is a statement made by the plaintiff while waiting in the hospital emergency room. In front of the admitting nurse and a police officer the plaintiff said, "I think my back is broke and I may be blind. If only I'd stopped at the stop sign." This statement appears in both the nurse's hospital notes and the police report.

1. May the nurse testify about the plaintiff's statement?
2. May the officer testify about the plaintiff's statement?
3. Assume the nurse died. May the nurse's hospital notes be admitted?
4. Assume the officer is on vacation. May the police report be admitted?

H. LEARNED TREATISE

[1] Federal Rule of Evidence 803(18)

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(18) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

* * *

[2] Illustration

Plaintiff sues defendant for back injuries as a result of a slip and fall. Plaintiff's physician has already testified, and is now circling the globe on a golf tour. The evidence has shown that the plaintiff did not feel any back pain the day of the fall, but could not get out of bed the next morning. Plaintiff's expert was not asked whether the delay in the pain was significant. Defendant's expert is on the stand.

Defendant: Doctor, is it possible for someone to sustain the type of injuries the plaintiff complains of from a slip and fall and not feel any pain until the next morning?

Doctor: Absolutely not.

The plaintiff cross-examines.

Plaintiff: Doctor, are you familiar with the textbook *Hecher on Diagnosis: Treatment of Back Injuries*?

Doctor: No, I don't think so.

Plaintiff: Why don't you read page 72? (The doctor reads the page.) Now doctor, doesn't the book indicate that it is not uncommon for pain to develop up to 72 hours after an injury?

Defendant: Objection! What the book says is obviously hearsay, and the doctor doesn't recognize the book as a learned treatise.

Plaintiff: Your Honor, my expert has said this is the primary book in the field. I should be allowed to cross-examine this witness with it, and offer the book as substantive proof that delay is not uncommon.

The court: _____

[3] Reliable Authority

COSTANTINO v. HERZOG 203 F.3d 164 (2d Cir. 2000)

MCLAUGHLIN, CIRCUIT JUDGE:

Dr. David Herzog was the obstetrician who delivered Amanda Costantino. During the delivery, Amanda's shoulder got trapped behind her mother's pubic bone, a condition known as "shoulder dystocia." While attempting to remedy the condition, Dr. Herzog performed: (1) the McRoberts maneuver: pulling Mrs. Costantino's legs toward her head and applying pressure to the area above her pubic bone; (2) the Woods corkscrew: reaching into the womb and rotating baby Amanda to release her trapped shoulder; and (3) the Posterior Arm Sweep: delivering Amanda's free posterior arm to create more space. Ultimately, Dr. Herzog delivered Amanda, but she was born with "Erb's Palsy," an impairment to the nerves running to the arm.

The Costantinos filed a diversity action against Dr. Herzog in the United States District Court for the Eastern District of New York (GLEESON, J.) alleging that by pulling and rotating Amanda's head during the delivery, he had caused her Erb's Palsy. They claimed that Dr. Herzog had deviated from accepted standards of obstetrical practice, and had therefore committed malpractice under governing New York law. The defense denied any malpractice, asserting that Amanda's Erb's Palsy was caused by the normal forces of labor.

The case was tried to a jury. Plaintiffs' first witness was the defendant, Dr. Herzog. Counsel questioned him on an excerpt from a medical treatise edited by Steven G. Gabbe, entitled *Obstetrics*, that stated: "Once a vaginal delivery has begun, the obstetrician must resist the temptation to rotate the head to a transverse axis." Dr. Herzog acknowledged attempting to rotate Amanda's head, but disagreed with the statement read from the Gabbe treatise. Plaintiffs' medical expert was Dr. Bernard Nathanson. Among his qualifications, Dr. Nathanson testified that he was a fellow of the American College of Obstetricians and Gynecologists ("ACOG"). ACOG, according to Dr. Nathanson, "is an organization of thirty thousand obstetricians and gynecologists," that "sets up courses for doctors who are in practice so that they will continue to be current with ongoing research." Dr. Nathanson added that ACOG "publishes a great deal of material which serve[s] to contribute to setting a standard of care for obstetricians and gynecologists."

Relying in part on various journals published by ACOG, as well as on the Gabbe treatise, Dr. Nathanson proceeded to testify that it was a departure from the standard of medical care to engage in "any manipulation of the head" during a shoulder dystocia delivery because it does nothing to relieve the trapped shoulder and greatly increases the risk of causing Erb's Palsy.

The defense sought to rebut this theory in several ways. Primarily, the defense relied on another learned treatise — Williams' Obstetrics — which stated that "downward traction * * * to the fetal head" was among "the most popular techniques" used to remedy shoulder dystocia. Dr. Nathanson conceded that the Williams treatise was authoritative and that applying traction to the fetal head was indeed the "most popular" treatment technique for shoulder dystocia. He continued, nevertheless, to insist that use of that technique constituted malpractice. The defense also sought to justify Dr. Herzog's management of Amanda's delivery by introducing a 15-minute videotape from ACOG's audiovisual library, entitled "Shoulder Dystocia." The tape was, according to the defense, "put out by [ACOG] to educate physicians" and portrayed the various techniques recommended to remedy shoulder dystocia.

Both the parties and JUDGE GLEESON recognized that the ACOG video was hearsay under Federal Rule of Evidence 801. The defense nevertheless sought to introduce it pursuant to the "learned treatise" exception to the hearsay rule set forth in Rule 803(18). Plaintiffs objected, arguing that Rule 803(18) enumerates only "published treatises, periodicals, or pamphlets" as learned treatises, and therefore could not encompass videotapes. Plaintiffs also argued that no foundation had been laid for the video.

After an in camera review of the videotape, JUDGE GLEESON ruled it admissible. With respect to whether a video could qualify as a learned treatise under Rule 803(18), JUDGE GLEESON reasoned: "I think * * * focusing on the distinction between * * * something in the form of a periodical or a book, as opposed [to] a videotape is just overly artificial."

As to the foundation, JUDGE GLEESON found, based on his in camera review, that the ACOG video "was a dissemination to the doctors in the relevant medical community of how they should go about dealing with this problem [of shoulder dystocia]." He also found that it had been "well established" through trial testimony that ACOG was "the source of authoritative information regarding the practices to be used by obstetricians in these circumstances." Included in the trial testimony regarding ACOG and the videotape, were Dr. Nathanson's concessions that he had: (1) viewed the videotape at a staff conference some years ago; and (2) testified in a prior action that he generally accepted "the standards promulgated by ACOG" within the field of obstetrics as "authoritative."

The ACOG video was played twice during trial. It was played in its entirety during the cross-examination of plaintiffs' expert, Dr. Nathanson, and portions were replayed during the direct examination of defendants' own expert Dr. James Howard.

In graphic detail the video portrays actual deliveries, complicated by shoulder dystocia, and demonstrates the recommended obstetrical responses to it. These portrayals are accompanied by a narrative given by a Dr. Young,

who the video reveals is from Dartmouth College's Hitchcock Medical Center. The various procedures recommended, Dr. Young explains, were chosen "following a careful review of the available literature." Several times during its 15 minute duration, the video cautions that "unfortunately, babies cannot always be delivered without injury even when the management is optimal," and that "sometimes * * * injuries cannot be avoided."

As the first step in treatment, the video recommends coordination of the mother's efforts to expel the baby with what Dr. Young characterizes as application of "a limited" or "appropriate" amount of traction to the baby's head by the obstetrician. Dr. Young goes on to warn, however, that "some of the problems that occur with shoulder dystocia may result from more forceful and prolonged efforts at pushing and pulling." The video instructs that where an initial application of traction to the baby's head has been unsuccessful, "it is important to stop and take a different approach to relieve the problem." The video then portrays application of the McRoberts, Woods and Posterior Arm Sweep maneuvers, which Dr. Herzog had testified to performing during Amanda's troubled delivery.

The video concludes with a portrayal of what Dr. Young acknowledges are two rare maneuvers, apparently to be tried only when all else fails. First, the video depicts placing the mother on all fours to facilitate delivery. Second, the video portrays pushing the baby back into the uterus to permit delivery by a Caesarian section.

In its closing credits, the video scrolls across the screen a printed disclaimer, stating: "This video does not define a standard of care, nor is it intended to dictate an exclusive course of management. It presents recognized techniques of clinical practice for consideration by health care providers for incorporation into their practices."

The closing credits also reveal that the video was awarded the Scientific Program Award at the 1995 Annual Clinical Meeting of ACOG. In addition to the ACOG video, the defense introduced as learned treatises, over objection, two articles published in the American Journal of Obstetrics and Gynecology. The first was entitled, *Shoulder Dystocia, an Analysis of Risks and Obstetrical Maneuvers*, and was written by Dr. James Nocon of the University of Indiana Medical School. Before this article was read to Dr. Herzog on cross-examination, he testified on voir dire that he: (1) did not know of the article's author, Dr. Nocon; and (2) had not read the specific article until "two minutes" before beginning his testimony about it. Later, during cross-examination of plaintiffs' expert, Dr. Nathanson, defense counsel sought to introduce a different article written by Robert Gherman, an obstetrics professor at the University of Southern California and also published in the American Journal of Obstetrics and Gynecology. Though Dr. Nathanson refused to concede the authoritativeness of that journal (based on his apparent belief that "no journal is authoritative"), JUDGE GLEESON allowed the defense to read the following statement from Dr. Gherman's article:

[Erb's] palsy is commonly attributed to excessive lateral traction applied to the fetal neck by the treating physician during attempts to free the shoulder * * *. Some authors have argued that with worsening severity of the shoulder dystocia, and increased efforts by

the operators, the impact of the traction force becomes more pronounced * * * . We have presented six cases in which it is virtually certain that this mechanism played no role * * * . Our data also imply that some cases of [Erb's palsy] may be related to events antedating the actual delivery, especially in light of the fact that one patient underwent a Caesarian section while in early labor.

Defense counsel also read a different portion of the same article to defendant's expert, Dr. Howard, during direct examination. Dr. Howard did not testify that he relied on the article in any way.

After trial, the jury found for Dr. Herzog on the issue of liability. The Costantinos now appeal, arguing that JUDGE GLEESON erred in admitting: (1) the ACOG video; and (2) the two articles from the American Journal of Obstetrics and Gynecology.

DISCUSSION

I. The ACOG Video

The Costantinos argue that because videotapes are not mentioned in Rule 803(18), they can never be learned treatises. Alternatively, they maintain that even if videos can be learned treatises, reversal is still required because JUDGE GLEESON: (1) erred in admitting the ACOG video without proper foundation; and (2) should have excluded the video as unduly confusing and prejudicial under Rule 403. None of these contentions warrant reversal.

A. Rule 803(18)

The primary question presented is whether videotapes can be admitted as learned treatises pursuant to Rule 803(18). We are the first federal Court of Appeals to address this question, though various state courts have considered it under their cognate learned treatise exceptions, and have forged no consensus.

We review JUDGE GLEESON's legal conclusion that videos can constitute learned treatises *de novo*. In its entirety, Rule 803(18) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: * * * (18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

The rationale for this exception is self-evident: so long as the authority of a treatise has been sufficiently established, the factfinder should have the benefit of expert learning on a subject, even though it is hearsay.

Emphasizing plain language, the Costantinos argue that videos cannot fall within the scope of Rule 803(18) because unlike "published treatises, periodicals, or pamphlets," they are not specifically listed in the Rule. They rely on *Simmons v. Yurchak*, 28 Mass. App. Ct. 371, 551 N.E.2d 539 (1990), which accepted this contention, and affirmed a trial court's refusal to recognize videotapes as learned treatises under the Massachusetts version of Rule 803(18). According to the *Simmons* court: "adding videotapes to the list of materials in [the Massachusetts learned treatise exception] would constitute judicial legislation."

Uttering the dark incantation of "judicial legislation" is to substitute a slogan for an analysis. Indeed, we are exhorted in Rule 102 to interpret the Rules of Evidence to promote the "growth and development of the law * * * to the end that the truth may be ascertained." In this endeavor a certain measure of legislative judgment is required. As Justice Holmes, in his Boston Brahmin prose conceded: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." Or as a graduate of N.Y. City College, Justice Frankfurter, put it more prosaically: "legislatures make law wholesale, judges retail." Joseph P. Lash, *From the Diaries of Felix Frankfurter* 67 (1975) (quoting unidentified letter from Felix Frankfurter to Hugo Black). Because judges "cannot escape the responsibility of filling in gaps which the finitude of even the most imaginative legislation renders inevitable," the problem is "not whether the judges make the law, but when and how much." *Id.*

In this case, we are compelled to "make law." For we agree with JUDGE GLEESON that it is just "overly artificial" to say that information that is sufficiently trustworthy to overcome the hearsay bar when presented in a printed learned treatise loses the badge of trustworthiness when presented in a videotape. We see no reason to deprive a jury of authoritative learning simply because it is presented in a visual, rather than printed, format. In this age of visual communication a videotape may often be the most helpful way to illuminate the truth in the spirit of Rule 102.

In sum, we agree with the Texas Court of Appeals that "[v]ideotapes are nothing more than a contemporary variant of a published treatise, periodical or pamphlet." *Loven v. State*, 831 S.W.2d 387, 397 (Tex. Ct. App. 1992). Accordingly, we hold that videotapes may be considered learned treatises under Rule 803(18).

B. Proper Foundation

The Costantinos argue that even assuming that the ACOG video may be a learned treatise, JUDGE GLEESON erred in admitting it without a proper foundation. We disagree.

Rule 803(18) explicitly requires trial judges to act as gatekeepers, ensuring that any treatise admitted is "authoritative." Thus, trial judges must first determine that the proffered treatise is "trustworth[y] * * * as viewed by professionals in [the relevant] field." *Id.*; see Fed. R. Evid. 803(18) Advisory Committee Note. In making this evaluation, trial judges need not be draconian. Since the object of Rule 803(18) is to make valuable information

available to the trier of fact, trial judges should not insist on a quantum of proof that the proponent cannot meet.

JUDGE GLEESON's finding that the authoritativeness of the ACOG video had been sufficiently established is reviewed for abuse of discretion and will not be disturbed absent "manifest error." The Costantinos invite us to apply the reasoning of *Meschino v. North American Drager, Inc.*, 841 F.2d 429 (1st Cir. 1988). There, the First Circuit ruled that it was not enough that the trade magazine in which an article appeared was reputable; the author of the particular article must also to be shown to be an authority before the article could be used as a learned treatise pursuant to Rule 803(18). The Court reasoned that "[i]n these days of quantified research, and pressure to publish, an article does not reach the dignity of a 'reliable authority' merely because some editor, even a most reputable one, sees fit to circulate it."

The Costantinos argue that *Meschino* requires reversal because JUDGE GLEESON's sole basis for accepting the video as authoritative was its sponsorship by ACOG. They claim that no testimony was offered that the video itself had received acceptance in the medical profession, or that its narrator, Dr. Young, was considered an authority in the field. And these omissions were particularly devastating, the Costantinos maintain, because as the Simmons court noted, it is unclear that the "careful, professional criticism" which ensures the reliability of printed treatises, also attends the production and dissemination of videotapes.

These arguments are unavailing. Even assuming that the potential authoritativeness of videotapes is somehow more suspect than that of materials like "pamphlet[s]" explicitly listed by the Rule, we cannot fault the district court's performance as a gatekeeper in this case.

We, of course, agree with the *Meschino* court that the contents of a periodical cannot be automatically qualified "wholesale" under Rule 803(18) merely by showing that the periodical itself is highly regarded. We do not, however, read *Meschino* to say that the reputation of the periodical containing the proffered article is irrelevant to the authoritativeness inquiry. Publication practices vary widely, and an article's publication by an esteemed periodical which subjects its contents to close scrutiny and peer review, obviously reflects well on the authority of the article itself. Indeed, because the authoritativeness inquiry is governed by a "liberal" standard, good sense would seem to compel recognizing some periodicals — provided there is a basis for doing so — as sufficiently esteemed to justify a presumption in favor of admitting the articles accepted for publication therein.

Turning to the instant case, there is no small irony in plaintiffs' complaint that ACOG sponsorship was insufficient to establish the video as an authority. After all, while plaintiffs' own expert Dr. Nathanson refused to concede the authoritativeness of the video itself, he nevertheless: (1) touted himself as a member of ACOG; (2) praised ACOG as an organization that "publishes a great deal of material which serve[s] to contribute to setting a standard of care for obstetricians and gynecologists"; and (3) testified in a prior action that he generally accepted "the standards promulgated by ACOG" within the field of obstetrics as "authoritative." Moreover, Dr. Nathanson relied in part on ACOG

publications in reaching his opinion that Dr. Herzog had committed malpractice.

In any event, other factors — quite apart from ACOG's status as a reputable organization — established the authoritativeness of the video. In particular, Dr. Nathanson recalled seeing a version of the ACOG video at a staff conference, inferentially conceding that it was exactly what the defense said it was: a training resource for the continuing medical education of obstetricians and gynecologists. And the video's use as a training resource — “written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation [of its producers and sponsors] at stake” — is clearly an important index of its authoritativeness under Rule 803(18). Fed. R. Evid. 803(18) Advisory Committee Note.

Moreover, JUDGE GLEESON himself took the additional precaution of reviewing the ACOG video in camera. Through that review, JUDGE GLEESON knew that the tape's narrator, Dr. Young, was a physician at Dartmouth College's Hitchcock Medical Center, and that the video itself had won an ACOG award, credentials which compared favorably with those of any expert who testified at trial. And after the same review, JUDGE GLEESON found that the video was what the defense represented it to be: a training resource — with recommendations culled from the “available literature” — used to show doctors “how they should go about dealing with this problem [of shoulder dystocia].” Having viewed the videotape ourselves, and having observed its clinical format, as well as its calm and instructional tone, we cannot say this finding amounts to “manifest error.”

In sum, we conclude that JUDGE GLEESON's determination that the ACOG video was sufficiently authoritative to deserve admission rested on an appropriate foundation.* * * And while some of the indicia of the video's reliability came to light through JUDGE GLEESON's independent in camera review, rather than through testimony, the authoritativeness inquiry is a freewheeling one and may be conducted by “any means.” Fed. R. Evid. 803(18) Advisory Committee Note.

JUDGE GLEESON did not abuse his discretion in finding that the ACOG video was sufficiently authoritative to be presented to the jury.

C. Rule 403

Even though the ACOG video qualified as a learned treatise under Rule 803(18), JUDGE GLEESON retained the discretion to exclude it if its “probative value [was] substantially outweighed by the danger of unfair prejudice [or] confusion” under Rule 403. The Costantinos argue that the video should have been excluded under Rule 403. We find no basis for reversal.

There can be no doubt that much of the ACOG videotape represented highly probative evidence. * * * As JUDGE GLEESON explained in ruling that the video was admissible, one “dimension” of plaintiffs' malpractice claim was that “the standard of care * * * prohibits a doctor from engaging in any traction” to remedy shoulder dystocia. Measured against this claim, those portions of the video portraying application of “a limited” or “appropriate” amount of traction to the baby's head were directly probative of whether such a technique

is an accepted obstetrical practice. And those portions of the video portraying application of the Woods, McRoberts and Posterior Arm Sweep maneuvers were probative of whether Dr. Herzog properly used those maneuvers in delivering Amanda.

We reject the plaintiffs' claim that the ACOG video should have been excluded because of the danger of undue confusion. The Costantinos maintain that the ACOG video must have caused the jurors to confuse what they saw on the tape with what was being orally reconstructed for them throughout the trial — i.e., the birth of Amanda. They argue that because the video shows appropriate amounts of traction being applied to babies' heads, the jurors must have unfairly concluded that Dr. Herzog's management of Amanda's delivery was appropriate. This argument is pure speculation. It was obvious that Amanda's birth was not what was depicted in the video. Even if it were not obvious to the jury, any ephemeral danger of confusion was more than outweighed by the highly probative value of the video.

Plaintiffs' second Rule 403 contention is similarly unavailing. The Costantinos point out that in addition to portraying the Woods, McRoberts and Posterior Arm Sweep maneuvers (as well as the application of traction to babies' heads), the ACOG video portrays the two rarely performed procedures of: (1) placing the mother on all fours to facilitate delivery; and (2) pushing the baby back into the uterus to facilitate a Caesarian section. The Costantinos assert that these portrayals were not probative of anything at trial, and were highly prejudicial because "the only inference the jury could have drawn from those parts of the tape * * * is that shoulder dystocia can be a complicated problem, requiring seemingly drastic measures to deliver children." It is true that Dr. Herzog never testified that he even contemplated performing these maneuvers during the birth of Amanda. However, to the extent that these portrayals prejudiced the Costantinos by emphasizing the inherent dangers of shoulder dystocia, such prejudice did not warrant exclusion.

Because virtually all evidence is prejudicial to one party or another, to justify exclusion under Rule 403 the prejudice must be unfair. The unfairness contemplated involves some adverse effect beyond tending to prove a fact or issue that justifies admission. We fail to see how plaintiffs were unfairly prejudiced by the portrayal of the challenged procedures here. The testimony at trial established that shoulder dystocia is indeed a "complicated problem, requiring seemingly drastic" responses by the treating obstetrician.* * * [A]ny prejudice arising from the video's portrayal of the challenged procedures was not unfair within the meaning of Rule 403. To the contrary, that portrayal was probative of whether Amanda Costantino's shoulder dystocia presented an "emergency" and whether Dr. Herzog responded appropriately in attempting to remedy it.

II. The American Journal of Obstetrics and Gynecology

The Costantinos final argument is that the admission of the two articles from the American Journal of Obstetrics and Gynecology also requires reversal. Once again, plaintiffs argue lack of proper foundation. First, they complain that because Dr. Herzog testified that he had not seen Dr. James

Nocon's article until shortly before testifying about it, he could not have "relied" upon that article as required by Rule 803(18). Second, they protest that there was no testimony establishing the authoritativeness of either Dr. Nocon's article, or the second article written by obstetrics professor Robert Gherman of the University of Southern California.

* * * It is not essential that a testifying expert rely on a learned treatise on direct examination. If he did not, a sufficient foundation is laid if the treatise is "called to the attention of [the] expert upon cross-examination." Fed. R. Evid. 803(18). The essential notion is that the jury enjoys explanation, context and perspective on the treatise's contents. That is exactly what happened on defense counsel's cross-examination of Dr. Herzog. As to authoritativeness, Dr. Herzog testified that the American Journal of Obstetrics and Gynecology is "probably the most reputable journal in our field and if it's accepted for publication, then we know it's quality information being presented." Plaintiffs' own expert, Dr. Nathanson, backed Dr. Herzog on this point, testifying that articles are published in the American Journal of Obstetrics and Gynecology only after "other obstetricians and gynecologists * * * review them for accuracy and believability." The district court was properly satisfied with this foundation.

III. Legal References

We are troubled by one aspect of this case. As noted above, the ACOG videotape's closing credits include the statement: "This video does not define a standard of care." Other learned treatises read at trial contain similar legalistic language, or actually allude to litigation, such as Dr. Gherman's article in the American Journal of Obstetrics and Gynecology, which refers to unfounded assertions made by "plaintiffs' expert witnesses."

Such references tend to suggest that shoulder dystocia births are the source of much unjustified litigation, and that the instant case was merely an example of such litigiousness rather than a legitimate attempt to achieve redress for real injury. Although plaintiffs have not directly challenged these references, we feel compelled to point out that they should have been redacted under Rule 403.

The district court's failure to perform such a redaction, however, does not warrant reversal. Throughout trial, JUDGE GLEESON carefully policed both counsel and the witnesses to ensure that the evidence was — in the main — properly focused on the discrete issue of whether Dr. Herzog committed malpractice in delivering Amanda Costantino. On this record, it is clear that the isolated admission of a few objectionable legal references could not have swayed the jury's verdict. We raise this issue only to alert district courts to be wary of admitting such material in the future.

CONCLUSION

For the reasons set forth above, the judgment of the district court is **AFFIRMED**.

NOTE

Why can a learned treatise not be received as an exhibit?

A learned treatise is a substitute for or supplement to expert testimony. A learned treatise should not be given more weight than the trial testimony of an expert. If it could be admitted as an exhibit, the jury might get the misimpression that the learned treatise is more important than trial testimony. See, e.g., *Graham v. Wyeth Labs.*, 906 F.2d 1399 (10th Cir. 1990) (AMA special report was sufficiently authoritative to qualify for admissibility under Rule 803(18), but the trial court erred in submitting the report to the jury). There is also a danger in allowing learned treatises to be considered by the jury during deliberations without the benefit of contemporaneous explanation by an expert.

There is a problem, however, if the learned treatise is not permitted in the jury room as an exhibit. In a trial of any length, there is no way the jury can possibly remember what was read to them from the treatise (or treatises; there could be several). Usually, the precise language of the treatise is critical. Without the treatise, or a verbatim excerpt from it, counsel and the jury are substantially limited in making effective use of the substantive evidence the rule permits. For this reason, the last sentence of the rule is often ignored. Some judges have indicated that the prohibition on exhibits is invoked only by a party who thinks he has come out on the short end of the battle of the treatises. On the other hand, where both sides think they have gained an advantage from the treatise material, copies of the treatise language are usually received without objection, sometimes in the form of blowups which are used in final arguments and sent to the jury.

PROBLEM 13-3: REVIEW OF RULE 803

Joy Smith is an uptight speed addict. Sarah Jones is an accountant. Joy and Sarah are standing together with Sarah's date on a street corner when they witness the same automobile accident. A police officer arrives at the scene almost immediately.

Ten minutes after the accident, Joy tells the police officer, "Oh my god, the red car was going 100 miles per hour when it hit the pedestrian in the crosswalk. I'm still shaking. It was horrible!"

Sarah, 12 minutes after the accident, tells the police officer, "The red car was clearly driving in excess of the speed limit. The pedestrian was walking with the 'walk' sign and had just stepped off the sidewalk when she was struck by the front right bumper of the red car. Her body flew over the back of the car and she landed on her head approximately 15 feet from the point of impact. The victim looked both ways before stepping off the sidewalk. The red car was going so fast the victim could not have responded in time to avoid being struck." The police officer's notes say, "Sarah was very calm and will make an excellent witness." Sarah also tells the police officer that her date, an

airline pilot, said just seconds before the accident happened that "the guy in the red car is going to kill someone if he doesn't slow down."

Joy has overdosed. Sarah is in tax season and didn't honor the subpoena when this case came to trial. The airline pilot is in France. The plaintiff calls the police officer to the stand.

Plaintiff: State your name.
Officer McCoy: Officer McCoy.
Plaintiff: Did you see the accident?
Officer McCoy: No.
Plaintiff: Did you talk to anyone at the scene about the accident?
Officer McCoy: Yes.
Plaintiff: Who?
Officer McCoy: Joy Smith and Sarah Jones.
Plaintiff: What did Joy tell you about the accident?
Defendant: Objection! Hearsay..
The court: Let me hear it so I can rule.
Officer McCoy: She said, "Oh my god, the red car was going 100 miles per hour when it hit the pedestrian in the crosswalk. I'm still shaking. It was horrible!"
Plaintiff: (1) _____
Defendant: Joy wasn't involved in the accident, so it can't be an excited utterance.
The court: (2) _____
Plaintiff: Did you talk to anyone else?
Officer McCoy: Yes, Sarah Jones.
Plaintiff: What did she say about the accident?
Defendant: Objection! Hearsay.
The court: What did she say?
Officer McCoy: She said, "The red car was clearly driving in excess of the speed limit. The pedestrian was walking with the 'walk' sign and had just stepped off the sidewalk when she was struck by the front right bumper of the red car and she landed on her head approximately fifteen feet from the point of impact. The victim had looked both ways before stepping off the sidewalk. The red car was going so fast the victim could not have responded in time to avoid being struck."
Plaintiff: Your Honor has ruled that Joy's statement is admissible. The same ruling should apply to Sarah.
Defendant: May I ask the witness one voir dire question in aid of an objection, your Honor?
The court: Yes.
Defendant: Was she calm when she gave you her statement?

- Officer McCoy:** Yes, very calm.
Defendant: And this was some twelve minutes after the event?
- Officer McCoy:** Yes.
Defendant: This is not an excited utterance.
The court: (3) _____.
Plaintiff: (4) Then the statement should be admitted as a _____.
- Defendant:** Objection. It was too long after the accident.
The court: (5) _____.
Plaintiff: Did she say anything else?
Officer McCoy: Yes.
Plaintiff: What did she say?
Defendant: Objection! Hearsay.
The court: Let me hear it so I can rule.
Officer McCoy: She said, "My airline friend said just before the accident happened 'that the guy in the red car better slow down or he's going to kill someone.'"
- Defendant:** (6) Objection! _____.
The court: (7) _____.
Plaintiff: Officer, did you talk to the pedestrian at the scene?
Officer McCoy: Yes, briefly, as they were loading him into the ambulance.
Plaintiff: What did he say?
Defendant: Objection! Hearsay.
The court: Let me hear it so I can rule.
Officer McCoy: He said, "My back must be broken. I have no feeling in my feet at all, but my head is on fire."
- Plaintiff:** (8) _____.
The court: (9) _____.
Plaintiff: Did he tell you anything else?
Officer McCoy: Yes.
Plaintiff: What did he tell you?
Defendant: Objection! Hearsay.
The court: Let me hear it so I can rule.
Officer McCoy: He said, "I'm about to pass out, tell the doctor that my back has never been hurt before."
- Defendant:** This is hearsay. It is a statement about the past.
Plaintiff: (10) _____.
Defendant: It was not made to a doctor, nurse or anyone providing medical treatment.
The court: (11) _____.
Plaintiff: Did you bring the police records of this case with you?
Officer McCoy: Yes, I have a copy.
Plaintiff: Did you do the actual accident evaluation?

- Officer McCoy:** No.
Plaintiff: Who did?
Officer McCoy: Officer Chin.
Plaintiff: Where is she?
Officer McCoy: She is now Chief of Police in Denver.
Plaintiff: Do you recognize the signature on the report?
Officer McCoy: Yes, it is Officer Chin's.
Plaintiff: Do your records indicate if she made measurements at the scene and evaluated the cause of the accident?
- Officer McCoy:** Yes.
Plaintiff: What do you know about Officer Chin's experience in investigating accidents?
Officer McCoy: She was the department's most experienced investigator. She investigated accidents for more than ten years.
Plaintiff: Your Honor, at this time I move for the introduction of the police record, including the measurements taken at the scene and the police officer's evaluation that the red car was traveling in excess of fifty miles per hour when it struck the pedestrian.
- Defendant:** Objection! Hearsay.
Plaintiff: It's a business record, and it's also a public record. May I ask the witness a few more questions.
- The court:** Yes.
Plaintiff: What is the date of the report?
Officer McCoy: Same date as the accident.
Plaintiff: Are these reports routinely made at or near the time of accidents as part of the department's regular duties, and are they routinely kept by the department as part of its duties?
- Officer McCoy:** Yes.
Plaintiff: So, I submit that these are business records.
Defendant: May I ask a question?
The court: Yes.
Defendant: Isn't this report based in large part on statements made and information provided by third parties who are not employed by and are under no duty to the department?
- Officer McCoy:** Yes, I suppose that is true. I told Officer Chin everything that Jane and Sarah told me. I'm sure she took that into account in arriving at her conclusions and in preparing her report.
- Defendant:** We renew our objection.
The court: (12) _____
Plaintiff: Whether or not it is a business record, it certainly should qualify as a public record.
Defendant: Objection! This report is conclusory and unreliable.

The court: (13) _____
Plaintiff: After the accident, did you have occasion to communicate with Jane or Sarah again?
Officer McCoy: Yes, I called Jane some weeks after the accident to see whether she would like to have coffee with me?
Plaintiff: Did you have coffee?
Officer McCoy: Yes, we met downtown for coffee and breakfast.
Plaintiff: Did you discuss the accident?
Officer McCoy: Not really. But she gave me some notes that she had written about the accident. She said she wrote them down the next day so that she would have a record of what happened if her memory failed. I brought them with me.
Plaintiff: The notes have been marked as Plaintiff's exhibit 14 for identification. Are these the notes?
Officer McCoy: Yes, those are the notes.
Plaintiff: Do they describe the accident in detail?
Officer McCoy: They do.
Plaintiff: We offer plaintiff's exhibit 14 in evidence.
Defendant: Objection! Hearsay.
Plaintiff: These are present sense impressions, excited utterances and also qualify as past recollection recorded.
Defendant: There is no showing that any of the exceptions is satisfied.
The court: (14) _____

Chapter 14

RESIDUAL EXCEPTION TO THE HEARSAY RULE

A. INTRODUCTION

Two residual or “catch-all” hearsay exceptions were contained in the Federal Rules as initially adopted. These exceptions were designed to permit the admission of trustworthy hearsay that did not fit under any of the categorical exceptions. The residual exceptions were identically worded; one was placed in Rule 803 (subdivision (24)), and the other was placed in Rule 804 (subdivision (b)(5)). In 1997, the residual exceptions were transferred out of Rules 803 and 804, and combined in a single exception, Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning was intended. The cases decided under old Rules 803(24) and 804(b)(5) remain pertinent in deciding whether hearsay is admissible under Rule 807.

B. RESIDUAL EXCEPTION

[1] Federal Rule of Evidence 807

Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

[2] Relationship to Other Exceptions

UNITED STATES v. VALDEZ-SOTO

31 F.3d 1467 (9th Cir. 1994)

KOZINSKI, CIRCUIT JUDGE:

There may be no loyalty among thieves, but there sometimes is among drug dealers. When called by the government, such witnesses occasionally change their story. The principal issue raised in these consolidated appeals is whether and when their inculpatory out-of-court statements may be admitted in the teeth of a hearsay objection.

I

Some days nothing goes right. The seller, Roberto Cortez, showed up in a restaurant parking lot with nine kilograms of cocaine just as he'd promised, only to discover that his buyer, Dennis Pierce, was a government agent. Cortez was in deep trouble and soon confessed. In so doing, he implicated two men as his suppliers, Gustavo Valdez-Soto and Fabio Gomez-Tello (our defendants), both of whom had already been arrested at the home of Cortez's sister-in-law.

Pierce had been working with narcotics informant Joaquin Olivas for some time, setting up a buy of thirty kilograms of cocaine from Cortez. Many of Olivas's conversations with Cortez had been taped. This provided incriminating evidence against both Cortez and his yet-to-be-identified suppliers, much of which was later corroborated by other evidence at trial. Based on information provided by Cortez, agents had zeroed in on Valdez-Soto and Gomez-Tello when they showed up in San Francisco in the company of Cortez right around the time the sale was to occur.

Cortez pled guilty shortly before trial and agreed to testify for the government. But Cortez's testimony was not consistent with his post-arrest statements and the district court ordered those statements admitted over defendants' hearsay objections. * * * Defendants were eventually convicted of conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846, and possession of more than five kilograms of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). Both challenge the admission of Cortez's prior inconsistent statements pursuant to Fed. R. Evid. 803(24) [now 807] * * *.

II

* * *

A. Right after his arrest, Cortez told FBI agents all about his cocaine source. He described his involvement in a narcotics trafficking conspiracy with Valdez-Soto and Gomez-Tello as the suppliers. He said that "Gustavo" (Valdez-Soto) brought the nine kilos of cocaine from Los Angeles and that "Fabio" (Gomez-Tello) lived with Valdez-Soto and came with him. Cortez said he'd distributed cocaine for Valdez-Soto in the past, and described their method

of handling finances. He also described Valdez-Soto and Gomez-Tello's arrival in the San Francisco area and their activities after they got there.

Sometime before trial, Cortez changed his tune and testified much differently. The district court, over defense counsel's objection, admitted Cortez's post-arrest statements under Rule 803(24). On the stand, Cortez acknowledged making parts of these statements; other parts he couldn't recall. For example, he insisted that neither Valdez-Soto nor Gomez-Tello was his supplier, though he had trouble remembering his supplier's name. He remembered saying Valdez-Soto and Gomez-Tello were his suppliers and had brought the cocaine to San Francisco, but insisted he'd fabricated this and other parts of his statement. He "absolutely" did not get the nine kilograms from the defendants. Special Agent Fresques was then allowed to testify regarding the statements he took from Cortez after his arrest.

B. [The Court first addresses the defendants' argument that introducing the prior inconsistent statement violated their right to confrontation.] Cortez was on the stand, and defendants here were able to cross-examine him (and take advantage of all the other benefits of confrontation) to their hearts' content. We are aware of no Supreme Court case, or any other case, which holds that introduction of hearsay evidence can violate the Confrontation Clause where the putative declarant is in court, and the defendants are able to cross-examine him. * * *

In the absence of concerns about the accused's right to confrontation, the trial judge ~~has a fair degree of latitude in deciding whether to admit statements under Fed. R. Evid. 803(24).~~ The rule requires only that the hearsay have "equivalent circumstantial guarantees of trustworthiness" to any of the rule's enumerated exceptions. In addition to factors such as "the declarant's perception, memory, narration, or sincerity concerning the matter asserted," *United States v. Friedman*, 593 F.2d 109, 119 (9th Cir. 1979), we've recognized that corroborating evidence is a valid consideration in determining the trustworthiness of out-of-court statements for purposes of Rule 803(24). *See, e.g., Larez v. City of Los Angeles*, 946 F.2d 630, 643 n.6 (9th Cir. 1991) (declarants' out-of-court statements were "especially reliable" under Rule 803(24) because they corroborated one another). ~~The district court thus did not err in considering corroborative evidence here.~~

C. Valdez-Soto and Gomez-Tello also claim the admission of these statements violated Rule 803(24)'s requirement that "the general purposes of these rules and the interests of justice will be best served by the admission of the statement." As we've previously stated, this requirement is "simply a further emphasis upon the showing of necessity and reliability and a caution that the hearsay rule should not be lightly disregarded * * *." *United States v. Friedman*, 593 F.2d 109, 119 (9th Cir. 1979). Relying on Rule 803(24)'s legislative history, defendants claim this hearsay exception must be interpreted narrowly. We decline the defendants' invitation to go skipping down the yellowbrick road of legislative history. Rule 803(24) exists to provide courts with flexibility in admitting statements traditionally regarded as hearsay but not falling within any of the conventional exceptions. And we review admission of evidence under this provision, like all other evidentiary rulings, for abuse of discretion.

Nor are we persuaded by defendants' related argument that prior inconsistent statements must be admitted, if at all, under those provisions of the hearsay rule dealing expressly with admission of such statements. Specifically, defendants assert that Rule 801(d)(1)(A) provides the only test for admission of unsworn prior inconsistent statements as substantive evidence: if that test is not met, they contend, the evidence can never be admitted. But the existence of a catch-all hearsay exception is a clear indication that Congress did not want courts to admit hearsay only if it fits within one of the enumerated exceptions. And the reference to guarantees of trustworthiness equivalent to those in the enumerated exceptions strongly suggests that almost fitting within one of these exceptions cuts in favor of admission, not against. Rule 803(24) easily encompasses a case like ours where the evidence has the requisite indicia of trustworthiness but is not otherwise admissible.

Defendants also point to *Fong v. American Airlines, Inc.*, 626 F.2d 759, 763 (9th Cir. 1980), where we held that 803(24) could not be used to admit certain "run-of-the-mill hearsay" — hearsay that "[did] not fit into one of the[] established categories [or] * * * share any of their circumstantial guarantees of trustworthiness." The statements here were anything but. Initially, we note that "the degree of reliability necessary for admission is greatly reduced where, as here, the declarant is testifying and is available for cross-examination, thereby satisfying the central concern of the hearsay rule." *United States v. McPartlin*, 595 F.2d 1321, 1350-51 (7th Cir. 1979). Here, Cortez took the stand at trial and was extensively cross-examined by defense counsel, giving the jury the opportunity to assess his credibility. As the Fifth Circuit said in *United States v. Leslie*, 542 F.2d 285 (5th Cir. 1976), "We agree with Judge Learned Hand's observation that when the jury decides the truth is not what the witness says now but what he said before, they are still deciding from what they see and hear in court."

Moreover, we agree with the district court that these statements possessed substantial indicia of reliability. For one, Cortez gave the statements to FBI agents soon after his arrest. "If a statement is proximate in time to the event, less opportunity for fabrication exists." *Tacey v. Peters*, 8 F.3d 498, 503 (7th Cir. 1993). Although the interview was not directly recorded and transcribed, it was witnessed by a translator who contemporaneously recorded the details. Special Agent Fresques also took notes, and he relied on them shortly thereafter in completing an affidavit for a search warrant he signed under penalty of perjury, as well in preparing a report to summarize the interview. As we must consider whether Cortez's statements have "equivalent circumstantial guarantees of trustworthiness" to any of the hearsay rule's enumerated exceptions, it's worth noting that this affidavit and report come within at least the spirit of Rule 803(6), the business records exception.

We also note that at the time Fresques prepared these documents, he considered Cortez a cooperating witness; it wasn't known until much later that Cortez would change his story. Cortez cooperated unhesitatingly from the start: As Special Agent Fresques put it, "Immediately after his arrest . . . he said that he would cooperate with us." When he made these statements, he'd been informed of his rights and signed a written waiver of them. It's important to note that he would have had no idea how much the agents knew at the

time, although, from the circumstances of his arrest, he would likely assume they knew a lot. He certainly would have realized that lying in the face of such uncertainty would seriously jeopardize any chance he had to benefit from cooperating. In addition, as the district court recognized, *id.*, his statements — which were quite detailed — were consistent with the physical evidence in this case.

Finally, we take into consideration that Cortez admitted on the stand he'd given statements to the FBI and acknowledged telling Fresques about significant details pertaining to Valdez-Soto and Gomez-Tello's involvement. Although he "didn't recall" disclosing other parts of the statements, and denied one particular part — that he'd moved to hide from his cocaine creditor — the fact that he admitted making important parts of these statements lent them reliability. In addition, it provided defense counsel with an opportunity to question Cortez about his reasons for making them, and gave the jury a chance to decide whether it believed him.

* * * On this record, admitting these statements under Rule 803(24) was far from an abuse of discretion.

Affirmed.

NOTE

Should a hearsay statement be admitted under Rule 807 if it is a "near miss" of another hearsay exception?

The residual exception applies to statements "not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness." Thus, courts must face the issue whether hearsay that almost, but not quite, fits one of the standard exceptions may be admitted under the residual exception. A major concern of some members of Congress was that certain types of hearsay deliberately excluded from the categorical exceptions might nevertheless be admitted as residual hearsay. Many decisions have demonstrated that there were good grounds for the congressional concerns, as courts have often admitted hearsay under the residual exception where it is a "near miss" of an enumerated exception. *See United States v. Furst*, 886 F.2d 558 (3d Cir. 1989) (the residual exception "is not limited in availability as to types of evidence not addressed in the other exceptions; [it] is also available when the proponent fails to meet the standards set forth in the other exceptions"); *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985) (a deposition was offered against a defendant who was not a party to the litigation in which the deposition was taken; the party who cross-examined the deponent was not a predecessor-in-interest as that term is used in Rule 804(b)(1); however, because the defendant could have added nothing to the cross-examination that did take place, the deposition was admissible under the residual exception, as a "near miss" of the prior testimony exception); *Turbyfill v. International Harvester Co.*, 486 F. Supp. 232 (E.D. Mich. 1980) (a statement that failed to meet the requirements of Rule 803(5) because the preparer of the record was not available to testify was admitted as residual hearsay

on "near miss" grounds); *United States v. Laster*, 258 F.3d 525 (6th Cir. 2001) (business records were not admissible under Rule 803(6) because the foundation witness was not sufficiently familiar with recordkeeping; but there was no error in admitting the records under the residual exception; "the phrase 'specifically covered' means only that if a statement is admissible under one of the exceptions, such subsection should be relied upon instead of the residual exception").

[3] Circumstantial Guarantees of Trustworthiness, and More Probative Than Any Other Evidence Reasonably Available

LAREZ v. CITY OF LOS ANGELES

946 F.2d 630 (9th Cir. 1991)

BOOCHEVER, CIRCUIT JUDGE:

Six officers of the Los Angeles Police Department (LAPD), Chief of Police Daryl Gates, and the City of Los Angeles appeal from the district court's denial of their motion for a new trial after jury verdicts against them in a civil rights trial based on a search of the home of the Larez family. We affirm the denial of the new trial motion as to the six officers, but, because of the erroneous admission of hearsay evidence, which we cannot say was harmless, we reverse and remand for a new trial as to Gates and the City.

BACKGROUND

The civil rights action which is the subject of this appeal arises out of an LAPD search of the Larez home. * * * [The plaintiffs alleged that the officers violated their Fourth Amendment rights in searching their home, and used excessive force during the search.]

Jessie Larez lodged a complaint with the LAPD. The department's Internal Affairs division assigned a CRASH detective not involved in the Larez search to investigate the complaint. In a letter signed by Chief Gates, Jessie ultimately was notified that none of the many allegations in his complaint could be sustained. The instant suit followed.

The Larezes' theory at trial was that the six individual officers had violated their constitutional rights to be free from unreasonable searches accompanied by the use of excessive force. Moreover, they complained about the disarray in which their home was left. Against Chief Gates and the City, the Larezes alleged the perpetuation of unconstitutional policies or customs of excessive force, illegal searches including official tolerance for the destruction of property during such searches, and inadequate citizen complaint procedures which have the effect of encouraging the excessive use of force.

Trial was bifurcated between the case against the six officers and the case against the Gates and the City. After the Larezes prevailed against the six officers, Gates and the City moved to dismiss the case against them contending that, because plaintiffs were fully awarded compensatory damages in the first phase of the trial, nothing was left to be adjudicated. The motion was denied.

At trial on the liability of Gates and the City, * * * Gates testified. Upon departing the courtroom, he was questioned by reporters about his reaction to the \$ 90,000 jury verdict against his officers in the first phase of the trial. Each of at least three Los Angeles newspapers attributed five statements to him. One of the five statements repeated in the various newspapers quoted Gates as saying that Jessie Larez had been lucky that he only had gotten a broken nose. All the statements were admitted over objection.

After hearing the second phase evidence, the jury found the supervisory defendants liable. Each plaintiff received \$1 nominal damages against the City and Gates in his official capacity. The jury awarded \$7 nominal damages and \$170,000 punitive damages against Gates in his individual capacity.

* * *

The Admissibility of the Newspaper Quotations

After testifying, Gates was questioned by reporters in the courthouse corridor. The next morning, articles in the Los Angeles Times, the Herald-Examiner, and the Daily News attributed certain statements to Gates. The variance between the quotations was minimal, and the substance of the quotations was substantially corroborated by all three newspapers.

The following five statements were attributed to Gates:

1. "How much is a broken nose worth?"
2. "\$90,000? I don't think it's worth anything. He's probably lucky that's all he has."
3. "Given the circumstances in this case, I don't think it's worth anything. [Larez] is probably lucky that's all he had broken."
4. "They [the jurors] see the family there all cleaned up * * *. They don't know their background, that there is a gang member on parole. They get very sympathetic."
5. "I tell my officers to do something — and we do something and they give them \$90,000."

* * *

After hearing both sides, the court admitted the statements. Finding the quotations relevant, the court also found them to be nonhearsay. * * * [W]e conclude that the statements were erroneously admitted hearsay, and that their admission was not harmless. While defense counsel requested that the Larezes put the reporters on the stand, and while the Larezes were apparently prepared to do so, the court unfortunately believed such a step unnecessary. Here, it erred.

Defense counsel has never claimed the quotations were complete fabrications. Instead, by focusing on the context and transcription of those statements, he called attention to the need for cross-examination of the reporters, requesting that "before they're admitted, * * * the persons who wrote up these articles [be called to] testify and be subject to [his] voir dire as to the

circumstances in which these were offered * * *." By so doing, he implicitly recognized that the statements' admissibility hinged on two out-of-court statements: (1) Gates's actual statements and (2) their later repetition by reporters.

~~Gates's actual out-of-court statements pose no admissibility problem. The statements clearly are relevant. They are probative of central issues in the case — Gates's recklessness and callous indifference, and customs and policies of the LAPD. In addition, they are admissible nonhearsay either as admissions of a party opponent, see Fed. R. Evid. 801(d)(2)(A), or because they are not offered for the truth of the matter asserted (i.e., not offered to prove that a broken nose is worth less than \$ 90,000, but rather to show Gates's state of mind), see Fed. R. Evid. 801(c). Because Gates's statements were properly considered nonhearsay, their admission technically does not pose a double hearsay problem.~~

The statements' repetition in the newspapers, however, posed a more difficult problem which the district court failed to address. As the reporters never testified nor were subjected to cross-examination, their transcriptions of Gates's statements involve a serious hearsay problem. First, the reporters' transcriptions were out-of-court statements. By attributing quotations to Gates, the reporters necessarily made the implicit statement, "Gates said this!" As the reporters' statements were made in newspapers, they were, a fortiori, statements made out-of-court where they were not subject to the rigors of cross-examination. Second, the statements — "Gates said this!" — were offered for the truth of the matter asserted: that Gates did in fact make the quoted statement.

~~The only exception which colorably applies to these hearsay statements is Fed. R. Evid. 803(24) [now 807]. * * * The touchstone of this exception is trustworthiness equivalent to that of the other specific hearsay exceptions.~~

While newspaper articles have been held inadmissible hearsay as to their content, see, e.g., *Pallotta v. United States*, 404 F.2d 1035 (1st Cir. 1968), few cases have addressed this question in light of the requirements of Rule 803(24). See *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985). In *May*, for example, newspaper accounts discussing legislative motives behind a school prayer bill had been admitted by the district court for use by school prayer opponents to prove legislative purpose under the *Lemon* test where no official legislative history for the bill existed. The panel majority, recognizing some problems with admissibility under Rule 803(24), ultimately did not pass on the 803(24) question for it found that, even if admission on that basis had been erroneous, such error was harmless because the evidence was cumulative. Dissenting on other grounds, JUDGE BECKER, however, examined the Rule 803(24) question more carefully. Among other things, he found that the newspaper accounts of the legislative hearings (of which there was no official record) lacked the "circumstantial guarantees of trustworthiness" because they might have "been written from a biased point of view." JUDGE BECKER added, "it is not unknown for reporters to stretch some facts or omit others * * *." He also found that subsection B of Rule 803(24) was not satisfied because the proponents of the evidence failed to make a "showing of inability to locate observers who attended the legislative debates * * *."

Similarly, in *United States Football League v. Nat'l Football League*, 1986-1 Trade Cas. (CCH) P 67,101 at 62,667 (S.D.N.Y. 1986), newspaper reports attributing statements to unknown declarants were excluded, as double hearsay, both as insufficiently trustworthy and as less probative than "other evidence which the proponent [could] procure through reasonable efforts." There, with respect to trustworthiness, the court specifically noted that newspaper articles "are often challenged by interested parties as inaccurate." The court was concerned that admission of articles containing statements of unknown declarants "could be the subject of widespread abuse if admitted into evidence under [Rule 803(24)] in any but the most extraordinary circumstances."

We quarrel with neither court's concerns about the trustworthiness of evidence sought to be admitted under Rule 803(24); indeed, they are concerns we share. Courts may well question whether an out-of-court statement, merely because it appears in newsprint, is sufficiently reliable. In the "extraordinary circumstances" of this case, however, where three independent newspapers attributed the same quotations to Gates, a known declarant who testified at trial, we believe the statements have "circumstantial guarantees of trustworthiness" at least equivalent to those of many of the other hearsay exceptions. * * *

It is with respect to subsection B of Rule 803(24), however, that we are unable to countenance the statements' admission. By requiring that "the statement [be] more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts," that subsection essentially creates a "best evidence" requirement. The statements' admission, therefore, was erroneous because the newspaper quotations were not the best available evidence of what Gates said; testimony from the reporters themselves would have been better. The Larezes knew as much for they had the reporters subpoenaed and apparently ready to testify. We cannot fault defense counsel for he specifically requested an opportunity to cross-examine the reporters before the evidence was admitted. Thus, the error was the failure to take testimony from, and particularly to allow the cross-examination of, the reporters who repeated Gates's comments. See *Cooperman*, 780 F.2d at 263 (BECKER, J., dissenting) (newspaper article was not the most probative evidence that could be procured by reasonable efforts).

[The court finds that the error was not harmless.]

NOTES

1. What factors are relevant in determining whether a statement is sufficiently trustworthy to qualify as residual hearsay?

See Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (9th ed. 2006):

The most important requirement for residual hearsay is that it possess guarantees of trustworthiness equivalent to those supporting the

Rule 803 and 804 exceptions. No inclusive list of factors determining admissibility can be devised because admissibility hinges upon the peculiar factual context within which the statement was made. But some nondispositive generalizations can be made.

There are certain standard factors all Courts consider in evaluating the trustworthiness of a declarant's statement under the residual exception. These include:

(1) The relationship between the declarant and the person to whom the statement was made. For example, a statement to a trusted confidante should be considered more reliable than a statement to a total stranger. *See, e.g., United States v. Morgan*, 385 F.3d 196 (2d Cir. 2004) (letter written by a defendant to her boyfriend was properly admitted against the defendant; it was sufficiently trustworthy because it was written to an intimate acquaintance in the privacy of the codefendant's hotel room, with no expectation that it would ever find its way to the police).

(2) The capacity of the declarant at the time of the statement. For instance, if the declarant was drunk or on drugs at the time, that would cut against a finding of trustworthiness, and vice versa. *See, e.g., United States v. Wilkus*, 875 F.2d 649 (7th Cir. 1989) (an affidavit signed while the declarant was under heavy medication, and as to which the declarant had no memory at the time of trial, was insufficiently trustworthy to qualify as residual hearsay). *See also United States v. Lawrence*, 349 F.3d 109 (3d Cir. 2003) (victim's identification of someone other than the defendant as the perpetrator was properly excluded; the victim had been severely injured and was capable of only blinks and nods; thus the "statement" was potentially ambiguous and untrustworthy).

(3) The personal truthfulness of the declarant. If the declarant is an untruthful person, this cuts against admissibility, while an unimpeachable character for veracity cuts in favor of admitting the statement. *See, e.g., United States v. Hall*, 165 F.3d 1095 (7th Cir. 1999) (confession of another person could not be admitted on the defendant's behalf as residual hearsay; the declarant "confessed to any crime he was questioned about by the police" and thus was untrustworthy).

(4) Whether the declarant appeared to carefully consider his statement. *See, e.g., United States v. York*, 852 F.2d 221, 226 (7th Cir. 1988) (where the declarant answered affirmatively to every question asked by the United States Attorney, trustworthiness could not be found: "Apparently, not even a single placebo question was amongst the lot to ensure that Tommy was considering the substance of each question and answering responsively, rather than simply agreeing with every question that the government posed.").

(5) Whether the declarant recanted or repudiated the statement after it was made. *See, e.g., United States v. York*, 852 F.2d 221, 226 (7th Cir. 1988) (a statement was not trustworthy where the declarant recanted).

(6) Whether the declarant has made other statements that were either consistent or inconsistent with the proffered statement. *See, e.g., United States v. Sinclair*, 74 F.3d 753 (7th Cir. 1996) (a statement offered by the defendant as residual hearsay was properly excluded, in part because of the great lapse of time between the declarant's statement and the events described and in part because the statement was inconsistent with prior statements made by the declarant to the FBI).

(7) Whether the behavior of the declarant was consistent with the content of the statement. *See, e.g., United States v. Bradley*, 145 F.3d 889 (7th Cir. 1998) (statement by the defendant's wife that the defendant brandished a gun at her was properly admitted as residual hearsay; among other things, the declarant was distraught when she made the statement, and this was "consistent with the trauma she described").

(8) Whether the declarant's memory might have been impaired due to the lapse of time between the event and the statement. *See, e.g., Braun v. Lorillard Inc.*, 84 F.3d 230 (7th Cir. 1996) (the trial judge properly excluded testimony relating statements made by a deceased declarant who was hired by the defendant cigarette manufacturer in 1954 to examine Kent cigarettes under an electron microscope; there was no documentary evidence of her study, but a journalist who interviewed the declarant and the declarant's son would have testified that the declarant said that she reported to the manufacturer that the Kent filters leaked asbestos into the lungs; the statements were made years after the work had been done and therefore were not sufficiently reliable to qualify as residual hearsay).

(9) Whether the statement, as well as the event described by the statement, is clear and factual, or instead is vague and ambiguous.

(10) Whether the statement was made under formal circumstances or pursuant to formal duties, such that the declarant would have been likely to consider the accuracy of the statement when making it.). *See, e.g., Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542 (9th Cir. 1990) (S-1 registration statement filed with Securities Exchange Commission held admissible as residual hearsay to prove the corporate history of the plaintiff; "The standard of due diligence applied by securities lawyers with regard to Registration Statements is sufficient to guarantee the requisite circumstantial guarantees of trustworthiness.").

(11) Whether the statement appears to have been made in anticipation of litigation and is favorable to the person who made or prepared the statement. *See, e.g., United States v. Walker*, 410 F.3d 754 (5th Cir. 2005) (no error in excluding a videotaped statement to police officers made by an associate of the defendant, in which she categorically denied that the defendant had brought any drugs into a room; the declarant "was in a room with a lot of cocaine," and was not under oath; she was facing the threat of criminal charges

and “had every incentive to lie.”); *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147 (3d Cir. 1995) (the trial court erred in admitting, as residual hearsay, interrogatory responses from a codefendant who had settled; the responses, which denied liability, were offered by the plaintiff to rebut the non-settling defendant’s contention that the plaintiff’s injury was solely caused by the settling defendant; the interrogatory responses were not sufficiently trustworthy, because they were made while the declarant was still a defendant in the litigation and “had every incentive to set forth the facts in a light most favorable to itself”).

(12) Whether the declarant was a disinterested bystander or rather an interested party. *See, e.g., United States v. Doerr*, 886 F.2d 944 (7th Cir. 1989) (“Another indicium of reliability is the declarant’s disinterest; the testimony of a mere bystander with no axe to grind tends to be more trustworthy.”); *Dogan v. Hardy*, 587 F. Supp. 967 (N.D. Miss. 1984) (the Court held inadmissible in a personal injury action a self-serving statement by the driver of a car, made while he was hospitalized).

(13) Whether the statement was corroborated by independent evidence or similar statements from others. *See Larez, supra*, where newspaper accounts were found sufficiently trustworthy because three independent reporters related the same account.

2. How is the notice requirement applied?

Consider this excerpt from Professors Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (9th ed. 2006):

The purpose of the notice requirement is to protect against excessive liberalization and unfair surprise and to lend more predictability to preparation for trial when residual hearsay is to be proffered. Some courts have interpreted the notice requirement literally, excluding the evidence unless the adversary has been notified before trial of the intent to invoke the residual exception to admit a specific statement.

See, e.g., Kirk v. Raymark Indus., Inc., 61 F.3d 147 (3d Cir. 1995) (trial court erred in admitting, as residual hearsay, interrogatory responses from a codefendant who had settled; the plaintiff never gave the defendant notice that she intended to introduce this evidence under the residual exception).

Generally speaking, however, the notice requirement has been applied flexibly in accordance with its intent, which is to prevent surprise and to allow time to prepare to meet the evidence. *See, e.g., United States v. Doe*, 860 F.2d 488 (1st Cir. 1988) (collecting cases adopting the majority view that the notice requirement will not preclude admission where the adversary has not been prejudiced). Under the majority, liberal approach, it is ordinarily possible to satisfy the notice requirement by notifying the adversary during the trial, so long as the adversary has sufficient time to challenge the evidence effectively. Postponing notification until trial may require the granting

of a continuance, depending on the circumstances; the Court will also consider whether the delay in notice could have been avoided. *See, e.g., United States v. Baker*, 985 F.2d 1248 (4th Cir. 1993) (where the need for rebuttal evidence did not become apparent until trial, and the rebuttal witness disappeared after the government announced it was offering rebuttal evidence, the witness's trustworthy statement was properly admitted as residual hearsay and pretrial notice was wholly impracticable and properly dispensed with).

There is some dispute among the courts as to the type of notice that the opponent of the evidence must receive. The Third Circuit holds that the opponent must be notified not only about the evidence itself but also of the proponent's intent to invoke the residual exception. All of the other Circuits that have decided the question appear to hold that the opponent need only be made aware in advance of the existence of the evidence and its potential proffer at trial. The usual fact situation in which this question arises is where the proponent has not even purported to give pretrial notice, and yet the opponent is well aware before trial of the existence of the evidence and its possible proffer at trial, albeit perhaps not under the residual exception.

The minority position is found in *United States v. Pelullo*, 964 F.2d 193 (3d Cir. 1992). The *Pelullo* Court noted that while the Rule could be read to require notice only of the statement itself, the Third Circuit requires specific notice of the proponent's intent to use the residual exception. Here, even though the defendant was given the documents months before trial, there was no specific notice of the government's intent to invoke the residual exception, so the documents were held improperly admitted as residual hearsay.

~~The more common result is that the notice requirement is deemed satisfied when the opponent has received actual notice, before trial,~~ of the existence of the evidence and its possible use at the trial. The reasoning is that under these circumstances, the opponent cannot complain about surprise or inability to prepare. Thus, in *United States v. Bachsian*, 4 F.3d 796 (9th Cir. 1993), the Court declared that "failure to give [explicit] pretrial notice will be excused if the adverse party had an opportunity to attack the trustworthiness of the evidence." In *Bachsian*, the government did not give notice under the residual exception, but the defendant was more generally notified two months before trial that the government intended to use the evidence, and the defendant was given copies. Also, the defendant did not move for a continuance. Under these circumstances, the Court found that the spirit of the notice requirement was met.

Query whether the cases finding the notice requirement satisfied whenever the opponent somehow becomes aware of the evidence are consistent with the terms of the Rule. The Rule specifies that the proponent must herself provide notice to the adverse party; these terms would not be met if the opponent, as is often the case, becomes aware of the information other than through the proponent. On the other hand, where the proponent has in fact given some kind of advance

notice about the hearsay evidence, but has failed to invoke the residual exception specifically, the Rule is, as the Third Circuit admits, vague as to whether the notice requirement is satisfied.

3. How is the “more probative” requirement of Rule 807 to be applied?

To be admitted under the residual exception, a hearsay statement must be “more probative” than any other evidence reasonably available to prove the point. The rationale for this requirement is that the residual exception should be reserved for cases of clear necessity — it should not be overused.

Courts have held that live testimony by the declarant is as a general rule more probative than or at least equally probative as hearsay. *See, e.g., Polansky v. CNA Ins. Co.*, 852 F.2d 626 (1st Cir. 1988) (a letter prepared by the plaintiff as to his understanding of a certain transaction was not the most probative evidence reasonably available since the plaintiff could have testified about these matters on the stand). These courts have generally excluded statements offered as residual hearsay when the declarant was not called to testify and was not shown to be unavailable. *See, e.g., United States v. Azure*, 801 F.2d 336 (8th Cir. 1986) (in a second trial on the same matter, where the witness testified in the first trial, an out-of-court statement by that witness could not be admitted as residual hearsay; if the witness were available for the second trial, her in-court testimony would be as probative as the residual hearsay; if the witness were not available at the second trial, her prior testimony at the first trial would be as probative as the residual hearsay; therefore, the “more probative” requirement of the Rule would not be met).

However, the failure to call an available declarant will not always preclude the admission of residual hearsay. A declarant may be technically available and yet may be unable or unwilling to give testimony that is as probative as the out-of-court statement. In such circumstances, the hearsay statement will be more probative evidence. For example, in child abuse cases, the child’s out-of-court statement concerning the abuse is often considered the more probative evidence because the child may not be able to communicate as well on the stand as he or she did out of court. *See, e.g., United States v. Dorian*, 803 F.2d 1439 (8th Cir. 1986) (where the child was frightened and uncommunicative on the stand, her residual hearsay statement was more probative).

Moreover, the Rule states that the proffered hearsay must be more probative than any other evidence that can be produced through *reasonable* efforts. In some cases, a declarant might be technically available, but it would be unreasonably prohibitive and time-consuming to demand that the declarant testify in court. For example, in consumer fraud actions, where thousands of consumers have been defrauded, reliable affidavits prepared by each consumer have been admitted as residual hearsay in lieu of in-court testimony. *See, e.g., FTC v. Amy Travel Serv.*, 875 F.2d 564, 576 (7th Cir. 1989) (thousands of consumer affidavits were properly admitted under the residual exception as the most probative evidence reasonably available: “The defendants ran a nation-wide telemarketing operation and it would be cumbersome and unnecessarily expensive to bring all the consumers in for live testimony.”). Because the probative value of the hearsay is compared with that of other evidence that

could be procured through "reasonable" efforts, limitations upon the financial resources available to the parties and the court are rightfully considered. As one Court has stated, the question of whether there is more probative evidence reasonably available depends upon "the importance of the evidence, the means at the command of the proponent, and the amount in controversy." *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1552 (9th Cir. 1990).

The term "more probative" must be distinguished from the term "more credible." For instance, if there are two eyewitnesses to an event, and one witness, now unavailable, makes a hearsay statement that is offered as residual hearsay, the statement is not more probative than the other eyewitness' in-court testimony would be. This is true even if the declarant's credibility is strong and the witness' credibility is weak. The term "probative" refers to the tendency of the statement to prove a proposition *if the jury decides to believe it*. As one court has stated: "The credibility of a witness has nothing to do with whether or not his testimony is probative with respect to the fact it seeks to prove. * * * [T]he law does not consider credibility as a component to relevance." *United States v. Welsh*, 774 F.2d 670, 672 (4th Cir. 1985).

PROBLEM 14-1

Uprock Company was a high-flying leader on the New York Stock Exchange as it led the way in the deregulated electricity market. Its stock rose over a period of two years more than 60%. Suddenly, however, the company announced that there were "off the book" losses that had not been reported in its annual financial statements. These losses involved partnerships in which Uprock had a financial risk, but which were treated as independent entities rather than as part of the company. As a result of the sudden announcement, the stock plummeted in value to virtually zero and Uprock filed for bankruptcy. A federal prosecutor began an investigation of Uprock and its outside accounting firm, Peerless & PIPPS, and Uprock shareholders filed a class action suit against the officers and directors of the company and against Peerless & PIPPS.

The class action case is set for trial. Prior to trial plaintiffs file a motion *in limine* seeking to admit a handwritten note found at the scene of a double suicide and indicating that, if necessary, they will rely on Rule 807. A husband and wife, Jan and Jene Jepschock, were former officers of Uprock. They were found dead in their home several months after the company went bankrupt. Each took a massive overdose of sleeping pills. Next to Jan's body was a note that was identified as being written by Jan which contained the following: "We can't take it any more. The prospects of a trial and possible indictment are too much to bear. The President knew about the loans, the CEO knew about the loans, the COO knew about the loans. I was there when they talked about the loans. They should have been disclosed. We all knew it. It was greed run amuck. We hope they rot in hell and this note helps those who have been injured."

The President, CEO, and COO are all named defendants in the class action. The President and CEO each claim that they were unaware of the

partnerships and of the company's risk. The COO claims that she knew of the partnerships, but was absolutely convinced by Peerless & PIPPS that the partnerships were accounted for properly and that the company's financial statements were prepared in accordance with general accounting principles. They and the other defendants oppose the admission of the note. The trial judge sets a pretrial hearing.

- Court:** What is the defendants' position regarding the note?
- Defendants:** We move to exclude it as pure hearsay.
- Court:** What do the plaintiffs have to say?
- Plaintiffs:** First, your Honor, we think it is a dying declaration. The declarant is unavailable, and the statement explains the death.
- Defendants:** What an outrageous claim. This is not simply a statement about the cause and circumstances of a death. It is a claim about who knew what and when they knew it. This is not a dying declaration.
- Court:** I'm inclined to agree with defendants that this goes beyond what I could admit as a dying declaration.
- Plaintiffs:** Second, it should come in to prove state of mind under Rule 803(3).
- Defendants:** The note refers to things that took place in the past. This is not simply a statement about a present state of mind. Although there may be small parts of the note that refer to a present state of mind, those are irrelevant, and the parts that are relevant look backward.
- Court:** Again, I am inclined to agree with defendants. To the extent that the note is relevant, it is an accusation that looks backwards and falls outside Rule 803(3).
- Plaintiffs:** Third, we submit that the statement is a declaration against both pecuniary and penal interest, and that the declarant is unavailable.
- Defendants:** It cannot be a declaration against penal interest, since the declarant expected to be dead not prosecuted. That's why he wrote the note. And, by taking his life, the declarant assured that the note could not be against his pecuniary interest. He did not expect to be alive to be held financially responsible.
- Court:** For the third time, I am inclined to agree with defendants that there is no showing that the declarant believed he would be exposing himself to penal or pecuniary liability by writing the note.

- Plaintiffs:** Fourth, we rely as we told defendants that we would, on the residual hearsay exception, Rule 807. The declarant is dead. Even though the court has rejected our first three arguments, we believe that the note is not only critically important, but that there are circumstantial guarantees of trustworthiness associated with it.
- Court:** What are those?
- Plaintiffs:** The declarant made the statement as he was about to die. The same principle that one does not face his maker with a lie on his lips that supports Rule 804(b)(2) applies here. Second, the declarant was prepared to die because of what he did; he was exposing himself to death which is at least as important as exposure to criminal or civil liability. Third, the fact is that he was describing his present state of mind and explaining why suicide was contemplated.
- Defendants:** We believe that there is better evidence available. The President, the CEO and the COO are here to testify as are other officers and directors. Their live testimony is better evidence than this hearsay note.
- Court:** Now, let me understand the defendants' position. Are you saying that a hearsay statement can not be admitted under Rule 807 whenever there are live witnesses to events?
- Defendants:** What we are saying is that Rule 807 plainly states that the proponent of hearsay should show that "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts" and there are better witnesses available.
- Plaintiffs:** All of those "better" witnesses have a reason to lie.
- Defendants:** So did the declarant. He obviously was hostile to the defendants and wrote the note to injure them. The plaintiffs have a full and fair chance to examine the witnesses who are alive, and the jury can determine whether their denials are true.
- Court:** Anything more?
- Plaintiffs:** No, your Honor.
- Defendants:** No, your Honor.
- Court:** (1)_____

The plaintiffs filed another *in limine* motion seeking admission of evidence. Pursuant to Rule 6 of the Federal Rules of Criminal Procedure, the federal

prosecutor sought and obtained permission from the federal district court to share with the plaintiffs in the civil suit the grand jury testimony of Jene Jepshock. Jene testified to the grand jury that "I worked for Uprock along with my husband. We had our entire pensions in company stock. When the stock took a dive, I asked my husband how this could have happened. He told me that the President knew about the loans, the CEO knew about the loans, and the COO knew about the loans. He said that he was there when they talked about the loans and that they all understood that the loans should have been disclosed, but they were all afraid that the stock value would drop." The plaintiffs seek to have the grand jury testimony admitted and give notice that they may rely on Rule 807.

- Court:** What is the defendants' position on this one?
Defendants: This is pure hearsay just like the note.
Court: What do plaintiffs have to say?
Plaintiffs: It's former testimony.
Defendants: Can't be. We did not have a chance to examine the witness.
- Court:** Defendants are right on that one.
Plaintiffs: What about Rule 801(d)(1)(A)?
Defendants: That must fail. She's not available for cross-examination.
- Court:** Defendants are correct once again.
Plaintiffs: It's a declaration against her husband's penal interest.
- Defendants:** A statement against someone else's pecuniary interest is not within Rule 804(b)(3).
- Court:** It does appear to fall outside the wall.
Plaintiffs: Then it should be admitted under the residual exception.
- Court:** What are the guarantees of trustworthiness?
Plaintiffs: The witness was under oath, and she knew she could be prosecuted if she lied. She made statements that were extremely damaging to her husband. A wife does not make such statements under oath if they are not true.
- Defendants:** The fact is that after making these statements she and her husband killed themselves, so she might have thought that nothing she said was ever going to be used against her husband. And the fact that she was under oath is true of all grand jury witnesses. The plaintiffs' argument would open the door to such testimony too far.
- Court:** Anything else?

- Defendants:** Yes. If the court decides to admit the note, the plaintiffs cannot show that "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." The wife's testimony is double hearsay, and it cannot be as reliable as the husband's statement. So, we think that the testimony must be excluded if the note is admitted and that it should be excluded anyway because there are live witnesses available to testify.
- Court:** Let me understand your position. You maintain that if I admit the husband's note, I cannot admit the wife's statement. Your argument is that there is by definition only one statement that is more probative than any other evidence, and therefore that two statements cannot be admitted.
- Defendants:** Exactly. That is just how we read Rule 807.
- Plaintiffs:** We don't read the Rule that way. We believe that the court may find that the statement by the husband is better than any other evidence concerning his role in the case, and the statement by the wife is better than other evidence with respect to what she learned about her husband's role.
- Court:** So, your position is that Rule 807 does not limit the court to admit only one hearsay statement in a case?
- Plaintiffs:** Exactly. That is how we read Rule 807.
- Court:** (2) _____



Chapter 15

HEARSAY AND THE CONFRONTATION CLAUSE

A. CONFRONTATION CLAUSE

The Confrontation Clause of the Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him."

In *Mattox v. United States*, 156 U.S. 237 (1895), the Supreme Court indicated that the Confrontation Clause served two purposes: to allow a defendant the right to face his or her accusing witness in open court for truth-testing cross-examinations and to give the jury an opportunity to determine the credibility of the witness through observation of the witness' demeanor. The Court further explained:

The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, from being used against the prisoner in lieu of a personal examination * * * of the witness * * * in which the accused has an opportunity [to compel the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

In 1965, the Supreme Court in *Pointer v. Texas*, 380 U.S. 400, 403 (1965), held that the protections afforded a criminal defendant under the Confrontation Clause of the Sixth Amendment were applicable in state court proceedings by virtue of the Due Process Clause of the Fourteenth Amendment.

B. CONFRONTATION CLAUSE vs. ADMISSION OF OUT-OF-COURT DECLARATIONS

Hearsay is defined by Federal Rule of Evidence 801 as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 802 further provides that hearsay is generally not admissible except as provided by the Rules of Evidence or by other rules prescribed by the Supreme Court. Hearsay is excluded from evidence for the same reason as underlies the Confrontation Clause — such declarations are generally not subject to cross-examination and thus are considered unreliable. See *California v. Green*, 399 U.S. 149, 155 (1970) (hearsay rules and the Confrontation Clause generally designed to protect similar values); and *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (hearsay rules and the Confrontation Clause "stem from the same roots").



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In *Mattox v. United States*, 156 U.S. 237 (1895), the Supreme Court indicated that the Confrontation Clause served two purposes: to allow a defendant the right to face his or her accusing witness in open court for truth-testing cross-examinations and to give the jury an opportunity to determine the credibility of the witness through observation of the witness' demeanor. The Court further explained:

The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, from being used against the prisoner in lieu of a personal examination * * * of the witness * * * in which the accused has an opportunity [to compel the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

In 1965, the Supreme Court in *Pointer v. Texas*, 380 U.S. 400, 403 (1965), held that the protections afforded a criminal defendant under the Confrontation Clause of the Sixth Amendment were applicable in state court proceedings by virtue of the Due Process Clause of the Fourteenth Amendment.

B. CONFRONTATION CLAUSE vs. ADMISSION OF OUT-OF-COURT DECLARATIONS

Hearsay is defined by Federal Rule of Evidence 801 as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 802 further provides that hearsay is generally not admissible except as provided by the Rules of Evidence or by other rules prescribed by the Supreme Court. Hearsay is excluded from evidence for the same reason as underlies the Confrontation Clause — such declarations are generally not subject to cross-examination and thus are considered unreliable. See *California v. Green*, 399 U.S. 149, 155 (1970) (hearsay rules and the Confrontation Clause generally designed to protect similar values); and *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (hearsay rules and the Confrontation Clause "stem from the same roots").

Thus, read together, the Confrontation Clause and the hearsay rule would seem to provide a basis for excluding from evidence any statements that fall under the definition of hearsay and for which no right of cross-examination is granted to the defendant. The hearsay rule, however, recognizes that there are means other than cross-examination for assuring reliability of the out-of-court statement. The conflict between the Confrontation Clause and hearsay rule arises as a result of the exclusions from and the exceptions to the definition of hearsay which allow a vast number and type of out-of-court declarations to be admitted into evidence without the declarant being present in court for cross-examination by the defendant. The Federal Rules of Evidence establish more than thirty types of out-of-court statements that are not rendered inadmissible by the hearsay rule. Both state and federal criminal courts are frequently confronted with the problem of attempting to reconcile the defendant's rights under the Confrontation Clause with the Rules of Evidence that allow for the admission of statements which either are excluded from the definition of hearsay or are deemed exceptions to the hearsay rule.

C. A FOCUS ON TESTIMONIAL HEARSAY

CRAWFORD v. WASHINGTON 541 U.S. 36 (2004)

JUSTICE SCALIA delivered the opinion of the Court.

Petitioner Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia. At his trial, the State played for the jury Sylvia's tape-recorded statement to the police describing the stabbing, even though he had no opportunity for cross-examination. The Washington Supreme Court upheld petitioner's conviction after determining that Sylvia's statement was reliable. The question presented is whether this procedure complied with the Sixth Amendment's guarantee that, "in all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him."

I

On August 5, 1999, Kenneth Lee was stabbed at his apartment. Police arrested petitioner later that night. After giving petitioner and his wife *Miranda* warnings, detectives interrogated each of them twice. Petitioner eventually confessed that he and Sylvia had gone in search of Lee because he was upset over an earlier incident in which Lee had tried to rape her. The two had found Lee at his apartment, and a fight ensued in which Lee was stabbed in the torso and petitioner's hand was cut.

Petitioner gave the following account of the fight:

Q. Okay. Did you ever see anything in [Lee's] hands?

A. I think so, but I'm not positive.

Q. Okay, when you think so, what do you mean by that?

A. I coulda swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here

and stuff * * * and I just * * * I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut * * * but I'm not positive. I, I, my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later.

Sylvia generally corroborated petitioner's story about the events leading up to the fight, but her account of the fight itself was arguably different — particularly with respect to whether Lee had drawn a weapon before petitioner assaulted him:

Q. Did Kenny do anything to fight back from this assault?

A. (pausing) I know he reached into his pocket * * * or somethin' * * * I don't know what.

Q. After he was stabbed?

A. He saw Michael coming up. He lifted his hand * * * his chest open, he might [have] went to go strike his hand out or something and then (inaudible).

Q. Okay, you, you gotta speak up.

A. Okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his * * * put his right hand in his right pocket * * * took a step back * * * Michael proceeded to stab him * * * then his hands were like * * * how do you explain this * * * open arms * * * with his hands open and he fell down * * * and we ran (describing subject holding hands open, palms toward assailant).

Q. Okay, when he's standing there with his open hands, you're talking about Kenny, correct?

A. Yeah, after, after the fact, yes.

Q. Did you see anything in his hands at that point?

A. (pausing) um um (no).

The State charged petitioner with assault and attempted murder. At trial, he claimed self-defense. Sylvia did not testify because of the state marital privilege, which generally bars a spouse from testifying without the other spouse's consent. See Wash. Rev. Code § 5.60.060(1) (1994). In Washington, this privilege does not extend to a spouse's out-of-court statements admissible under a hearsay exception, see *State v. Burden*, 120 Wn. 2d 371, 377, 841 P.2d 758, 761 (1992), so the State sought to introduce Sylvia's tape-recorded statements to the police as evidence that the stabbing was not in self-defense. Noting that Sylvia had admitted she led petitioner to Lee's apartment and thus had facilitated the assault, the State invoked the hearsay exception for statements against penal interest, Wash. Rule Evid. 804(b)(3) (2003).

Petitioner countered that, state law notwithstanding, admitting the evidence would violate his federal constitutional right to be "confronted with the

witnesses against him.” Amdt. 6. According to our description of that right in *Ohio v. Roberts*, 448 U.S. 56 (1980), it does not bar admission of an unavailable witness’s statement against a criminal defendant if the statement bears “adequate indicia of reliability.” *Id.*, 448 U.S. at 66. To meet that test, evidence must either fall within a “firmly rooted hearsay exception” or bear “particularized guarantees of trustworthiness.” *Ibid.* The trial court here admitted the statement on the latter ground, offering several reasons why it was trustworthy: Sylvia was not shifting blame but rather corroborating her husband’s story that he acted in self-defense or “justified reprisal”; she had direct knowledge as an eyewitness; she was describing recent events; and she was being questioned by a “neutral” law enforcement officer. The prosecution played the tape for the jury and relied on it in closing, arguing that it was “damning evidence” that “completely refutes [petitioner’s] claim of self-defense.” Tr. 468 (Oct. 21, 1999). The jury convicted petitioner of assault.

The Washington Court of Appeals reversed. It applied a nine-factor test to determine whether Sylvia’s statement bore particularized guarantees of trustworthiness, and noted several reasons why it did not: The statement contradicted one she had previously given; it was made in response to specific questions; and at one point she admitted she had shut her eyes during the stabbing. The court considered and rejected the State’s argument that Sylvia’s statement was reliable because it coincided with petitioner’s to such a degree that the two “interlocked.” The court determined that, although the two statements agreed about the events leading up to the stabbing, they differed on the issue crucial to petitioner’s self-defense claim: “[Petitioner’s] version asserts that Lee may have had something in his hand when he stabbed him; but Sylvia’s version has Lee grabbing for something only after he has been stabbed.”

The Washington Supreme Court reinstated the conviction, unanimously concluding that, although Sylvia’s statement did not fall under a firmly rooted hearsay exception, it bore guarantees of trustworthiness: “When a codefendant’s confession is virtually identical [to, *i.e.*, interlocks with,] that of a defendant, it may be deemed reliable.” 147 Wash. 2d 424, 437, 54 P. 3d 656, 663 (2002) (quoting *State v. Rice*, 120 Wn. 2d 549, 570, 844 P.2d 416, 427 (1993)). The court explained:

Although the Court of Appeals concluded that the statements were contradictory, upon closer inspection they appear to overlap * * *.

Both of the Crawfords’ statements indicate that Lee was possibly grabbing for a weapon, but they are equally unsure when this event may have taken place. They are also equally unsure how Michael received the cut on his hand, leading the court to question when, if ever, Lee possessed a weapon. In this respect they overlap.

Neither Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself. And it is this omission by both that interlocks the statements and makes

Sylvia's statement reliable. 147 Wash. 2d, at 438-439, 54 P. 3d, at 664 (internal quotation marks omitted).¹

We granted certiorari to determine whether the State's use of Sylvia's statement violated the Confrontation Clause. 539 U.S. 914 (2003).

II

The Sixth Amendment's Confrontation Clause provides that, "in all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." We have held that this bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer v. Texas*, 380 U.S. 400, 406 (1965). As noted above, *Roberts* says that an unavailable witness's out-of-court statement may be admitted so long as it has adequate indicia of reliability — *i.e.*, falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." 448 U.S., at 66. Petitioner argues that this test strays from the original meaning of the Confrontation Clause and urges us to reconsider it.

A

The Constitution's text does not alone resolve this case. One could plausibly read "witnesses against" a defendant to mean those who actually testify at trial, cf. *Woodsides v. State*, 3 Miss. 655, 664-665, 1 Morr. St. Cas. 95 (1837), those whose statements are offered at trial, see 3 J. Wigmore, *Evidence* § 1397, p. 104 (2d ed. 1923) (hereinafter *Wigmore*), or something in-between. We must therefore turn to the historical background of the Clause to understand its meaning.

The right to confront one's accusers is a concept that dates back to Roman times. See *Coy v. Iowa*, 487 U.S. 1012, 1015, 101 L. Ed. 2d 857, 108 S. Ct. 2798 (1988); Herrmann & Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 Va. J. Int'l L. 481 (1994). The founding generation's immediate source of the concept, however, was the common law. English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers. See 3 W. Blackstone, *Commentaries on the Laws of England* 373-374 (1768).

Nonetheless, England at times adopted elements of the civil-law practice. Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court in lieu of live

¹ The court rejected the State's argument that guarantees of trustworthiness were unnecessary since petitioner waived his confrontation rights by invoking the marital privilege. It reasoned that "forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice." 147 Wash. 2d, at 432, 54 P. 3d, at 660. The State has not challenged this holding here. The State also has not challenged the Court of Appeals' conclusion (not reached by the State Supreme Court) that the confrontation violation, if it occurred, was not harmless. We express no opinion on these matters.

testimony, a practice that "occasioned frequent demands by the prisoner to have his 'accusers,' i.e. the witnesses against him, brought before him face to face." 1 J. Stephen, *History of the Criminal Law of England* 326 (1883). In some cases, these demands were refused. See 9 W. Holdsworth, *History of English Law* 216-217, 228 (3d ed. 1944); e.g., *Raleigh's Case*, 2 How. St. Tr. 1, 15-16, 24 (1603); *Throckmorton's Case*, 1 How. St. Tr. 869, 875-876 (1554); cf. *Lilburn's Case*, 3 How. St. Tr. 1315, 1318-1322, 1329 (Star Chamber 1637).

Pretrial examinations became routine under two statutes passed during the reign of Queen Mary in the 16th century, 1 & 2 Phil. & M., c. 13 (1554), and 2 & 3 *id.*, c. 10 (1555). These Marian bail and committal statutes required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court. It is doubtful that the original purpose of the examinations was to produce evidence admissible at trial. See J. Langbein, *Prosecuting Crime in the Renaissance* 21-34 (1974). Whatever the original purpose, however, they came to be used as evidence in some cases, see 2 M. Hale, *Pleas of the Crown* 284 (1736), resulting in an adoption of continental procedure. See 4 Holdsworth, *supra*, at 528-530.

The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour." 1 D. Jardine, *Criminal Trials* 435 (1832). Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that "the Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face * * * ." 2 How. St. Tr., at 15-16. The judges refused, *id.*, at 24, and, despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," *id.*, at 15, the jury convicted, and Raleigh was sentenced to death.

One of Raleigh's trial judges later lamented that "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh." 1 Jardine, *supra*, at 520. Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses. For example, treason statutes required witnesses to confront the accused "face to face" at his arraignment. E.g., 13 Car. 2, c. 1, § 5 (1661); see 1 Hale, *supra*, at 306. Courts, meanwhile, developed relatively strict rules of unavailability, admitting examinations only if the witness was demonstrably unable to testify in person. See *Lord Morley's Case*, 6 How. St. Tr. 769, 770-771 (H. L. 1666); 2 Hale, *supra*, at 284; 1 Stephen, *supra*, at 358. Several authorities also stated that a suspect's confession could be admitted only against himself, and not against others he implicated. See 2 W. Hawkins, *Pleas of the Crown* c. 46, § 3, pp. 603-604 (T. Leach 6th ed. 1787); 1 Hale, *supra*, at 585, n. (k); 1 G. Gilbert, *Evidence* 216 (C. Lofft ed. 1791); cf. *Tong's Case*, Kel. J. 17, 18, 84 Eng. Rep. 1061, 1062 (1662) (treason). But see *King v. Westbeer*, 1 Leach 12, 168 Eng. Rep. 108, 109 (1739).

One recurring question was whether the admissibility of an unavailable witness's pretrial examination depended on whether the defendant had had an opportunity to cross-examine him. In 1696, the Court of King's Bench answered this question in the affirmative, in the widely reported misdemeanor libel case of *King v. Paine*, 5 Mod. 163, 87 Eng. Rep. 584. The court ruled that, even though a witness was dead, his examination was not admissible where "the defendant not being present when [it was] taken before the mayor * * * had lost the benefit of a cross-examination." *Id.*, at 165, 87 Eng. Rep., at 585. The question was also debated at length during the infamous proceedings against Sir John Fenwick on a bill of attainder. Fenwick's counsel objected to admitting the examination of a witness who had been spirited away, on the ground that Fenwick had had no opportunity to cross-examine. See *Fenwick's Case*, 13 How. St. Tr. 537, 591-592 (H. C. 1696) (Powys) ("That which they would offer is something that Mr. Goodman hath sworn when he was examined * * *; sir J. F. not being present or privy, and no opportunity given to cross-examine the person; and I conceive that cannot be offered as evidence * * *"); *id.*, at 592 (Shower) ("No deposition of a person can be read, though beyond sea, unless in cases where the party it is to be read against was privy to the examination, and might have cross-examined him * * *. Our constitution is, that the person shall see his accuser"). The examination was nonetheless admitted on a closely divided vote after several of those present opined that the common-law rules of procedure did not apply to parliamentary attainder proceedings — one speaker even admitting that the evidence would normally be inadmissible. See *id.*, at 603-604 (Williamson); *id.*, at 604-605 (Chancellor of the Exchequer); *id.*, at 607; 3 Wigmore § 1364, at 22-23, n. 54. Fenwick was condemned, but the proceedings "must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination." *Id.*, § 1364, at 22; cf. *Carmell v. Texas*, 529 U.S. 513, 526-530 (2000).

Paine had settled the rule requiring a prior opportunity for cross-examination as a matter of common law, but some doubts remained over whether the Marian statutes prescribed an exception to it in felony cases. The statutes did not identify the circumstances under which examinations were admissible, see 1 & 2 Phil. & M., c. 13 (1554); 2 & 3 *id.*, c. 10 (1555), and some inferred that no prior opportunity for cross-examination was required. See *Westbeer*, *supra*, at 12, 168 Eng. Rep., at 109; compare *Fenwick's Case*, 13 How. St. Tr., at 596 (Sloane), with *id.*, at 602 (Musgrave). Many who expressed this view acknowledged that it meant the statutes were in derogation of the common law. See *King v. Eriswell*, 3 T. R. 707, 710, 100 Eng. Rep. 815, 817 (K. B. 1790) (Grose, J.) (*dicta*); *id.*, at 722-723, 100 Eng. Rep., at 823-824 (Kenyon, C. J.) (same); compare 1 Gilbert, Evidence, at 215 (admissible only "by Force 'of the Statute'"), with *id.*, at 65. Nevertheless, by 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases. See *King v. Dingler*, 2 Leach 561, 562-563, 168 Eng. Rep. 383, 383-384 (1791); *King v. Woodcock*, 1 Leach 500, 502-504, 168 Eng. Rep. 352, 353 (1789); cf. *King v. Radbourne*, 1 Leach 457, 459-461, 168 Eng. Rep. 330, 331-332 (1787); 3 Wigmore § 1364, at 23. Early 19th-century treatises confirm that requirement. See 1 T. Starkie, Evidence 95 (1826); 2 *id.*, at 484-492; T. Peake,

Evidence 63-64 (3d ed. 1808). When Parliament amended the statutes in 1848 to make the requirement explicit, see 11 & 12 Vict., c. 42, § 17, the change merely "introduced in terms" what was already afforded the defendant "by the equitable construction of the law." *Queen v. Beeston*, 29 Eng. L. & Eq. R. 527, 529 (Ct. Crim. App. 1854) (Jervis, C. J.).²

B

Controversial examination practices were also used in the Colonies. Early in the 18th century, for example, the Virginia Council protested against the Governor for having "privately issued several commissions to examine witnesses against particular men *ex parte*," complaining that "the person accused is not admitted to be confronted with, or defend himself against his defamers." A Memorial Concerning the Maladministrations of His Excellency Francis Nicholson, reprinted in 9 English Historical Documents 253, 257 (D. Douglas ed. 1955). A decade before the Revolution, England gave jurisdiction over Stamp Act offenses to the admiralty courts, which followed civil-law rather than common-law procedures and thus routinely took testimony by deposition or private judicial examination. See 5 Geo. 3, c. 12, § 57 (1765); Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381, 396-397 (1959). Colonial representatives protested that the Act subverted their rights "by extending the jurisdiction of the courts of admiralty beyond its ancient limits." Resolutions of the Stamp Act Congress § 8th (Oct. 19, 1765), reprinted in *Sources of Our Liberties* 270, 271 (R. Perry & J. Cooper eds. 1959). John Adams, defending a merchant in a high-profile admiralty case, argued: "Examinations of witnesses upon Interrogatories, are only by the Civil Law. Interrogatories are unknown at common Law, and Englishmen and common Lawyers have an aversion to them if not an Abhorrence of them." Draft of Argument in *Sewall v. Hancock* (1768-1769), in 2 Legal Papers of John Adams 194, 207 (K. Wroth & H. Zobel eds. 1965).

Many declarations of rights adopted around the time of the Revolution guaranteed a right of confrontation. See Virginia Declaration of Rights § 8 (1776); Pennsylvania Declaration of Rights § IX (1776); Delaware Declaration of Rights § 14 (1776); Maryland Declaration of Rights § XIX (1776); North Carolina Declaration of Rights § VII (1776); Vermont Declaration of Rights Ch. I, § X (1777); Massachusetts Declaration of Rights § XII (1780); New Hampshire Bill of Rights § XV (1783), all reprinted in 1 B. Schwartz, *The Bill of Rights: A Documentary History* 235, 265, 278, 282, 287, 323, 342, 377 (1971). The proposed Federal Constitution, however, did not. At the Massachusetts ratifying convention, Abraham Holmes objected to this omission precisely

² There is some question whether the requirement of a prior opportunity for cross-examination applied as well to statements taken by a coroner, which were also authorized by the Marian statutes. See 3 Wigmore § 1364, at 23 (requirement "never came to be conceded at all in England"); T. Peake, *Evidence* 64, n. (m) (3d ed. 1808) (not finding the point "expressly decided in any reported case"); *State v. Houser*, 26 Mo. 431, 436 (1858) ("there may be a few cases * * * but the authority of such cases is questioned, even in [England], by their ablest writers on common law"); *State v. Campbell*, 30 S.C.L. 124 (1844) (point "has not * * * been plainly adjudged, even in the English cases"). Whatever the English rule, several early American authorities flatly rejected any special status for coroner statements. See *Houser*, *supra*, at 436; *Campbell*, *supra*, at 130; T. Cooley, *Constitutional Limitations* *318.

on the ground that it would lead to civil-law practices: "The mode of trial is altogether indetermined; * * * whether [the defendant] is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told * * *. We shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, * * * the *Inquisition*." 2 Debates on the Federal Constitution 110-111 (J. Elliot 2d ed. 1863). Similarly, a prominent Antifederalist writing under the pseudonym Federal Farmer criticized the use of "written evidence" while objecting to the omission of a vicinage right: "Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question * * *. Written evidence * * * [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth." R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), reprinted in 1 Schwartz, *supra*, at 469, 473. The First Congress responded by including the Confrontation Clause in the proposal that became the Sixth Amendment.

Early state decisions shed light upon the original understanding of the common-law right. *State v. Webb*, 2 N. C. 103 (1794) (*per curiam*), decided a mere three years after the adoption of the Sixth Amendment, held that depositions could be read against an accused only if they were taken in his presence. Rejecting a broader reading of the English authorities, the court held: "It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." *Id.*, at 104.

Similarly, in *State v. Campbell*, 30 S.C.L. 124 (1844), South Carolina's highest law court excluded a deposition taken by a coroner in the absence of the accused. It held: "If we are to decide the question by the established rules of the common law, there could not be a dissenting voice. For, notwithstanding the death of the witness, and whatever the respectability of the court taking the depositions, the solemnity of the occasion and the weight of the testimony, such depositions are *ex parte*, and, therefore, utterly incompetent." *Id.*, at 125. The court said that one of the "indispensable conditions" implicitly guaranteed by the State Constitution was that "prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination." *Ibid.*

Many other decisions are to the same effect. Some early cases went so far as to hold that prior testimony was inadmissible in criminal cases *even if* the accused had a previous opportunity to cross-examine. See *Finn v. Commonwealth*, 26 Va. 701, 708 (1827); *State v. Atkins*, 1 Tenn. 229 (1807) (*per curiam*). Most courts rejected that view, but only after reaffirming that admissibility depended on a prior opportunity for cross-examination. See *United States v. Macomb*, 26 F. Cas. 1132, 1133, F. Cas. No. 15702 (No. 15,702) (CC Ill. 1851); *State v. Houser*, 26 Mo. 431, 435-436 (1858); *Kendrick v. State*, 29 Tenn. 479, 485-488 (1850); *Bostick v. State*, 22 Tenn. 344, 345-346 (1842); *Commonwealth v. Richards*, 35 Mass. 434, 437, 18 Pick. 434 (1837); *State v. Hill*, 20 S.C.L. 607, 608-610 (S. C. 1835); *Johnston v. State*, 10 Tenn. 58, 59 (1821). Nineteenth-century treatises confirm the rule. See 1 J. Bishop, *Criminal Procedure* § 1093, p. 689 (2d ed. 1872); T. Cooley, *Constitutional Limitations* *318.

III

This history supports two inferences about the meaning of the Sixth Amendment.

A

First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon "the law of Evidence for the time being." 3 Wigmore § 1397, at 101; accord, *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring in result). Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.

This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.

The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused — in other words, those who "bear testimony." 1 N. Webster, *An American Dictionary of the English Language* (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent — that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements * * * contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois*, 502 U.S. 346, 365 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part

and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition — for example, *ex parte* testimony at a preliminary hearing.

Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive. Cobham's examination was unsworn, see 1 Jardine, *Criminal Trials*, at 430, yet Raleigh's trial has long been thought a paradigmatic confrontation violation, see, e.g., *Campbell*, 30 S.C.L., at 130. Under the Marian statutes, witnesses were typically put on oath, but suspects were not. See 2 Hale, *Pleas of the Crown*, at 52. Yet Hawkins and others went out of their way to caution that such unsworn confessions were not admissible against anyone but the confessor. See *supra*, at 8. [Footnote 3 omitted.]

That interrogators are police officers rather than magistrates does not change the picture either. Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function. See 1 Stephen, *Criminal Law of England*, at 221; Langbein, *Prosecuting Crime in the Renaissance*, at 34-45. England did not have a professional police force until the 19th century, see 1 Stephen, *supra*, at 194-200, so it is not surprising that other government officers performed the investigative functions now associated primarily with the police. The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.

In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.⁴

B

The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the "right * * * to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only

⁴ We use the term "interrogation" in its colloquial, rather than any technical legal, sense. Cf. *Rhode Island v. Innis*, 446 U.S. 291, 300-301, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980). Just as various definitions of "testimonial" exist, one can imagine various definitions of "interrogation," and we need not select among them in this case. Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.

those exceptions established at the time of the founding. See *Mattox v. United States*, 156 U.S. 237, 243 (1895). As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations. The numerous early state decisions applying the same test confirm that these principles were received as part of the common law in this country. [Footnote 5 omitted.]

We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability. This is not to deny, as THE CHIEF JUSTICE notes, that "there were always exceptions to the general rule of exclusion" of hearsay evidence. Several had become well established by 1791. But there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case.⁶ 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. We do not infer from these that the Framers thought exceptions would apply even to prior testimony. Cf. *Lilly v. Virginia*, 527 U.S. 116, 134, 144 L. Ed. 2d 117, 119 S. Ct. 1887 (1999) (plurality opinion) ("Accomplices' confessions that inculcate a criminal defendant are not within a firmly rooted exception to the hearsay rule").⁷

IV

Our case law has been largely consistent with these two principles. Our leading early decision, for example, involved a deceased witness's prior trial testimony. *Mattox v. United States*, 156 U.S. 237 (1895). In allowing the statement to be admitted, we relied on the fact that the defendant had had, at the first trial, an adequate opportunity to confront the witness: "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to

⁶ The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. See, e.g., *Mattox v. United States*, 156 U.S. 237, 243-244, 39 L. Ed. 409, 15 S. Ct. 337 (1895); *King v. Reason*, 16 How. St. Tr. 1, 24-38 (K. B. 1722); 1 D. Jardine, *Criminal Trials* 435 (1832); Cooley, *Constitutional Limitations*, at *318; 1 G. Gilbert, *Evidence* 211 (C. Loffl ed. 1791); see also F. Heller, *The Sixth Amendment* 105 (1951) (asserting that this was the *only* recognized criminal hearsay exception at common law). Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. See *Woodcock*, *supra*, at 501-504, 168 Eng. Rep., at 353-354; *Reason*, *supra*, at 24-38; Peake, *Evidence*, at 64; cf. *Radbourne*, *supra*, at 460-462, 168 Eng. Rep., at 332-333. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.

⁷ We cannot agree with THE CHIEF JUSTICE that the fact "that a statement might be testimonial does nothing to undermine the wisdom of one of these [hearsay] exceptions." Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse — a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.

the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of * * *." *Id.*, at 244.

Our later cases conform to *Mattox's* holding that prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine. See *Mancusi v. Stubbs*, 408 U.S. 204, 213-216 (1972); *California v. Green*, 399 U.S. 149, 165-168 (1970); *Pointer v. Texas*, 380 U.S., at 406-408; cf. *Kirby v. United States*, 174 U.S. 47, 55-61 (1899). Even where the defendant had such an opportunity, we excluded the testimony where the government had not established unavailability of the witness. See *Barber v. Page*, 390 U.S. 719, 722-725 (1968); cf. *Motes v. United States*, 178 U.S. 458, 470-471 (1900). We similarly excluded accomplice confessions where the defendant had no opportunity to cross-examine. See *Roberts v. Russell*, 392 U.S. 293, 294-295 (1968) (*per curiam*); *Bruton v. United States*, 391 U.S. 123, 126-128 (1968); *Douglas v. Alabama*, 380 U.S. 415, 418-420 (1965). In contrast, we considered reliability factors beyond prior opportunity for cross-examination when the hearsay statement at issue was not testimonial. See *Dutton v. Evans*, 400 U.S., at 87-89 (plurality opinion).

Even our recent cases, in their outcomes, hew closely to the traditional line. *Ohio v. Roberts*, 448 U.S., at 67-70, admitted testimony from a preliminary hearing at which the defendant had examined the witness. *Lilly v. Virginia*, *supra*, 527 U.S. 116, excluded testimonial statements that the defendant had had no opportunity to test by cross-examination. And *Bourjaily v. United States*, 483 U.S. 171, 181-184 (1987), admitted statements made unwittingly to an FBI informant after applying a more general test that did *not* make prior cross-examination an indispensable requirement.⁸

Lee v. Illinois, 476 U.S. 530 (1986), on which the State relies, is not to the contrary. There, we *rejected* the State's attempt to admit an accomplice confession. The State had argued that the confession was admissible because it "interlocked" with the defendant's. We dealt with the argument by rejecting its premise, holding that "when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted." *Id.*, at 545. Respondent argues that "the logical inference of this statement is that when the discrepancies between the statements *are* insignificant, then the codefendant's statement *may* be admitted." Brief for Respondent 6. But this is merely a possible inference, not an inevitable one, and we do not draw it here. If *Lee* had meant authoritatively to announce an exception — previously unknown to this Court's jurisprudence — for interlocking confessions, it would

⁸ One case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is *White v. Illinois*, 502 U.S. 346(1992), which involved, *inter alia*, statements of a child victim to an investigating police officer admitted as spontaneous declarations. It is questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made "immediately upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage." *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K. B. 1694). In any case, the only question presented in *White* was whether the Confrontation Clause imposed an unavailability requirement on the types of hearsay at issue. The holding did not address the question whether certain of the statements, because they were testimonial, had to be excluded *even if* the witness was unavailable. We "[took] as a given * * * that the testimony properly falls within the relevant hearsay exceptions." *Id.*, at 351, n. 4.

not have done so in such an oblique manner. Our only precedent on interlocking confessions had addressed the entirely different question whether a limiting instruction cured prejudice to codefendants from admitting a defendant's *own* confession against him in a joint trial. See *Parker v. Randolph*, 442 U.S. 62, 69-76 (1979) (plurality opinion), abrogated by *Cruz v. New York*, 481 U.S. 186 (1987).

Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.⁹

V

Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales. *Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." 448 U.S., at 66. This test departs from the historical principles identified above in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.

Members of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause.

⁹ THE CHIEF JUSTICE complains that our prior decisions have "never drawn a distinction" like the one we now draw, citing in particular *Mattox v. United States*, 156 U.S. 237 (1895), *Kirby v. United States*, 174 U.S. 47 (1899), and *United States v. Burr*, 25 F. Cas. 187, F. Cas. No. 14694 (No. 14,694) (CC Va. 1807) (Marshall, C. J.). But nothing in these cases contradicts our holding in any way. *Mattox* and *Kirby* allowed or excluded evidence depending on whether the defendant had had an opportunity for cross-examination. That the two cases did not extrapolate a more general class of evidence to which that criterion applied does not prevent us from doing so now. As to *Burr*, we disagree with THE CHIEF JUSTICE's reading of the case. Although Chief Justice Marshall made one passing reference to the Confrontation Clause, the case was fundamentally about the hearsay rules governing statements in furtherance of a conspiracy. The "principle so truly important" on which "inroads" had been introduced was the "rule of evidence which rejects mere hearsay testimony." See 25 F. Cas., at 193. Nothing in the opinion concedes exceptions to the Confrontation Clause's exclusion of testimonial statements as we use the term. THE CHIEF JUSTICE fails to identify a single case (aside from one minor, arguable exception, see *supra*, at n. 8), where we have admitted testimonial statements based on indicia of reliability other than a prior opportunity for cross-examination. If nothing else, the test we announce is an empirically accurate explanation of the results our cases have reached.

Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. See *California v. Green*, 399 U.S. 149, 162 (1970). It is therefore irrelevant that the reliability of some out-of-court statements "cannot be replicated, even if the declarant testifies to the same matters in court." The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. (The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See *Tennessee v. Street*, 471 U.S. 409, 414 (1985).)

See, e.g., *Lilly*, 527 U.S., at 140-143 (BREYER, J., concurring); *White*, 502 U.S., at 366 (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); A. Amar, *The Constitution and Criminal Procedure* 125-131 (1997); Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L. J. 1011 (1998). They offer two proposals: First, that we apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law — thus eliminating the overbreadth referred to above. Second, that we impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine — thus eliminating the excessive narrowness referred to above.

In *White*, we considered the first proposal and rejected it. 502 U.S., at 352-353. Although our analysis in this case casts doubt on that holding, we need not definitively resolve whether it survives our decision today, because Sylvia Crawford's statement is testimonial under any definition. This case does, however, squarely implicate the second proposal.

A

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, *Commentaries*, at 373 ("This open examination of witnesses * * * is much more conducive to the clearing up of truth"); M. Hale, *History and Analysis of the Common Law of England* 258 (1713) (adversarial testing "beats and bolts out the Truth much better").

The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability. See *Reynolds v. United States*, 98 U.S. 145, 158-159 (1879).

The Raleigh trial itself involved the very sorts of reliability determinations that *Roberts* authorizes. In the face of Raleigh's repeated demands for confrontation, the prosecution responded with many of the arguments a court applying *Roberts* might invoke today: that Cobham's statements were self-inculpatory, 2 How. St. Tr., at 19, that they were not made in the heat of

passion, *id.*, at 14, and that they were not “extracted from [him] upon any hopes or promise of Pardon,” *id.*, at 29. It is not plausible that the Framers’ only objection to the trial was that Raleigh’s judges did not properly weigh these factors before sentencing him to death. Rather, the problem was that the judges refused to allow Raleigh to confront Cobham in court, where he could cross-examine him and try to expose his accusation as a lie.

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

B

The legacy of *Roberts* in other courts vindicates the Framers’ wisdom in rejecting a general reliability exception. The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.

Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable; the nine-factor balancing test applied by the Court of Appeals below is representative. *See, e.g., People v. Farrell*, 34 P. 3d 401, 406-407 (Colo. 2001) (eight-factor test). Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts. For example, the Colorado Supreme Court held a statement more reliable because its inculcation of the defendant was “detailed,” *id.*, at 407, while the Fourth Circuit found a statement more reliable because the portion implicating another was “fleeting,” *United States v. Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 245 (2001). The Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime (thus making the statement more obviously against her penal interest), *see Nowlin v. Commonwealth*, 40 Va. App. 327, 335-338, 579 S.E. 2d 367, 371-372 (2003), while the Wisconsin Court of Appeals found a statement more reliable because the witness was *not* in custody and *not* a suspect, *see State v. Bintz*, 257 Wis. 2d 177, 187, 650 N.W.2d 913, 918. Finally, the Colorado Supreme Court in one case found a statement more reliable because it was given “immediately after” the events at issue, *Farrell, supra*, at 407, while that same court, in another case, found a statement more reliable because two years had elapsed, *Stevens v. People*, 29 P. 3d 305, 316 (2001).

The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude. Despite the plurality’s speculation in *Lilly*, 527 U.S., at 137, that it was “highly unlikely” that accomplice confessions implicating the accused could survive *Roberts*, courts continue routinely to admit them [citing nine state cases]. One recent study found that, after *Lilly*, appellate courts admitted accomplice statements to the authorities in 25 out of 70 cases — more than one-third of the time. Kirst, Appellate Court Answers to the Confrontation Questions in *Lilly v. Virginia*, 53 Syracuse L. Rev. 87, 105 (2003). Courts have invoked *Roberts* to admit other

sorts of plainly testimonial statements despite the absence of any opportunity to cross-examine. See *United States v. Aguilar*, 295 F.3d 1018, 1021-1023 (CA9 2002) (plea allocution showing existence of a conspiracy); *United States v. Centracchio*, 265 F.3d 518, 527-530 (CA7 2001) (same); *United States v. Dolah*, 245 F.3d 98, 104-105 (CA2 2001) (same); *United States v. Petrillo*, 237 F.3d 119, 122-123 (CA2 2000) (same); *United States v. Moshowitz*, 215 F.3d 265, 268-269 (CA2 2000) (same); *United States v. Gallego*, 191 F.3d 156, 166-168 (CA2 1999) (same); *United States v. Papajohn*, 212 F.3d 1112, 1118-1120 (CA8 2000) (grand jury testimony); *United States v. Thomas*, 30 Fed. Appx. 277, 279 (CA4 2002) (same); *Bintz, supra*, PP15-22, 257 Wis. 2d, at 188-191, 650 N. W. 2d, at 918-920 (prior trial testimony); *State v. McNeill*, 140 N. C. App. 450, 457-460, 537 S.E. 2d 518, 523-524 (2000) (same).

To add insult to injury, some of the courts that admit untested testimonial statements find reliability in the very factors that *make* the statements testimonial. As noted earlier, one court relied on the fact that the witness's statement was made to police while in custody on pending charges — the theory being that this made the statement more clearly against penal interest and thus more reliable. *Nowlin, supra*, at 335-338, 579 S.E. 2d, at 371-372. Other courts routinely rely on the fact that a prior statement is given under oath in judicial proceedings. *E.g., Gallego, supra*, at 168 (plea allocution); *Papajohn, supra*, at 1120 (grand jury testimony). That inculcating statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes the Clause's demands most urgent. It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands.

C

Roberts' failings were on full display in the proceedings below. Sylvia Crawford made her statement while in police custody, herself a potential suspect in the case. Indeed, she had been told that whether she would be released “depended on how the investigation continues.” App. 81. In response to often leading questions from police detectives, she implicated her husband in Lee's stabbing and at least arguably undermined his self-defense claim. Despite all this, the trial court admitted her statement, listing several reasons why it was reliable. In its opinion reversing, the Court of Appeals listed several *other* reasons why the statement was *not* reliable. Finally, the State Supreme Court relied exclusively on the interlocking character of the statement and disregarded every other factor the lower courts had considered. The case is thus a self-contained demonstration of *Roberts'* unpredictable and inconsistent application.

Each of the courts also made assumptions that cross-examination might well have undermined. The trial court, for example, stated that Sylvia Crawford's statement was reliable because she was an eyewitness with direct knowledge of the events. But Sylvia at one point told the police that she had “shut [her] eyes and * * * didn't really watch” part of the fight, and that she was “in shock.” App. 134. The trial court also buttressed its reliability finding by claiming that Sylvia was “being questioned by law enforcement, and, thus,

the [questioner] is * * * neutral to her and not someone who would be inclined to advance her interests and shade her version of the truth unfavorably toward the defendant." *Id.*, at 77. The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by "neutral" government officers. But even if the court's assessment of the officer's motives was accurate, it says nothing about Sylvia's perception of her situation. Only cross-examination could reveal that.

The State Supreme Court gave dispositive weight to the interlocking nature of the two statements — that they were both ambiguous as to when and whether Lee had a weapon. The court's claim that the two statements were *equally* ambiguous is hard to accept. Petitioner's statement is ambiguous only in the sense that he had lingering doubts about his recollection: "A. I coulda swore I seen him goin' for somethin' before, right before everything happened * * *. But I'm not positive." *Id.*, at 155. Sylvia's statement, on the other hand, is truly inscrutable, since the key timing detail was simply assumed in the leading question she was asked: "Q. Did Kenny do anything to fight back from this assault?" *Id.*, at 137. Moreover, Sylvia specifically said Lee had nothing in his hands after he was stabbed, while petitioner was not asked about that.

The prosecutor obviously did not share the court's view that Sylvia's statement was ambiguous — he called it "damning evidence" that "completely refutes [petitioner's] claim of self-defense." Tr. 468 (Oct. 21, 1999). We have no way of knowing whether the jury agreed with the prosecutor or the court. Far from obviating the need for cross-examination, the "interlocking" ambiguity of the two statements made it all the more imperative that they be tested to tease out the truth.

We readily concede that we could resolve this case by simply reweighing the "reliability factors" under *Roberts* and finding that Sylvia Crawford's statement falls short. But we view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion. Moreover, to reverse the Washington Supreme Court's decision after conducting our own reliability analysis would perpetuate, not avoid, what the Sixth Amendment condemns. The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.

We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands. By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh's — great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear. It is difficult to imagine *Roberts'* providing any meaningful protection in those circumstances.

* * *

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law — as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial."¹⁰ Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

I dissent from the Court's decision to overrule *Ohio v. Roberts*, 448 U.S. 56 (1980). I believe that the Court's adoption of a new interpretation of the Confrontation Clause is not backed by sufficiently persuasive reasoning to overrule long-established precedent. Its decision casts a mantle of uncertainty over future criminal trials in both federal and state courts, and is by no means necessary to decide the present case.

The Court's distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine. Under the common law, although the courts were far from consistent, out-of-court statements made by someone other than the accused and not taken under oath, unlike *ex parte* depositions or affidavits, were generally not considered substantive evidence upon which a conviction could be based. [Footnote omitted]. See, e.g., *King v. Brasier*, 1 Leach 199, 200, 168 Eng. Rep. 202 (K. B. 1779); see also J. Langbein, *Origins of Adversary Criminal Trial* 235-242 (2003); G. Gilbert, *Evidence* 152 (3d ed 1769). [Footnote omitted]. Testimonial statements such as accusatory statements to police officers likely would have been disapproved of in the 18th century, not necessarily because

¹⁰ We acknowledge THE CHIEF JUSTICE's objection that our refusal to articulate a comprehensive definition in this case will cause interim uncertainty. But it can hardly be any worse than the status quo. The difference is that the *Roberts* test is *inherently*, and therefore *permanently*, unpredictable.

they resembled *ex parte* affidavits or depositions as the Court reasons, but more likely than not because they were not made under oath. [Footnote omitted.] See *King v. Woodcock*, 1 Leach 500, 503, 168 Eng. Rep. 352, 353 (1789) (noting that a statement taken by a justice of the peace may not be admitted into evidence unless taken under oath). Without an oath, one usually did not get to the second step of whether confrontation was required.

Thus, while I agree that the Framers were mainly concerned about sworn affidavits and depositions, it does not follow that they were similarly concerned about the Court's broader category of testimonial statements. See 1 N. Webster, *An American Dictionary of the English Language* (1828) (defining "Testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. *Such affirmation in judicial proceedings, may be verbal or written, but must be under oath*" (emphasis added)). As far as I can tell, unsworn testimonial statements were treated no differently at common law than were nontestimonial statements, and it seems to me any classification of statements as testimonial beyond that of sworn affidavits and depositions will be somewhat arbitrary, merely a proxy for what the Framers might have intended had such evidence been liberally admitted as substantive evidence like it is today. [Footnote omitted.]

I therefore see no reason why the distinction the Court draws is preferable to our precedent. Starting with CHIEF JUSTICE MARSHALL's interpretation as a Circuit Justice in 1807, 16 years after the ratification of the Sixth Amendment, *United States v. Burr*, 25 F. Cas. 187, 193, F. Cas. No. 14694 (No. 14,694) (CC Va. 1807), continuing with our cases in the late 19th century, *Mattox v. United States*, 156 U.S. 237, 243-244 (1895); *Kirby v. United States*, 174 U.S. 47, 54-57 (1899), and through today, e.g., *White v. Illinois*, 502 U.S. 346, 352-353 (1992), we have never drawn a distinction between testimonial and nontestimonial statements. And for that matter, neither has any other court of which I am aware. I see little value in trading our precedent for an imprecise approximation at this late date.

I am also not convinced that the Confrontation Clause categorically requires the exclusion of testimonial statements. Although many States had their own Confrontation Clauses, they were of recent vintage and were not interpreted with any regularity before 1791. State cases that recently followed the ratification of the Sixth Amendment were not uniform; the Court itself cites state cases from the early 19th century that took a more stringent view of the right to confrontation than does the Court, prohibiting former testimony even if the witness was subjected to cross-examination. See *ante* (citing *Finn v. Commonwealth*, 26 Va. 701, 708 (1827); *State v. Atkins*, 1 Tenn. 229 (1807) (*per curiam*)).

Nor was the English law at the time of the framing entirely consistent in its treatment of testimonial evidence. Generally *ex parte* affidavits and depositions were excluded as the Court notes, but even that proposition was not universal. See *King v. Eriswell*, 3 T. R. 707, 100 Eng. Rep. 815 (K. B. 1790) (affirming by an equally divided court the admission of an *ex parte* examination because the declarant was unavailable to testify); *King v. Westbeer*, 1 Leach 12, 13, 168 Eng. Rep. 108, 109 (1739) (noting the admission of an *ex parte* affidavit); see also 1 M. Hale, *Pleas of the Crown* 585-586 (1736) (noting

that statements of "accusers and witnesses" which were taken under oath could be admitted into evidence if the declarant was "dead or not able to travel"). Wigmore notes that sworn examinations of witnesses before justices of the peace in certain cases would not have been excluded until the end of the 1700's, 5 Wigmore § 1364, at 26-27, and sworn statements of witnesses before coroners became excluded only by statute in the 1800's, *see ibid.*; *id.*, § 1374, at 59. With respect to unsworn testimonial statements, there is no indication that once the hearsay rule was developed courts ever excluded these statements if they otherwise fell within a firmly rooted exception. *See, e.g., Eriswell, supra*, at 715-719 (Buller, J.), 720 (Ashhurst, J.), 100 Eng. Rep., at 819-822 (concluding that an *ex parte* examination was admissible as an exception to the hearsay rule because it was a declaration by a party of his state and condition). Dying declarations are one example. *See, e.g., Woodcock, supra*, at 502-504, 168 Eng. Rep., at 353-354; *King v. Reason*, 16 How. St. Tr. 1, 22-23 (K. B. 1722).

Between 1700 and 1800 the rules regarding the admissibility of out-of-court statements were still being developed. There were always exceptions to the general rule of exclusion, and it is not clear to me that the Framers categorically wanted to eliminate further ones. It is one thing to trace the right of confrontation back to the Roman Empire; it is quite another to conclude that such a right absolutely excludes a large category of evidence. It is an odd conclusion indeed to think that the Framers created a cut-and-dried rule with respect to the admissibility of testimonial statements when the law during their own time was not fully settled.

To find exceptions to exclusion under the Clause is not to denigrate it as the Court suggests. Chief Justice Marshall stated of the Confrontation Clause: "I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important." *Burr*, 25 F. Cas., at 193. Yet, he recognized that such a right was not absolute, acknowledging that exceptions to the exclusionary component of the hearsay rule, which he considered as an "inroad" on the right to confrontation, had been introduced.

Exceptions to confrontation have always been derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they were made. We have recognized, for example, that co-conspirator statements simply "cannot be replicated, even if the declarant testifies to the same matters in court." *United States v. Inadi*, 475 U.S. 387, 395 (1986). Because the statements are made while the declarant and the accused are partners in an illegal enterprise, the statements are unlikely to be false and their admission "actually furthers the 'Confrontation Clause's very mission' which is to 'advance the accuracy of the truth-determining process in criminal trials.'" *Id.*, at 396. Similar reasons justify the introduction of spontaneous declarations, *see White*, 502 U.S., at 356, statements made in the course of procuring medical services, *see ibid.*, dying declarations, *see Kirby, supra*, at 61, and countless other hearsay exceptions. That a statement might be testimonial does nothing to undermine the wisdom of one of these exceptions.

Indeed, cross-examination is a tool used to flesh out the truth, not an empty procedure. See *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987) (“The right to cross-examination, protected by the Confrontation Clause, thus is essentially a ‘functional’ right designed to promote reliability in the truth-finding functions of a criminal trial”); see also *Maryland v. Craig*, 497 U.S. 836, 845 (1990) (“The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact”). “In a given instance [cross-examination may] be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.” 5 Wigmore § 1420, at 251. In such a case, as we noted over 100 years ago, “The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.” *Mattox*, 156 U.S., at 243; see also *Salinger v. United States*, 272 U.S. 542, 548 (1926). By creating an immutable category of excluded evidence, the Court adds little to a trial’s truth-finding function and ignores this longstanding guidance.

In choosing the path it does, the Court of course overrules *Ohio v. Roberts*, 448 U.S. 56 (1980), a case decided nearly a quarter of a century ago. *Stare decisis* is not an inexorable command in the area of constitutional law, but by and large, it “is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” And in making this appraisal, doubt that the new rule is indeed the “right” one should surely be weighed in the balance. Though there are no vested interests involved, unresolved questions for the future of everyday criminal trials throughout the country surely counsel the same sort of caution. The Court grandly declares that “we leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of “testimony” the Court lists, is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

To its credit, the Court’s analysis of “testimony” excludes at least some hearsay exceptions, such as business records and official records. To hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process. Likewise to the Court’s credit is its implicit recognition that the mistaken application of its new rule by courts which guess wrong as to the scope of the rule is subject to harmless-error analysis.

But these are palliatives to what I believe is a mistaken change of course. It is a change of course not in the least necessary to reverse the judgment of the Supreme Court of Washington in this case. The result the Court reaches follows inexorably from *Roberts* and its progeny without any need for overruling that line of cases. In *Idaho v. Wright*, 497 U.S. 805, 820-824 (1990), we held that an out-of-court statement was not admissible simply because the truthfulness of that statement was corroborated by other evidence at trial.

As the Court notes, the Supreme Court of Washington gave decisive weight to the “interlocking nature of the two statements.” No re-weighting of the “reliability factors,” which is hypothesized by the Court, is required to reverse the judgment here. A citation to *Idaho v. Wright, supra*, 497 U.S. 805, would suffice. For the reasons stated, I believe that this would be a far preferable course for the Court to take here.

Post-Crawford Attempt to Further Define Which Hearsay Statements are “Testimonial”: Davis and Hammon

DAVIS v. WASHINGTON and HAMMON v. INDIANA
126 S. Ct. 2266 (2006)

JUSTICE SCALIA delivered the opinion of the Court.

These cases require us to determine when statements made to law enforcement personnel during a 911 call or at a crime scene are “testimonial” and thus subject to the requirements of the Sixth Amendment’s Confrontation Clause.

I

A

The relevant statements in *Davis v. Washington*, were made to a 911 emergency operator on February 1, 2001. When the operator answered the initial call, the connection terminated before anyone spoke. She reversed the call, and Michelle McCottry answered. In the ensuing conversation, the operator ascertained that McCottry was involved in a domestic disturbance with her former boyfriend Adrian Davis, the petitioner in this case:

911 Operator: Hello.

Complainant: Hello.

911 Operator: What’s going on?

Complainant: He’s here jumpin’ on me again.

911 Operator: Okay. Listen to me carefully. Are you in a house or an apartment?

Complainant: I’m in a house.

911 Operator: Are there any weapons?

Complainant: No. He’s usin’ his fists.

911 Operator: Okay. Has he been drinking?

Complainant: No.

911 Operator: Okay, sweetie. I’ve got help started. Stay on the line with me, okay?

Complainant: I’m on the line.

911 Operator: Listen to me carefully. Do you know his last name?

Complainant: It's Davis.

911 Operator: Davis? Okay, what's his first name?

Complainant: Adran

911 Operator: What is it?

Complainant: Adrian.

911 Operator: Adrian?

Complainant: Yeah.

911 Operator: Okay. What's his middle initial?

Complainant: Martell. He's runnin' now.

As the conversation continued, the operator learned that Davis had "just r[un] out the door" after hitting McCottry, and that he was leaving in a car with someone else. McCottry started talking, but the operator cut her off, saying, "Stop talking and answer my questions." She then gathered more information about Davis (including his birthday), and learned that Davis had told McCottry that his purpose in coming to the house was "to get his stuff," since McCottry was moving. McCottry described the context of the assault, after which the operator told her that the police were on their way. "They're gonna check the area for him first," the operator said, "and then they're gonna come talk to you."

The police arrived within four minutes of the 911 call and observed McCottry's shaken state, the "fresh injuries on her forearm and her face," and her "frantic efforts to gather her belongings and her children so that they could leave the residence."

The State charged Davis with felony violation of a domestic no-contact order. The State's only witnesses were the two police officers who responded to the 911 call. Both officers testified that McCottry exhibited injuries that appeared to be recent, but neither officer could testify as to the cause of the injuries. McCottry presumably could have testified as to whether Davis was her assailant, but she did not appear. Over Davis's objection, based on the Confrontation Clause of the Sixth Amendment, the trial court admitted the recording of her exchange with the 911 operator, and the jury convicted him. The Washington Court of Appeals affirmed. The Supreme Court of Washington, with one dissenting justice, also affirmed, concluding that the portion of the 911 conversation in which McCottry identified Davis was not testimonial, and that if other portions of the conversation were testimonial, admitting them was harmless beyond a reasonable doubt. We granted certiorari.

B

In *Hammon v. Indiana*, No. 05-5705, police responded late on the night of February 26, 2003, to a "reported domestic disturbance" at the home of Hershel and Amy Hammon. They found Amy alone on the front porch, appearing "somewhat frightened," but she told them that "nothing was the matter." She gave them permission to enter the house, where an officer saw "a gas heating unit in the corner of the living room" that had "flames coming

out of the * * * partial glass front. There were pieces of glass on the ground in front of it and there was flame emitting from the front of the heating unit."

Hershel, meanwhile, was in the kitchen. He told the police that he and his wife had "been in an argument" but "everything was fine now" and the argument "never became physical." By this point Amy had come back inside. One of the officers remained with Hershel; the other went to the living room to talk with Amy, and "again asked [her] what had occurred." Hershel made several attempts to participate in Amy's conversation with the police, but was rebuffed. The officer later testified that Hershel "became angry when I insisted that [he] stay separated from Mrs. Hammon so that we can investigate what had happened." After hearing Amy's account, the officer "had her fill out and sign a battery affidavit." Amy handwrote the following: "Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter."

The State charged Hershel with domestic battery and with violating his probation. Amy was subpoenaed, but she did not appear at his subsequent bench trial. The State called the officer who had questioned Amy, and asked him to recount what Amy told him and to authenticate the affidavit. Hershel's counsel repeatedly objected to the admission of this evidence. At one point, after hearing the prosecutor defend the affidavit because it was made "under oath," defense counsel said, "That doesn't give us the opportunity to cross examine [the] person who allegedly drafted it. Makes me mad." Nonetheless, the trial court admitted the affidavit as a "present sense impression," and Amy's statements as "excited utterances" that "are expressly permitted in these kinds of cases even if the declarant is not available to testify." The officer thus testified that Amy

informed me that she and Hershel had been in an argument. That he became irate over the fact of their daughter going to a boyfriend's house. The argument became * * * physical after being verbal and she informed me that Mr. Hammon, during the verbal part of the argument was breaking things in the living room and I believe she stated he broke the phone, broke the lamp, broke the front of the heater. When it became physical he threw her down into the glass of the heater* * *. She informed me Mr. Hammon had pushed her onto the ground, had shoved her head into the broken glass of the heater and that he had punched her in the chest twice I believe.

The trial judge found Hershel guilty on both charges, and the Indiana Court of Appeals affirmed in relevant part. The Indiana Supreme Court also affirmed, concluding that Amy's statement was admissible for state-law purposes as an excited utterance; that "a 'testimonial' statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings," where "the motivations of the questioner and declarant are the central concerns;" and that Amy's oral statement was not "testimonial" under these standards. It also concluded that, although the affidavit was testimonial and thus wrongly admitted, it was harmless beyond a reasonable doubt, largely because the trial was to the bench. We granted certiorari.

II

The Confrontation Clause of the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him.” In *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), we held that this provision bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” A critical portion of this holding, and the portion central to resolution of the two cases now before us, is the phrase “testimonial statements.” Only statements of this sort cause the declarant to be a “witness” within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.

Our opinion in *Crawford* set forth “[v]arious formulations” of the core class of testimonial statements, but found it unnecessary to endorse any of them, because “some statements qualify under any definition.” Among those, we said, were “[s]tatements taken by police officers in the course of interrogations.” The questioning that generated the deponent’s statement in *Crawford* — which was made and recorded while she was in police custody, after having been given *Miranda* warnings as a possible suspect herself — “qualifies under any conceivable definition” of an “interrogation.” We therefore did not define that term, except to say that “[w]e use [it] * * * in its colloquial, rather than any technical legal, sense,” and that “one can imagine various definitions * * *, and we need not select among them in this case.” The character of the statements in the present cases is not as clear, and these cases require us to determine more precisely which police interrogations produce testimony.

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.¹

¹ Our holding refers to interrogations because, as explained below, the statements in the cases presently before us are the products of interrogations — which in some circumstances tend to generate testimonial responses. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly *not* the result of sustained questioning. *Raleigh's Case*, 2 How. St. Tr. 1, 27 (1603).) And of course even when interrogation exists, it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.

III

A

In *Crawford*, it sufficed for resolution of the case before us to determine that “even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.” Moreover, as we have just described, the facts of that case spared us the need to define what we meant by “interrogations.” The *Davis* case today does not permit us this luxury of indecision. The inquiries of a police operator in the course of a 911 call² are an interrogation in one sense, but not in a sense that “qualifies under any conceivable definition.” We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay, and, if so, whether the recording of a 911 call qualifies.

The answer to the first question was suggested in *Crawford*, even if not explicitly held:

The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to ‘witnesses’ against the accused — in other words, those who ‘bear testimony.’ 1 N. Webster, *An American Dictionary of the English Language* (1828). ‘Testimony,’ in turn, is typically ‘a solemn declaration or affirmation made for the purpose of establishing or proving some fact.’ *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.

A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its “core,” but its perimeter.

We are not aware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not clearly involve testimony as thus defined. [footnote 3, citing case law, omitted]. Well into the 20th century, our own Confrontation Clause jurisprudence was carefully applied only in the testimonial context. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 158 (1879) (testimony at prior trial was subject to the Confrontation Clause, but petitioner had forfeited that right by procuring witness’s absence); *Mattox v. United States*, 156 U.S. 237, 240-244 (1895) (prior trial testimony of deceased witnesses admitted because subject to cross-examination); *Kirby v. United States*, 174 U.S. 47, 55-56 (1899) (guilty pleas and jury conviction of others could not be admitted to show that property defendant received from them was stolen); *Motes v. United States*, 178 U.S. 458, 467, 470-471 (1900) (written deposition subject to cross-examination was not admissible because witness was available); *Dowdell v. United States*, 221

² If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police. As in *Crawford v. Washington*, 541 U.S. 36 (2004), therefore, our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are “testimonial.”

U.S. 325, 330-331 (1911) (facts regarding conduct of prior trial certified to by the judge, the clerk of court, and the official reporter did not relate to defendants' guilt or innocence and hence were not statements of "witnesses" under the Confrontation Clause).

Even our later cases, conforming to the reasoning of *Ohio v. Roberts*, 448 U.S. 56 (1980),⁴ never in practice dispensed with the Confrontation Clause requirements of unavailability and prior cross-examination in cases that involved testimonial hearsay, see *Crawford*, 541 U.S., at 57-59 (citing cases), with one arguable exception, see *id.*, at 58, n. 8 (discussing *White v. Illinois*, 502 U.S. 346 (1992)). Where our cases did dispense with those requirements — even under the *Roberts* approach — the statements at issue were clearly nontestimonial. See, e.g., *Bourjaily v. United States*, 483 U.S. 171, 181-184 (1987) (statements made unwittingly to a Government informant); *Dutton v. Evans*, 400 U.S. 74, 87-89 (1970) (plurality opinion) (statements from one prisoner to another).

Most of the American cases applying the Confrontation Clause or its state constitutional or common-law counterparts involved testimonial statements of the most formal sort — sworn testimony in prior judicial proceedings or formal depositions under oath — which invites the argument that the scope of the Clause is limited to that very formal category. But the English cases that were the progenitors of the Confrontation Clause did not limit the exclusionary rule to prior court testimony and formal depositions, see *Crawford*, *supra*, at 52, and n. 3. In any event, we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case — English or early American, state or federal — can be cited, that is it.

The question before us in *Davis*, then, is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements. When we said in *Crawford*, *supra*, at 53, that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in *Crawford*, "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." (The solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood. See, e.g., *United States v. Stewart*, 433 F.3d 273, 288 (C.A.2 2006) (false statements made to federal investigators violate 18 U.S.C. § 1001). A 911 call, on

⁴ *Roberts* condition[ed] the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.' *Crawford*, 541 U.S., at 60 (quoting *Roberts*, 448 U.S., at 66). We overruled *Roberts* in *Crawford* by restoring the unavailability and cross-examination requirements.

the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to "establis[h] or prov[e]" some past fact, but to describe current circumstances requiring police assistance.

The difference between the interrogation in *Davis* and the one in *Crawford* is apparent on the face of things. In *Davis*, McCottry was speaking about events *as they were actually happening*, rather than "describ [ing] past events," *Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (plurality opinion). Sylvia Crawford's interrogation, on the other hand, took place hours after the events she described had occurred. Moreover, any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency. Although one *might* call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against bona fide physical threat. Third, the nature of what was asked and answered in *Davis*, again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. And finally, the difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

We conclude from all this that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. ~~She simply was not acting as a witness; she was not testifying.~~ What she said was not "a weaker substitute for live testimony" at trial, *United States v. Inadi*, 475 U.S. 387, 394 (1986), like Lord Cobham's statements in *Raleigh's Case*, 2 How. St. Tr. 1 (1603) * * * or Sylvia Crawford's statement in *Crawford*. In * * * those cases, the *ex parte* actors and the evidentiary products of the *ex parte* communication aligned perfectly with their courtroom analogues. McCottry's emergency statement does not. No "witness" goes into court to proclaim an emergency and seek help.

Davis seeks to cast McCottry in the unlikely role of a witness by pointing to English cases. None of them involves statements made during an ongoing emergency. In *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), for example, a young rape victim, "immediately on her coming home, told all the circumstances of the injury" to her mother. The case would be helpful to *Davis* if the relevant statement had been the girl's screams for aid as she was being chased by her assailant. But by the time the victim got home, her story was an account of past events.

This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme Court put it, "evolve into testimonial statements" once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have

ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the "structured police questioning" that occurred in *Crawford*. This presents no great problem. Just as, for Fifth Amendment purposes, "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect," *New York v. Quarles*, 467 U.S. 649, 658-659 (1984), trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through *in limine* procedure, they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence. Davis's jury did not hear the *complete* 911 call, although it may well have heard some testimonial portions. We were asked to classify only McCottry's early statements identifying Davis as her assailant, and we agree with the Washington Supreme Court that they were not testimonial. That court also concluded that, even if later parts of the call were testimonial, their admission was harmless beyond a reasonable doubt. Davis does not challenge that holding, and we therefore assume it to be correct.

B

Determining the testimonial or nontestimonial character of the statements that were the product of the interrogation in *Hammon* is a much easier task, since they were not much different from the statements we found to be testimonial in *Crawford*. It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct — as, indeed, the testifying officer expressly acknowledged. There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything. When the officers first arrived, Amy told them that things were fine, and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) "what is happening," but rather "what happened." Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime — which is, of course, precisely what the officer *should* have done.

It is true that the *Crawford* interrogation was more formal. It followed a *Miranda* warning, was tape-recorded, and took place at the station house. While these features certainly strengthened the statements' testimonial aspect — made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events — none was essential to the point. It was formal enough that Amy's interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his "investigation." What we called the "striking resemblance" of the *Crawford* statement to civil-law *ex parte* examinations, is shared by Amy's statement here. Both declarants were actively separated from the defendant — officers forcibly prevented Hershel

from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.⁵

Both Indiana and the United States as *amicus curiae* argue that this case should be resolved much like *Davis*. For the reasons we find the comparison to *Crawford* compelling, we find the comparison to *Davis* unpersuasive. The statements in *Davis* were taken when McCottry was alone, not only unprotected by police (as Amy Hammon was protected), but apparently in immediate danger from Davis. She was seeking aid, not telling a story about the past. McCottry's present-tense statements showed immediacy; Amy's narrative of past events was delivered at some remove in time from the danger she described. And after Amy answered the officer's questions, he had her execute an affidavit, in order, he testified, "[t]o establish events that have occurred previously."

Although we necessarily reject the Indiana Supreme Court's implication that virtually any "initial inquiries" at the crime scene will not be testimonial, we do not hold the opposite — that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that "[o]fficers called to investigate * * * need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." Such exigencies may *often* mean that "initial inquiries" produce nontestimonial statements. But in cases like this one, where Amy's statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the

⁵ The dissent criticizes our test for being "neither workable nor a targeted attempt to reach the abuses forbidden by the [Confrontation] Clause." As to the former: We have acknowledged that our holding is not an "exhaustive classification of all conceivable statements — or even all conceivable statements in response to police interrogation," but rather a resolution of the cases before us and those like them. For *those* cases, the test is objective and quite "workable." The dissent, in attempting to formulate an exhaustive classification of its own, has not provided anything that deserves the description "workable" — unless one thinks that the distinction between "formal" and "informal" statements, qualifies. And the dissent even qualifies that vague distinction by acknowledging that the Confrontation Clause "also reaches the use of technically informal statements when used to evade the formalized process," and cautioning that the Clause would stop the State from "us[ing] out-of-court statements as a means of circumventing the literal right of confrontation." It is hard to see this as much more "predictable" than the rule we adopt for the narrow situations we address.

As for the charge that our holding is not a "targeted attempt to reach the abuses forbidden by the [Confrontation] Clause," which the dissent describes as the depositions taken by Marian magistrates, characterized by a high degree of formality: We do not dispute that formality is indeed essential to testimonial utterance. But we no longer have examining Marian magistrates; and we do have, as our 18th-century forebears did not, examining police officers, who perform investigative and testimonial functions once performed by examining Marian magistrates. It imports sufficient formality, in our view, that lies to such officers are criminal offenses. Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.

fact that they were given at an alleged crime scene and were “initial inquiries” is immaterial.⁶

IV

Respondents in both cases, joined by a number of their *amici*, contend that the nature of the offenses charged in these two cases — domestic violence — requires greater flexibility in the use of testimonial evidence. This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free. But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: that “the rule of forfeiture by wrongdoing * * * extinguishes confrontation claims on essentially equitable grounds.” That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

We take no position on the standards necessary to demonstrate such forfeiture, but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance-of-the-evidence standard, *see, e.g., United States v. Scott*, 284 F.3d 758, 762 (C.A.7 2002). State courts tend to follow the same practice, *see, e.g., Commonwealth v. Edwards*, 444 Mass. 526, 542, 830 N.E.2d 158, 172 (2005). Moreover, if a hearing on forfeiture is required, *Edwards*, for instance, observed that “hearsay evidence, including the unavailable witness’s out-of-court statements, may be considered.” The *Roberts* approach to the Confrontation Clause undoubtedly made recourse to this doctrine less necessary, because prosecutors could show the “reliability” of *ex parte* statements more easily than they could show the defendant’s procurement of the witness’s absence. *Crawford*, in overruling *Roberts*, did not destroy the ability of courts to protect the integrity of their proceedings.

We have determined that, absent a finding of forfeiture by wrongdoing, the Sixth Amendment operates to exclude Amy Hammon’s affidavit. The Indiana courts may (if they are asked) determine on remand whether such a claim of forfeiture is properly raised and, if so, whether it is meritorious.

⁶ Police investigations themselves are, of course, in no way impugned by our characterization of their fruits as testimonial. Investigations of past crimes prevent future harms and lead to necessary arrests. While prosecutors may hope that inculpatory “nontestimonial” evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it be so. The Confrontation Clause in no way governs police conduct, because it is the trial use of, not the investigatory collection of, *ex parte* testimonial statements which offends that provision. But neither can police conduct govern the Confrontation Clause; testimonial statements are what they are.

* * *

We affirm the judgment of the Supreme Court of Washington in No. 05-5224. We reverse the judgment of the Supreme Court of Indiana in No. 05-5705, and remand the case to that Court for proceedings not inconsistent with this opinion.

JUSTICE THOMAS, concurring in the judgment in part and dissenting in part.

In *Crawford v. Washington*, 541 U.S. 36 (2004), we abandoned the general reliability inquiry we had long employed to judge the admissibility of hearsay evidence under the Confrontation Clause, describing that inquiry as “*inherently*, and therefore *permanently*, unpredictable.” Today, a mere two years after the Court decided *Crawford*, it adopts an equally unpredictable test, under which district courts are charged with divining the “primary purpose” of police interrogations. Besides being difficult for courts to apply, this test characterizes as “testimonial,” and therefore inadmissible, evidence that bears little resemblance to what we have recognized as the evidence targeted by the Confrontation Clause. Because neither of the cases before the Court today would implicate the Confrontation Clause under an appropriately targeted standard, I concur only in the judgment in *Davis v. Washington*, No. 05-5224, and dissent from the Court’s resolution of *Hammon v. Indiana*, No. 05-5705.

I

A

* * * The history surrounding the right to confrontation supports the conclusion that it was developed to target particular practices that occurred under the English bail and committal statutes passed during the reign of Queen Mary, namely, the “civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.” *Crawford, supra*, at 43, 50. “The predominant purpose of the [Marian committal] statute was to institute *systematic* questioning of the accused and the witnesses.” J. Langbein, *Prosecuting Crime in the Renaissance* 23 (1974) (emphasis added). The statute required an oral examination of the suspect and the accusers, transcription within two days of the examinations, and physical transmission to the judges hearing the case. These examinations came to be used as evidence in some cases, in lieu of a personal appearance by the witness. * * *

In *Crawford*, we recognized that this history could be squared with the language of the Clause, giving rise to a workable, and more accurate, interpretation of the Clause. “[W]itnesses,” we said, are those who “bear testimony.” And “[t]estimony” is “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” Admittedly, we did not set forth a detailed framework for addressing whether a statement is “testimonial” and thus subject to the Confrontation Clause. But the plain terms of the “testimony” definition we endorsed necessarily require some degree of solemnity before a statement can be deemed “testimonial.”

This requirement of solemnity supports my view that the statements regulated by the Confrontation Clause must include extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. Affidavits, depositions, and prior testimony are, by their very nature, taken through a formalized process. Likewise, confessions, when extracted by police in a formal manner, carry sufficient indicia of solemnity to constitute formalized statements and, accordingly, bear a “striking resemblance,” *Crawford, supra*, at 52, to the examinations of the accused and accusers under the Marian statutes.

Although the Court concedes that the early American cases invoking the right to confrontation or the Confrontation Clause itself all “clearly involve[d] testimony” as defined in *Crawford*, it fails to acknowledge that all of the cases it cites fall within the narrower category of formalized testimonial materials I have proposed. Interactions between the police and an accused (or witnesses) resemble Marian proceedings — and these early cases — only when the interactions are somehow rendered “formal.” In *Crawford*, for example, the interrogation was custodial, taken after warnings given pursuant to *Miranda v. Arizona*. *Miranda* warnings, by their terms, inform a prospective defendant that “anything he says can be used against him in a court of law.” This imports a solemnity to the process that is not present in a mere conversation between a witness or suspect and a police officer.

The Court all but concedes that no case can be cited for its conclusion that the Confrontation Clause also applies to informal police questioning under certain circumstances. Instead, the sole basis for the Court’s conclusion is its apprehension that the Confrontation Clause will “readily be evaded” if it is only applicable to formalized testimonial materials. But the Court’s proposed solution to the risk of evasion is needlessly overinclusive. Because the Confrontation Clause sought to regulate prosecutorial abuse occurring through use of *ex parte* statements as evidence against the accused, it also reaches the use of technically informal statements when used to evade the formalized process. That is, even if the interrogation itself is not formal, the production of evidence by the prosecution at trial would resemble the abuses targeted by the Confrontation Clause if the prosecution attempted to use out-of-court statements as a means of circumventing the literal right of confrontation. In such a case, the Confrontation Clause could fairly be applied to exclude the hearsay statements offered by the prosecution, preventing evasion without simultaneously excluding evidence offered by the prosecution in good faith.

The Court’s standard is not only disconnected from history and unnecessary to prevent abuse; it also yields no predictable results to police officers and prosecutors attempting to comply with the law. In many, if not most, cases where police respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence. Assigning one of these two largely unverifiable motives primacy requires constructing a hierarchy of purpose that will rarely be present — and is not reliably discernible. It will inevitably be, quite simply, an exercise in fiction.

The Court’s repeated invocation of the word “objectiv[e]” to describe its test, however, suggests that the Court may not mean to reference purpose at all,

but instead to inquire into the function served by the interrogation. Certainly such a test would avoid the pitfalls that have led us repeatedly to reject tests dependent on the subjective intentions of police officers. It would do so, however, at the cost of being even more disconnected from the prosecutorial abuses targeted by the Confrontation Clause. Additionally, it would shift the ability to control whether a violation occurred from the police and prosecutor to the judge, whose determination as to the "primary purpose" of a particular interrogation would be unpredictable and not necessarily tethered to the actual purpose for which the police performed the interrogation.

B

Neither the 911 call at issue in *Davis* nor the police questioning at issue in *Hammon* is testimonial under the appropriate framework. Neither the call nor the questioning is itself a formalized dialogue. Nor do any circumstances surrounding the taking of the statements render those statements sufficiently formal to resemble the Marian examinations; the statements were neither Mirandized nor custodial, nor accompanied by any similar indicia of formality. Finally, there is no suggestion that the prosecution attempted to offer the women's hearsay evidence at trial in order to evade confrontation. Accordingly, the statements at issue in both cases are nontestimonial and admissible under the Confrontation Clause.

The Court's determination that the evidence against Hammon must be excluded extends the Confrontation Clause far beyond the abuses it was intended to prevent. When combined with the Court's holding that the evidence against *Davis* is perfectly admissible, however, the Court's *Hammon* holding also reveals the difficulty of applying the Court's requirement that courts investigate the "primary purpose[s]" of the investigation. The Court draws a line between the two cases based on its explanation that *Hammon* involves "no emergency in progress," but instead, mere questioning as "part of an investigation into possibly criminal past conduct," and its explanation that *Davis* involves questioning for the "primary purpose" of "enabl[ing] police assistance to meet an ongoing emergency." But the fact that the officer in *Hammon* was investigating Mr. Hammon's past conduct does not foreclose the possibility that the primary purpose of his inquiry was to assess whether Mr. Hammon constituted a continuing danger to his wife, requiring further police presence or action. It is hardly remarkable that Hammon did not act abusively towards his wife in the presence of the officers, and his good judgment to refrain from criminal behavior in the presence of police sheds little, if any, light on whether his violence would have resumed had the police left without further questioning, transforming what the Court dismisses as "past conduct" back into an "ongoing emergency." Nor does the mere fact that McCottry needed emergency aid shed light on whether the "primary purpose" of gathering, for example, the name of her assailant was to protect the police, to protect the victim, or to gather information for prosecution. In both of the cases before the Court, like many similar cases, pronouncement of the "primary" motive behind the interrogation calls for nothing more than a guess by courts.

II

Because the standard adopted by the Court today is neither workable nor a targeted attempt to reach the abuses forbidden by the Clause, I concur only in the judgment in *Davis v. Washington*, No. 05-5224, and respectfully dissent from the Court's resolution of *Hammon v. Indiana*, No. 05-5705.

***Note on Crawford and Its Relationship to the Federal Rules
Hearsay Exceptions***

While the precise definition of "testimonial" is not clear, it is clear that *Crawford* has made a significant change in the current use of hearsay by the prosecution in criminal trials. Under the *Roberts* test, virtually all hearsay admitted in Federal courts would satisfy the Confrontation Clause. This is because almost all of the Federal Rules hearsay exceptions were "firmly-rooted", and those that were not (e.g., the residual exception), were applied in compliance with the constitutional reliability requirements imposed by *Roberts*. But the *Roberts* reliability test for assessing hearsay has now been discarded. See *Whorton v. Bockting*, 127 S. Ct. 1173 (2007) (*Roberts* test overruled even as to hearsay that is not testimonial). The following discussion considers the likely changes imposed by *Crawford* on the admissibility of hearsay admitted under the exemptions and exceptions provided by the Federal Rules of Evidence.

Rule 801 Exceptions

1. Statements That Are Not Hearsay. The analysis of these statements does not change after *Crawford*. If the statement is not hearsay, there is no need to cross-examine the declarant and accordingly there are no Confrontation Clause concerns. In a footnote in *Crawford*, the Court explicitly adheres to its position that admission of non-hearsay does not violate the Confrontation Clause. See, e.g., *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."); *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).

2. Prior Statements of Testifying Witnesses. The analysis of these statements does not change after *Crawford*. Even though many such statements are testimonial, the condition of their admissibility is that the witness who made the statement is produced for trial and subject to cross-examination. This requirement satisfies the *Crawford* standard. The point is illustrated by *United States v. Kappell*, 418 F.3d 550 (6th Cir. 2005), a child sex abuse

prosecution, in which the victims testified and the trial court admitted a number of hearsay statements that the victims had 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."

3. Admissions. The treatment of party-admissions and adoptive admissions is probably unchanged after *Crawford*. Under any view of the Confrontation Clause, the accused does not have a constitutional right to confront himself. On the other hand, the intellectual purity of the argument in *Crawford* could be used by an accused to argue that a confession he made to law enforcement is "testimonial" and therefore admitting the confession would violate his right to confrontation unless the declarant is subject to cross-examination. It would seem that the government could respond that the criminal defendant could confront himself by taking the stand; by not doing so, the argument goes, he procures his own unavailability. One way or another, a court is likely to hold that a criminal defendant has no right to confront himself.

As to agency-admissions, they had been held firmly rooted under *Roberts*, but that analysis has been rejected by *Crawford*, at least if the admissions are "testimonial." Admissibility under the Confrontation Clause will depend on whether a particular agent-admission is "testimonial." It would seem possible that some agent statements admissible under Rule 801(d)(2)(D) could be "testimonial." An example would be statements obtained from corporate agents to government officials investigating allegations of corporate criminal misconduct. But the run-of-the-mill agent's statement (e.g., a water cooler statement complaining about the graft occurring in the accounting department) is unlikely to be considered "testimonial" under *Crawford* (as it would not be made in anticipation of use in a criminal trial) so the only question would be whether the statement fits the admissibility requirements of Rule 801(d)(2)(D).

As to coconspirator statements, they are only admissible if they are made during the course and in furtherance of the conspiracy. It would be unusual, but not impossible, for a coconspirator to make a qualifying statement that would result in "testimony" under *Crawford*. For example, if the coconspirator is knowingly confessing to police officers, or making a plea allocution, those statements are not in furtherance of the conspiracy and so not admissible under the exception. One possibility, however, arises with statements made by coconspirators to undercover police officers, e.g., arranging for a sale of drugs. These statements are in furtherance of the conspiracy, so the question is whether they are testimonial within the meaning of *Crawford*. It could be

argued that they are, because law enforcement is involved in generating the statement; but it could be argued that they are not, because the declarant does not know that he is talking to a government official and so it doesn't look like a statement specifically generated for trial. It should be noted that the Court in *Crawford* states in passing that statements made during the course and in furtherance of the conspiracy are "by their nature" not testimonial. See also *United States v. Robinson*, 367 F.3d 278 (5th Cir. 2004) (holding that coconspirator statements were not "testimonial" under *Crawford* as they were made under informal circumstances and not for the purpose of creating evidence for trial).

Two examples of coconspirator hearsay after *Crawford* are illustrative. In *United States v. Johnson*, 440 F.3d 832 (6th Cir. 2006), the court found no *Crawford* violation when the trial court admitted statements by an accomplice to an undercover informant. The accomplice and the informant were long-time friends, and the accomplice had no idea that his friend was cooperating with the prosecution. The statements were held 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."

In contrast, the court in *United States v. Holmes*, 406 F.3d 337 (5th Cir. 2005), encountered a statement made by a coconspirator that was probably testimonial under *Crawford*. 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 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." Statements that are offered for a non-hearsay purpose pose no Confrontation Clause concerns, whether or not they are testimonial, as the Court recognized in *Crawford*.

Rule 803 Exceptions

The change wrought by *Crawford* will undoubtedly affect statements offered under Rule 803 because under *Roberts* these exceptions had been held firmly rooted and so statements fitting the exceptions automatically satisfied the Confrontation Clause. Under *Crawford*, the question is not whether the hearsay exception is firmly rooted but whether the particular statement offered is or is not testimonial.

So it is clear that the confrontation analysis must be statement by statement rather than exception by exception. One cannot make a categorical conclusion, for example, that if a statement fits the excited utterance exception, it by definition satisfies the Confrontation Clause. The Court in *Davis* and *Hammon* specifically declines to impose broad rules on which kind of excited utterances are testimonial and which are not. That said, while some excited utterances will be testimonial, most will not. For example, if a police officer encounters a stabbing victim in an alley, and asks the victim to identify a perpetrator, the victim's response may well be considered testimonial even though it fits the excited utterance exception. The Court's analysis in *Hammon* appears to indicate that if a police officer interviews a person during the investigation of a crime, the interviewee's statements are likely to be testimonial. The same goes for state of mind statements, present sense impressions, etc.

Business records, by definition, are unlikely to be testimonial — and the Court in *Crawford* refers to business records as being not testimonial “by their nature.” See, e.g., *United States v. Jamieson*, 427 F.3d 394 (6th Cir. 2005) (business records are by definition not prepared in anticipation of litigation and are not testimonial under *Crawford* because they do not “resemble the formal statement or solemn declaration identified as testimony by the Supreme Court.”). Official police reports are likely to be testimonial only if they appear to be prepared for a particular prosecution.

In sum, it is clear that the Confrontation Clause after *Crawford* will result in exclusion of certain hearsay statements that are admissible under one of the Rule 803 exceptions. The First Circuit, in *United States v. Brito*, 427 F.3d 53 (1st Cir. 2005), provides some indication of where the lines might be drawn. The *Brito* 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 statements were not “testimonial” within the meaning of *Crawford v. Washington*. The Court refused, however, to adopt a categorical rule that an excited utterance could never be testimonial under *Crawford*. 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.” Once the initial danger has dissipated, however, “a person who speaks while still under the stress of a startling event is more likely able to comprehend the larger significance of her words. If the record fairly supports a finding of comprehension, the fact that the statement also qualifies as an excited utterance will not alter its testimonial nature.” 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.”

While the analysis in *Brito* preceded the Supreme Court’s decision in *Davis* and *Hammon*, it certainly appears to be consistent with those cases. The Supreme Court in *Davis/Hammon* drew this general line between testimonial and non-testimonial statements in the context of 911 calls and reports by victims to police officers:

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 in *Davis* emphasized the narrowness of its opinion. It was not attempting to establishing an all-encompassing test of which statements are testimonial and which are not. The Court did not decide, for example, whether statements made to someone other than law enforcement personnel can be testimonial. It did not even decide that all statements to responding police officers are testimonial and all statements to 911 operators are not. According to the Court, “testimonial” even in these narrow circumstances depends on the facts.

Rule 804 Exceptions

Generally speaking, hearsay statements falling within the Rule 804 exceptions satisfied the Confrontation Clause under the *Roberts* analysis, for one reason or another. Under *Crawford*, the analysis will depend on the exception and in some cases on the particular statement admitted under the exception. The change wrought by *Crawford*, as applied to statements offered under Rule 804, is likely to be as follows:

1. Rule 804(b)(1). Statements admitted under the prior testimony exception will satisfy the Confrontation Clause even after *Crawford* because admissibility is dependent on prior cross-examination and declarant unavailability — so even though prior testimony is clearly testimonial, it by definition satisfies the admissibility requirements set forth in *Crawford* for testimonial hearsay.

2. Rule 804(b)(2). Statements admitted as dying declarations may or may not be testimonial. If a victim is being asked by a police officer “who shot you?” while the victim is in the throes of death, it is possible that the victim’s statement identifying the defendant as the perpetrator is testimonial under *Crawford*. If the declarant makes a deathbed statement to his mother, then

it is probably not testimonial. For an application of the dying declarations exception after *Crawford*, see *People v. Ahib Paul*, 25 A.D.3d 165, 803 N.Y.S.2d 66, 68-71 (1st Dept. 2005) (dying declaration was not testimonial where it was “volunteered, to people who were friends, acquaintances or neighbors”).

Yet there remains a question, after *Crawford*, about the constitutional admissibility of even testimonial dying declarations. In a footnote in *Crawford*, the Court noted that it had held in the 19th century that a statement admitted as a dying declaration did not violate the accused’s right to confrontation. That particular statement held properly admitted may have been testimonial. In the *Crawford* footnote, the Court bowed to precedent and entertained the possibility that a hearsay statement fitting the dying declarations exception might be admissible even though it is testimonial. The posited rationale was that the dying declarations exception was essentially as old as time itself. Ultimately, the *Crawford* Court found it unnecessary to decide whether a dying declaration would be an “exception” to the Court’s new rule precluding testimonial hearsay. It did say that if it was an exception, it would be “*sui generis*.”

3. Rule 804(b)(3). Statements admitted as declarations against interest may or may not be testimonial. Certainly if the statement is made to law enforcement by an accomplice, its admission against the accused will violate the Confrontation Clause even if it satisfies the hearsay exception. Of course, in *Williamson v. United States*, the Supreme Court held that an accomplice statement made to law enforcement was not admissible under the hearsay exception to the extent it directly identified the accused, because such a statement was not sufficiently against the declarant’s penal interest. Justice O’Connor in *Williamson* intimated that an accomplice statement might be admissible to the extent that it implicated the declarant alone — the government might then be able to use that statement circumstantially to tie the accused to the crime. After *Crawford*, however, an accomplice statement made to law enforcement cannot be admitted against the accused, whether or not it implicates the accused directly. The question after *Crawford* is not whether the statement is sufficiently reliable or sufficiently against interest. ~~The question is whether the statement is “testimonial,” and the Court clearly held that accomplice statements made to law enforcement are indeed testimonial.~~ ~~Therefore,~~ the opening left for admissibility of some accomplice statements has been closed as a constitutional matter by *Crawford*. See, e.g., *United States v. Jones*, 371 F.3d 363 (7th Cir. 2004), where 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 assuming, arguendo, that the redacted confession was admissible as a declaration against interest, 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 since 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.”

Crawford will also have a dramatic effect on the federal circuit case law that permitted the government to admit plea allocutions by codefendants,

when they are redacted to eliminate all direct references to the accused. That practice is no longer permitted after *Crawford*. Allocution statements had been admitted because, as redacted, they were reliable enough to satisfy the *Roberts* requirements. But under *Crawford*, the question for hearsay statements is not whether they are reliable but whether they are testimonial. Plea allocutions are singled out as testimonial (whether redacted or not) in the majority opinion in *Crawford*. See, e.g., *United States v. Snype*, 441 F.3d 119 (2d Cir. 2006) (guilty plea allocution of the defendant's accomplice was testimonial even though all direct references to the defendant were redacted).

On the other hand, certain statements against penal interest will be nontestimonial after *Crawford*. An example is a statement by an accomplice to his girlfriend, describing a bank robbery that he and the defendant committed. This statement is against the accomplice's penal interest, but it is not testimonial because it is not given to law enforcement and there is no intent that it be used in lieu of testimony in the defendant's criminal trial.

United States v. Franklin, 415 F.3d 537 (6th Cir. 2005), illustrates the possibilities for admitting declarations against penal interest after *Crawford*. Franklin was charged with bank robbery. One of Franklin'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 Franklin 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*.

4. Rule 804(b)(6). In a footnote in *Crawford*, the Court stated that nothing in the case was intended to change the rule that an accused who is responsible in some way for creating the unavailability of a witness can be held to have forfeited his Confrontation Clause objection to the hearsay statements of that witness. So *Crawford* does not change the existing law on forfeiture. And this conclusion is fortified by language in *Davis/Hammon*:

While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: that "the rule of forfeiture by wrongdoing * * * extinguishes confrontation claims on essentially equitable grounds." That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

Residual Exception

The change wrought by *Crawford*, as applied to statements offered under Rule 807, is likely to be dramatic for certain categories of statements that have been admitted routinely as residual hearsay. The most obvious example is grand jury testimony. The Court in *Crawford* makes clear that grand jury testimony is "testimonial." As such it cannot be admitted unless the declarant

is produced and subject to cross-examination. It does not matter that the grand jury testimony is reliable under the circumstances, as that is no longer the constitutional inquiry under *Crawford* for testimonial hearsay. So *Crawford* has swept away a good deal of case law admitting grand jury testimony under the residual exception. See, e.g., *United States v. Bruno*, 383 F.3d 65 (2d Cir. 2004) (admission of grand jury testimony was error as it was clearly testimonial after *Crawford*).

Other candidates for exclusion as testimonial hearsay include statements made by children to law enforcement personnel; statements made to police officers by eyewitnesses; prior testimony from the trial of a codefendant in which the accused was not a party; and statements made by law enforcement laboratory personnel concerning forensic testing.

An example of admissible residual hearsay after *Crawford* is *United States v. Morgan*, 385 F.3d 196 (2d Cir. 2004): In a drug trial, a letter written by the co-defendant was admitted against the defendant. The letter was written to a boyfriend and implicated both the defendant and the co-defendant in a conspiracy to smuggle drugs. The court found that the letter was properly admitted under Rule 807, and that it was not testimonial under *Crawford*. The court noted the following circumstances indicating that the letter was not testimonial: 1) it was not written in a coercive atmosphere; 2) it was not addressed to law enforcement authorities; 3) it was written to an intimate acquaintance; 4) it was written in the privacy of the co-defendant's hotel room; 5) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 6) it was not written to curry favor with the authorities or with anyone else. These were the same factors that rendered the hearsay statement sufficiently reliable to qualify under Rule 807.

Relationship Between Crawford/Davis and the Federal Rules Exceptions for Business and Public Records

UNITED STATES v. ELLIS 460 F.3d 920 (7th Cir. 2006)

KANNE, CIRCUIT JUDGE:

After being convicted at trial on three counts of illegal possession of firearms, Brian K. Ellis was sentenced as an armed career criminal to 300 months' imprisonment. He now raises three issues on appeal, including one argument relying on the decision of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). We affirm.

I. HISTORY

Ellis was pulled over in Gibson County, Indiana, when a police officer noticed him driving erratically. He failed some initial field sobriety tests, but a field test for the presence of alcohol came up negative. With the officer's prompting, Ellis agreed to go to a hospital to have his blood and urine tested for drugs.

At this point, the officer placed Ellis in custody. An inventory search of the pickup truck Ellis was driving led to the discovery of a loaded .22 caliber revolver on the driver's side floorboard, .22 caliber ammunition scattered throughout, drug paraphernalia, and several cans of beer. The only other passenger, Bradley Ventress, was interviewed and quickly denied ownership of the gun. Ellis, who has a lengthy criminal history including three felony convictions, also disclaimed ownership of the gun.

After undergoing tests at a local hospital, Ellis was released from custody. A warrant was later issued for his arrest on a state DUI charge. That state charge was followed by a federal indictment charging Ellis with unlawful possession of a firearm. Ellis was not interested in facing the warrant or the indictment and apparently went into hiding.

About a month later, police were tipped off that Ellis was at a residence in rural Illinois near the Indiana border. The local authorities made plans to arrest him. Ellis had other plans. As the jury heard, a sheriff's deputy attempted to effect a traffic stop on Ellis after he drove away from the residence, but by the time Ellis's car stopped, it was on fire. He then jumped out of the car with a can of Coleman fuel in his hands, which he used to feed the fire. After dousing the flames and throwing the whole fuel can into the car, Ellis ran into a cornfield. The Illinois State Police were called to assist, and in a matter of hours Ellis was arrested. When taken into custody, he had in his possession a .22 caliber Beretta and a receipt from the retailer Wal-Mart. What the jury did not hear was that before dousing his car with fuel and fleeing the scene, Ellis led authorities on a harrowing car chase during which he repeatedly fired shots at the police.¹

Subsequent investigation revealed that the Wal-Mart receipt documented a recent purchase of ammunition. Federal agents traced the receipt to a store in Vincennes, Indiana, where they were able to obtain video footage (later shown to the jury) of Ellis purchasing the ammunition.

Ellis was charged by a superseding indictment with three counts. Counts I and II, both based on the initial traffic stop in Indiana, charged that he was a felon in possession in violation of 18 U.S.C. § 922(g)(1), and a user of a controlled substance in possession of a firearm in violation of § 922(g)(3), respectively. Count III charged that Ellis was a felon in possession in violation of § 922(g)(1) based upon the events leading to his final arrest in Illinois. The indictment also alleged that Ellis would be subject to the fifteen-year mandatory minimum of § 924(e) because of his three previous felony convictions.

A trial was held on all three counts over Ellis's motion to sever Count III. A certified copy of the results of Ellis's blood and urine tests was introduced at trial over Ellis's objection under *Crawford*. The results were introduced as business records to help prove that Ellis was a user of controlled substances. Authentication of these records was established under Federal Rule of Evidence 902(11). The records were admitted during the testimony of the arresting officer. He testified that he took Ellis to the hospital and witnessed

¹ The district court judge granted Ellis's motion in limine to preclude any mention at trial of him shooting at the police. At sentencing, the local sheriff testified to being shot at by Ellis.

a lab technician draw blood and Ellis urinate in a cup. He also testified that the results of the urine tests were positive for methamphetamine.²

The actual exhibit of medical records admitted at trial contains a number of pages, including a certification of authenticity performed by a laboratory technician at the local hospital. The exhibit also contains two forms filled out at the local hospital, which apparently accompanied Ellis's blood and urine samples. These forms indicate that the "Collector" of the samples was a person with the first name Kristy. These forms were signed by Ellis and had a number of preprinted "Reason[s] for Test." The box checked on Ellis's forms indicates that the reason for his tests was "Reasonable Suspicion/Cause." Furthermore, in the section of one of the forms indicating which tests would be performed, presumably the form accompanying Ellis's blood, there is a handwritten note stating "Blood Drug Screen — Requested by Officer."

The exhibit also includes pages indicating three separate tests of Ellis's samples. An initial test of Ellis's urine was performed by Kristy at the local hospital on the same day Ellis was there. It returned a positive result for methamphetamine. The samples were then apparently shipped out of state to two separate companies for further tests — one for blood and one for urine. Both companies produced documents — dated after Ellis's trip to the hospital — indicating that Ellis had methamphetamine in his system.

The jury convicted on all counts.

II. ANALYSIS

We can easily dispose of two of the issues. * * * .

Having dealt with those issues, we are left with Ellis's argument relying on *Crawford* attacking the admission of the medical records establishing the presence of methamphetamine in his system. Evidentiary rulings affecting a defendant's right to confront witnesses are reviewed de novo. *United States v. Gilbertson*, 435 F.3d 790, 794-95 (7th Cir. 2006) (citations omitted). The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with witnesses against him." U.S. Const. amend. VI. As we now know, this right applies only to evidence that is considered "testimonial." *Davis v. Washington*, 126 S. Ct. 2266, 2273-76, 165 L. Ed. 2d 224 (2006). Hearsay evidence that is nontestimonial "is not subject to the Confrontation Clause." *Id.* at 2273. The Supreme Court, however, has expressly declined to provide a comprehensive definition of the term "testimonial." *Davis*, 126 S. Ct. at 2273 (citation omitted); *Crawford*, 541 U.S. at 68, 124 S. Ct. 1354.

But we are not without guidance. The prototypical case of testimonial evidence is that created by the civil-law tradition of a judicial officer examining a witness in private and then later reporting the results in court. *Crawford*, 541 U.S. at 43-44, 124 S. Ct. 1354. This method was contrary to the common-law tradition of "live testimony in court subject to adversarial testing," but, nonetheless, it was utilized at times by English courts. *Id.* An infamous

² Before trial, the government complied with Rule 902(11) and provided written notice of its intent to offer the medical records by a written declaration of the custodian. Ellis did not challenge the authenticity of the records.

example of the use of this type of testimonial evidence is the treason trial of Sir Walter Raleigh. *Id.* at 44, 124 S.Ct. 1354. The crucial evidence used against Raleigh was the statement of an alleged accomplice implicating Raleigh. Despite Raleigh's cry to "[c]all my accuser before my face," the statement was not given by way of live testimony. *See id.* (citing *Raleigh's Case*, 2 How. St. Tr. 1, 15-16 (1603)). Instead, it was introduced in the form of a letter that was created during a pretrial examination of the accomplice. As the Court in *Crawford* explained, this method of producing and introducing evidence was the "principal evil at which the Confrontation Clause was directed." *Id.* at 50, 124 S. Ct. 1354. Accordingly, when the Court later provided guidance as to what constitutes testimonial evidence, it explained, "[w]hatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* at 68, 124 S. Ct. 1354.

On the other end of the spectrum, the Court in *Crawford* explicitly noted, quite importantly for this case, that business records "by their nature were not testimonial." *Id.* at 56, 124 S. Ct. 1354; *see also id.* at 75, 124 S.Ct. 1354 (REHNQUIST, C.J., concurring in judgment) (noting the majority had excluded business records from the definition of testimonial evidence). Thus, it is clear that statements embodied in a business record are nontestimonial. *Id.*

The disputed tests were introduced as a business record under Federal Rules of Evidence 803(6) and 902(11), and we note that Ellis has advanced no argument here or objection below under those rules. His only claim of error is under *Crawford*. Neither his argument here nor his objection below were particularly well-developed. Nevertheless, we will construe his argument as one directed not only to the business records themselves, but also to the certification of those records pursuant to Rule 902(11). We will consider these in turn.

A. *The Business Records of the Underlying Medical Tests*

Faced with the obvious obstacle of the Court's designation of business records as nontestimonial, Ellis attacks the underlying medical records by arguing that they were created not because of routine medical procedures, but because of a government investigation. What we gather from this argument is that most business records would by their very nature have been created prior to any investigation of criminal activity, and that these are the type of business records the Court had in mind. The records used against Ellis, however, might be considered testimonial because they were created under police supervision and during an investigation for the purpose of determining whether a crime had been committed.

Whether a statement was made with an eye toward prosecution, that is, with the knowledge or for the purpose that it would be used later for prosecution, is an important aspect of delineating between testimonial and nontestimonial evidence. Two of the possible definitions of testimonial provided by the Court in *Crawford* focus on this circumstance. *See Crawford*, 541 U.S. at 51-52, 124 S. Ct. 1354 ("ex parte in-court testimony or its functional

equivalent * * * that declarants would reasonably expect to be used prosecutorially” and “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial”) (citations omitted). And the courts of appeals have taken to defining testimonial in terms of whether the declarant reasonably expected the statement to be used prosecutorially. E.g., *United States v. Maher*, 454 F.3d 13, 21 (1st Cir. 2006) (holding a statement to be testimonial because “it [was] clear that an objectively reasonable person in [the declarant’s] shoes would understand that the statement would be used in prosecuting [the defendant] at trial”); *United States v. Hinton*, 423 F.3d 355, 359 (3d Cir. 2005) (explaining that statements are testimonial when “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial”) (citations and quotations omitted); *United States v. Cromer*, 389 F.3d 662, 673-74 (6th Cir. 2004) (explaining that a statement is testimonial when “a reasonable person in the declarant’s position would anticipate his statement being used against the accused in investigating and prosecuting the crime”); *United States v. Saget*, 377 F.3d 223, 228-29 (2d Cir. 2004) (“*Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant’s awareness or expectation that his or her statements may later be used at a trial.”); see also Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 *Geo. L.J.* 1011, 1042-43 (1998) (defining a testimonial statement as one made when the declarant “anticipates that the statement will be used in the prosecution or investigation of a crime”).

We, in fact, have previously rejected a *Crawford* argument on the basis that the challenged statements (certified certificates of vehicle titles, including odometer statements used to prove fraud) were “not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution.” *United States v. Gilbertson*, 435 F.3d 790, 795-96 (7th Cir. 2006) (citing *Crawford*, 541 U.S. at 56 n. 7, 124 S. Ct. 1354).

Given the focus of the courts of appeals and our own precedent on the declarant’s reasonable expectations of whether a statement would be used prosecutorially, Ellis may appear to be on strong ground in arguing that the results of his medical tests were testimonial. It must have been obvious to Kristy (the laboratory technician at the local hospital) that her test results might end up as evidence against Ellis in some kind of trial. After all, she indicated on the form that the reason for the tests was “Reasonable Suspicion/Cause.” Moreover, the police officer’s participation in initiating these tests — the officer accompanied Ellis to the hospital and even watched him urinate in a cup — would also have led Kristy to believe that her test results would be used for criminal prosecution. The same might go for the professionals performing the tests out of state. The forms which we assume accompanied the samples bore the ominous “Reasonable Suspicion/Cause” indication checked by Kristy, and the blood sample form also had the notation that it was “Requested by Officer”.

Nevertheless, we do not think these circumstances transform what is otherwise a nontestimonial business record into a testimonial statement implicating the Confrontation Clause. There is no indication that the observations embodied in Ellis’s medical records were made in anything but the

ordinary course of business. Such observations, the Court in *Crawford* made clear, are nontestimonial. 541 U.S. at 56, 124 S. Ct. 1354. And we do not think it matters that these observations were made with the knowledge that they might be used for criminal prosecution. Prior to the Court's decision in *Davis*, two other courts of appeals decided that certificates of nonexistence of record ("CNR"), admitted under Rule 803(10) and used to prove an alien did not receive permission from the Attorney General to reenter the country, were nontestimonial despite the fact they were prepared by the government in anticipation of a criminal prosecution. See, e.g., *United States v. Cervantes-Flores*, 421 F.3d 825, 833 (9th Cir. 2005); *United States v. Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir. 2005). The focus of these decisions was that the preparation of these CNRs was routine, and the statements in them were simply too far removed from the examples of testimonial evidence provided by *Crawford*. *Cervantes-Flores*, 421 F.3d at 833-34; *Rueda-Rivera*, 396 F.3d at 680.

We agree with these courts that the mere fact a person creating a business record (or other similar record) knows the record might be used for criminal prosecution does not by itself make that record testimonial. The Court's recent decision in *Davis* (though we recognize the Court made no such pronouncement) supports this conclusion because we think it necessarily rejects a strict adherence to denominating as testimonial all statements made under circumstances where a reasonable person would know the statements might be used as evidence of a crime.

In *Davis*, the Court addressed a statement made by a woman to a 911 operator reporting she had been assaulted. 126 S. Ct. at 2270-71. That recorded statement was later used at trial to prosecute *Davis* (the woman's former boyfriend) for a felony violation of a domestic no-contact order. *Id.* at 2271. The Court considered the 911 operator's questioning of the woman to be an interrogation, *id.* at 2274 n. 1, and the operators themselves to be at least "agents of law enforcement," *id.* at 2274 n. 2. In the face of *Davis*'s objection that introduction of the statement violated the Sixth Amendment, the Court held that when the objective circumstances indicate the "primary purpose" of police interrogation is to meet an ongoing emergency, the statements elicited in response are nontestimonial. *Id.* at 2273-74. We believe this holding necessarily implies that consciousness on the part of the person reporting an emergency (or the police officer eliciting information about the emergency) that his or her statements might be used as evidence in a crime does not lead to the conclusion ipso facto that the statement is testimonial. A reasonable person reporting a domestic disturbance, which is what the declarant in *Davis* was doing, will be aware that the result is the arrest and possible prosecution of the perpetrator. See, e.g., Richard D. Friedman & Bridget McCormack, *Dial-In-Testimony*, 150 U. Pa. L.Rev. 1171, 1199 (concluding that most 911 callers know that by reporting domestic violence "they are practically ensuring that the other person will be arrested, and that a criminal prosecution will probably follow"). So it cannot be that a statement is testimonial in every case where a declarant reasonably expects that it might be used prosecutorially.

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. Therefore, when these professionals made those observations, they — like the declarant reporting an emergency in *Davis*. — were “not acting as * * * witness[es];” and were “not testifying.” See *Davis*, 126 S. Ct. at 2277 (emphasis in original). 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*.

B. Certification Pursuant to Rule 902(11)

Prior to *Crawford*, we held that Rule 803(6) remained a firmly rooted exception to the hearsay rule, and, therefore, did not violate the Confrontation Clause despite the then-recent amendment allowing authentication by written certification pursuant to Rule 902(11). See *United States v. Klinzing*, 315 F.3d 803, 809-10 (7th Cir. 2003). The question we must answer in the wake of *Crawford* is whether a written certification attesting to the authenticity of a business record is testimonial evidence. *Davis*, 126 S. Ct. at 2274-76. We do not think it is.

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. *Crawford*, 541 U.S. at 56, 124 S. Ct. 1354. 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. See, e.g., *Cervantes-Flores*, 421 F.3d at 833; *Rueda-Rivera*, 396 F.3d at 680. 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. *Cervantes-Flores*, 421 F.3d at 831; *Rueda-Rivera*, 396 F.3d at 679.

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 the 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. *Crawford*, 541 U.S. at 50, 124 S. Ct. 1354.

III. CONCLUSION

For the foregoing reason, Ellis’s convictions and sentence are Affirmed.

D. THE BRUTON ISSUES

RICHARDSON v. MARSH

481 U.S. 200 (1987)

JUSTICE SCALIA delivered the opinion of the Court.

In *Bruton v. United States*, 391 U.S. 123 (1968), we held that a defendant is deprived of his rights under the Confrontation Clause when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. Today we consider whether *Bruton* requires the same result when the codefendant's confession is redacted to omit any reference to the defendant, but the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial.

I

Respondent Clarissa Marsh, Benjamin Williams, and Kareem Martin were charged with assaulting Cynthia Knighton and murdering her 4-year-old son, Koran, and her aunt, Ollie Scott. Respondent and Williams were tried jointly, over her objection. (Martin was a fugitive at the time of trial.) At the trial, Knighton testified as follows: On the evening of October 29, 1978, she and her son were at Scott's home when respondent and her boyfriend Martin visited. After a brief conversation in the living room, respondent announced that she had come to "pick up something" from Scott and rose from the couch. Martin then pulled out a gun, pointed it at Scott and the Knightons, and said that "someone had gotten killed and [Scott] knew something about it." Respondent immediately walked to the front door and peered out the peephole. The doorbell rang, respondent opened the door, and Williams walked in, carrying a gun. As Williams passed respondent, he asked, "Where's the money?" Martin forced Scott upstairs, and Williams went into the kitchen, leaving respondent alone with the Knightons. Knighton and her son attempted to flee, but respondent grabbed Knighton and held her until Williams returned. Williams ordered the Knightons to lie on the floor and then went upstairs to assist Martin. Respondent, again left alone with the Knightons, stood by the front door and occasionally peered out the peephole. A few minutes later, Martin, Williams, and Scott came down the stairs, and Martin handed a paper grocery bag to respondent. Martin and Williams then forced Scott and the Knightons into the basement, * * *.

In addition to Knighton's testimony, the state introduced (over respondent's objection) a confession given by Williams to the police shortly after his arrest. The confession was redacted to omit all reference to respondent — indeed, to omit all indication that *anyone* other than Martin and Williams participated in the crime.¹ The confession largely corroborated Knighton's account of the

¹ The redacted confession in its entirety read:

On Sunday evening, October the 29th, 1978, at about 6:30 p.m., I was over to my girl friend's house at 237 Moss, Highland Park, when I received a phone call from a friend of mine named Kareem Martin. He said he had been looking for me and James

activities of persons other than respondent in the house. In addition, the confession described a conversation Williams had with Martin as they drove to the Scott home, during which, according to Williams, Martin said that he would have to kill the victims after the robbery. At the time the confession was admitted, the jury was admonished not to use it in any way against respondent. Williams did not testify Martin shot them. Only Cynthia Knighton survived.

After the State rested, respondent took the stand. She testified that on October 29, 1978, she had lost money that Martin intended to use to buy drugs. Martin was upset, and suggested to respondent that she borrow money from Scott, with whom she had worked in the past. Martin and respondent picked up Williams and drove to Scott's house. During the drive, respondent, who was sitting in the backseat, "knew that [Martin and Williams] were talking" but could not hear the conversation because "the radio was on and the speaker was right in [her] ear." Martin and respondent were admitted into the home, and respondent had a short conversation with Scott, during which she asked for a loan. Martin then pulled a gun, and respondent walked to the door to see where the car was. When she saw Williams, she opened the door for him. Respondent testified that during the robbery she did not feel free to leave and was too scared to flee. She said that she did not know why she prevented the Knightons from escaping. She admitted taking the bag from Martin, but said that after Martin and Williams took the victims into the basement, she left the house without the bag. Respondent insisted that she had possessed no prior knowledge that Martin and Williams were armed, had heard no

Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay. Then he said he'd be by and pick me up. About 15 or 20 minutes later Kareem came by in his black Monte Carlo car. I got in the car and Kareem told me he was going to stick up this crib, told me the place was a numbers house. Kareem said there would be over \$5,000 or \$10,000 in the place. Kareem said he would have to take them out after the robbery. Kareem had a big silver gun. He gave me a long barrelled *[sic]*.22 revolver. We then drove over to this house and parked the car across the big street near the house. The plan was that I would wait in the car in front of the house and then I would move the car down across the big street because he didn't want anybody to see the car. Okay, Kareem went up to the house and went inside. A couple of minutes later I moved the car and went up to the house. As I entered, Kareem and this older lady were in the dining room, a little boy and another younger woman were sitting on the couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs. He had a pistol, also. I stayed downstairs with the two people on the floor. After Kareem took the lady upstairs I went upstairs and the lady was laying on the bed in the room to the left as you get up the stairs. The lady had already given us two bags full of money before we ever got upstairs. Kareem had thought she had more money and that's why we had went upstairs. Me and Kareem started searching the rooms but I didn't find any money. I came downstairs and then Kareem came down with the lady. I said, 'Let's go, let's go.' Kareem said no. Kareem then took the two ladies and little boy down the basement and that's when I left to go to the car. I went to the car and got in the back seat. A couple of minutes later Kareem came to the car and said he thinks the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't go down the basement and I said I wasn't doing no shit like that. He then dropped me back off at my girl's house in Highland Park and I was supposed to get together with him today, get my share of the robbery after he had counted the money. That's all.

conversation about anyone's being harmed, and had not intended to rob or kill anyone.

During his closing argument, the prosecutor admonished the jury not to use Williams' confession against respondent. Later in his argument, however, he linked respondent to the portion of Williams' confession describing his conversation with Martin in the car.² (Respondent's attorney did not object to this.) After closing arguments, the judge again instructed the jury that Williams' confession was not to be considered against respondent. The jury convicted respondent of two counts of felony murder in the perpetration of an armed robbery and one count of assault with intent to commit murder. The Michigan Court of Appeals affirmed in an unpublished opinion, and the Michigan Supreme Court denied leave to appeal.

Respondent then filed a petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. She alleged that her conviction was not supported by sufficient evidence and that introduction of Williams' confession at the joint trial had violated her rights under the Confrontation Clause. The District Court denied the petition. The United States Court of Appeals for the Sixth Circuit reversed. The Court of Appeals held that in determining whether *Bruton* bars the admission of a nontestifying codefendant's confession, a court must assess the confession's "inculpatory value" by examining not only the face of the confession, but also all of the evidence introduced at trial. Here, Williams' account of the conversation in the car was the only *direct* evidence that respondent knew before entering Scott's house that the victims would be robbed and killed. Respondent's own testimony placed her in that car. In light of the "paucity" of other evidence of malice and the prosecutor's linkage of respondent and the statement in the car during closing argument, admission of Williams' confession "was powerfully incriminating to [respondent] with respect to the critical element of intent." * * * Thus, the Court of Appeals concluded, the Confrontation Clause was violated. We granted *certiorari* because the Sixth Circuit's decision conflicts with those of other Courts of Appeals which have declined to adopt the "evidentiary linkage" or "contextual implication" approach to *Bruton* questions.

² The prosecutor said:

"It's important in light of [respondent's] testimony when she says Kareem drives over to Benjamin Williams' home and picks him up to go over. What's the thing that she says? 'Well, I'm sitting in the back seat of the car.' 'Did you hear any conversation that was going on in the front seat between Kareem and Mr. Williams?' 'No, couldn't hear any conversation. The radio was too loud.' I asked [*sic*] you whether that is reasonable. Why did she say that? Why did she say she couldn't hear any conversation? She said, 'I know they were having conversation but I couldn't hear it because of the radio.' Because if she admits that she heard the conversation and she admits to the plan, she's guilty of at least armed robbery. So she can't tell you that." (Respondent's attorney did not object to this.) After closing arguments, the judge again instructed the jury that Williams' confession was not to be considered against respondent. The jury convicted respondent of two counts of felony murder in the perpetration of an armed robbery and one count of assault with intent to commit murder. The Michigan Court of Appeals affirmed in an unpublished opinion, and the Michigan Supreme Court denied leave to appeal.

II

* * *

Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness "against" a defendant if the jury is instructed to consider that testimony only against a codefendant. * * * In *Bruton*, however, we recognized a narrow exception to this principle: We held that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant. We said:

[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial* * *."

There is an important distinction between this case and *Bruton*, which causes it to fall outside the narrow exception we have created. In *Bruton*, the codefendant's confession "expressly implicat[ed]" the defendant as his accomplice. * * * Thus, at the time that confession was introduced there was not the slightest doubt that it would prove "powerfully incriminating." * * * By contrast, in this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony).

Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit the crime" is more vivid than inferential incrimination, and hence more difficult to thrust out of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget. In short, while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton's* exception to the general rule.

Even more significantly, evidence requiring linkage differs from evidence incriminating on its face in the practical effects which application of the *Bruton* exception would produce. If limited to facially incriminating confessions, *Bruton* can be complied with by redaction — a possibility suggested in that opinion itself. * * * If extended to confessions incriminating by connection, not

only is that not possible, but it is not even possible to predict the admissibility of a confession in advance of trial. The "contextual implication" doctrine articulated by the Court of Appeals would presumably require the trial judge to assess at the end of each trial whether, in light of all of the evidence, a nontestifying codefendant's confession has been so "powerfully incriminating" that a new, separate trial is required for the defendant. This obviously lends itself to manipulation by the defense — and even without manipulation will result in numerous mistrials and appeals. It might be suggested that those consequences could be reduced by conducting a pretrial hearing at which prosecution and defense would reveal the evidence they plan to introduce, enabling the court to assess compliance with *Bruton ex ante* rather than *ex post*. If this approach is even feasible * * * it would be time consuming and obviously far from foolproof.

One might say, of course, that a certain way of assuring compliance would be to try defendants separately whenever an incriminating statement of one of them is sought to be used. That is not as facile or as just a remedy as might seem. Joint trials play a vital role in the criminal justice system, accounting for almost one-third of federal criminal trials in the past five years. Many joint trials — for example, those involving large conspiracies to import and distribute illegal drugs — involve a dozen or more codefendants. Confessions by one or more of the defendants are commonplace — and indeed the probability of confession increases with the number of participants, since each has reduced assurance that he will be protected by his own silence. It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability — advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts. The other way of assuring compliance with an expansive *Bruton* rule would be to forgo use of codefendant confessions. That price also is too high, since confessions "are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 426 (1986). * * *

The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process. On the precise facts of *Bruton*, involving a facially incriminating confession, we found that accommodation inadequate. As our discussion above shows, the calculus changes when confessions that do not name the defendant are at issue. While we continue to apply *Bruton* where we have found that its rationale validly applies, we decline to extend it further. We hold that the Confrontation Clause is not violated by the admission of a nontestifying

codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.

~~In the present case, however, the prosecutor sought to undo the effect of the limiting instruction by urging the jury to use Williams' confession in evaluating respondent's case.* * *~~ On remand, the court should consider whether, in light of respondent's failure to object to the prosecutor's comments, the error can serve as the basis for granting a writ of habeas corpus.* * *

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

* * *

In the edited statement that the jury was instructed not to consider against Marsh, Williams described the conversation he had with Kareem Martin while they were in a car driving to their victims' residence. In that conversation, Martin stated that "he would have to take them out after the robbery." * * * The State's principal witness had testified that Martin and Marsh arrived at the victims' house together. The jury was therefore certain to infer from the confession that respondent had been in the car and had overheard the statement by Martin. Viewed in the total context of the trial evidence, this confession was of critical importance because it was the only evidence directly linking respondent with the specific intent, expressed before the robbery, to kill the victims afterwards. If Williams had taken the witness stand and testified, respondent's lawyer could have cross-examined him to challenge his credibility and to establish or suggest that the car radio was playing so loudly that Marsh could not have overheard the conversation between the two men from the back seat. An acknowledgment of the possibility of such facts by Williams would have done much more to eliminate the certainty beyond a reasonable doubt that Marsh knew about the murder plan than could possibly have been achieved by the later testimony of respondent herself. Moreover, the price respondent had to pay in order to attempt to rebut the obvious inference that she had overheard Martin was to remind the jury once again of what he had said and to give the prosecutor a further opportunity to point to this most damaging evidence on the close question of her specific intent. * * *

The facts in this case are, admittedly, different from those in *Bruton* because Williams' statement did not directly mention respondent. Thus, instead of being "incriminating on its face," * * * it became so only when considered in connection with the other evidence presented to the jury. The difference between the facts of *Bruton* and the facts of this case does not eliminate their common, substantial, and constitutionally unacceptable risk that the jury, when resolving a critical issue against respondent, may have relied on impermissible evidence.

II

* * *

The Court * * * expresses concern that trial judges will be unable to determine whether a codefendant's confession that does not directly mention the defendant and is inadmissible against him will create a substantial risk of unfair prejudice. In most such cases the trial judge can comply with the dictates of *Bruton* by postponing his or her decision on the admissibility of the confession until the prosecution rests, at which time its potentially inculpatory effect can be evaluated in the light of the government's entire case. The Court expresses concern that such a rule would enable "manipulation by the defense" * * * by which the Court presumably means the defense might tailor its evidence to make sure that a confession which does not directly mention the defendant is deemed powerfully incriminating when viewed in light of the prosecution's entire case. As a practical matter, I cannot believe that there are many defense lawyers who would deliberately pursue this high-risk strategy of "manipulating" their evidence in order to enhance the prejudicial impact of a codefendant's confession. * * *

I respectfully dissent.

GRAY v. MARYLAND

523 U.S. 185 (1998)

JUSTICE BREYER delivered the opinion of the Court.

The issue in this case concerns the application of *Bruton v. United States*, 391 U.S. 123 (1968). *Bruton* involved two defendants accused of participating in the same crime and tried jointly before the same jury. One of the defendants had confessed. His confession named and incriminated the other defendant. The trial judge issued a limiting instruction, telling the jury that it should consider the confession as evidence only against the codefendant who had confessed and not against the defendant named in the confession. *Bruton* held that, despite the limiting instruction, the Constitution forbids the use of such a confession in the joint trial.

The case before us differs from *Bruton* in that the prosecution here redacted the codefendant's confession by substituting for the defendant's name in the confession a blank space or the word "deleted." We must decide whether these substitutions make a significant legal difference. We hold that they do not and that *Bruton's* protective rule applies.

I

In 1993, Stacy Williams died after a severe beating. Anthony Bell gave a confession, to the Baltimore City police, in which he said that he (Bell), Kevin Gray, and Jacquin "Tank" Vanlandingham had participated in the beating that resulted in Williams' death. Vanlandingham later died. A Maryland grand jury indicted Bell and Gray for murder. The State of Maryland tried them jointly.

The trial judge, after denying Gray's motion for a separate trial, permitted the State to introduce Bell's confession into evidence at trial. But the judge ordered the confession redacted. Consequently, the police detective who read the confession into evidence said the word "deleted" or "deletion" whenever Gray's name or Vanlandingham's name appeared. Immediately after the police detective read the redacted confession to the jury, the prosecutor asked, "after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?" The officer responded, "That's correct." The State also introduced into evidence a written copy of the confession with those two names omitted, leaving in their place blank white spaces separated by commas. The State produced other witnesses, who said that six persons (including Bell, Gray, and Vanlandingham) participated in the beating. Gray testified and denied his participation. Bell did not testify.

When instructing the jury, the trial judge specified that the confession was evidence only against Bell; the instructions said that the jury should not use the confession as evidence against Gray. The jury convicted both Bell and Gray. Gray appealed.

Maryland's intermediate appellate court accepted Gray's argument that *Bruton* prohibited use of the confession and set aside his conviction. Maryland's highest court disagreed and reinstated the conviction. We granted certiorari in order to consider *Bruton's* application to a redaction that replaces a name with an obvious blank space or symbol or word such as "deleted."

II

In deciding whether *Bruton's* protective rule applies to the redacted confession before us, we must consider both *Bruton*, and a later case, *Richardson v. Marsh*, 481 U.S. 200 (1987), which limited *Bruton's* scope. We shall briefly summarize each of these two cases.

Bruton, as we have said, involved two defendants — Evans and Bruton — tried jointly for robbery. Evans did not testify, but the Government introduced into evidence Evans' confession, which stated that both he (Evans) and Bruton together had committed the robbery. The trial judge told the jury it could consider the confession as evidence only against Evans, not against Bruton.

This Court held that, despite the limiting instruction, the introduction of Evans' out-of-court confession at Bruton's trial had violated Bruton's right, protected by the Sixth Amendment, to cross-examine witnesses. The Court recognized that in many circumstances a limiting instruction will adequately protect one defendant from the prejudicial effects of the introduction at a joint trial of evidence intended for use only against a different defendant. But it said that

there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the

incriminations devastating to the defendant but their credibility is inevitably suspect* * *. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.

The Court found that Evans' confession constituted just such a "powerfully incriminating extrajudicial statemen[t]," and that its introduction into evidence, insulated from cross-examination, violated Bruton's Sixth Amendment rights.

In *Richardson*, the Court considered a redacted confession. The case involved a joint murder trial of Marsh and Williams. The State had redacted the confession of one defendant, Williams, so as to "omit all reference" to his codefendant, Marsh — "indeed, to omit all indication that anyone other than * * * Williams" and a third person had "participated in the crime." The trial court also instructed the jury not to consider the confession against Marsh. As redacted, the confession indicated that Williams and the third person had discussed the murder in the front seat of a car while they traveled to the victim's house. The redacted confession contained no indication that Marsh — or any other person — was in the car. Later in the trial, however, Marsh testified that she was in the back seat of the car. For that reason, in context, the confession still could have helped convince the jury that Marsh knew about the murder in advance and therefore had participated knowingly in the crime.

The Court held that this redacted confession fell outside *Bruton's* scope and was admissible (with appropriate limiting instructions) at the joint trial. The Court distinguished Evans' confession in *Bruton* as a confession that was "incriminating on its face," and which had "expressly implicat[ed]" *Bruton*. By contrast, Williams' confession amounted to "evidence requiring linkage" in that it "became" incriminating in respect to Marsh "only when linked with evidence introduced later at trial." The Court held that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.

The Court added: "We express no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun."

III

Originally, the codefendant's confession in the case before us, like that in *Bruton*, referred to, and directly implicated another defendant. The State, however, redacted that confession by removing the nonconfessing defendant's name. Nonetheless, unlike *Richardson's* redacted confession, this confession refers directly to the "existence" of the nonconfessing defendant. The State has simply replaced the nonconfessing defendant's name with a kind of symbol, namely the word "deleted" or a blank space set off by commas. The redacted confession, for example, responded to the question "Who was in the group that beat Stacey," with the phrase, "Me, _____, and a few other guys."

And when the police witness read the confession in court, he said the word "deleted" or "deletion" where the blank spaces appear. We therefore must decide a question that *Richardson* left open, namely whether redaction that replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word "deleted," or a similar symbol, still falls within *Bruton's* protective rule. We hold that it does.

Bruton, as interpreted by *Richardson*, holds that certain "powerfully incriminating extrajudicial statements of a codefendant" — those naming another defendant — considered as a class, are so prejudicial that limiting instructions cannot work. Unless the prosecutor wishes to hold separate trials or to use separate juries or to abandon use of the confession, he must redact the confession to reduce significantly or to eliminate the special prejudice that the *Bruton* Court found. Redactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indications of alteration, however, leave statements that, considered as a class, so closely resemble *Bruton's* unredacted statements that, in our view, the law must require the same result.

For one thing, a jury will often react similarly to an unredacted confession and a confession redacted in this way, for the jury will often realize that the confession refers specifically to the defendant. This is true even when the State does not blatantly link the defendant to the deleted name, as it did in this case by asking whether Gray was arrested on the basis of information in Bell's confession as soon as the officer had finished reading the redacted statement. Consider a simplified but typical example, a confession that reads "I, Bob Smith, along with Sam Jones, robbed the bank." To replace the words "Sam Jones" with an obvious blank will not likely fool anyone. A juror somewhat familiar with criminal law would know immediately that the blank, in the phrase "I, Bob Smith, along with _____, robbed the bank," refers to defendant Jones. A juror who does not know the law and who therefore wonders to whom the blank might refer need only lift his eyes to Jones, sitting at counsel table, to find what will seem the obvious answer, at least if the juror hears the judge's instruction not to consider the confession as evidence against Jones, for that instruction will provide an obvious reason for the blank. A more sophisticated juror, wondering if the blank refers to someone else, might also wonder how, if it did, the prosecutor could argue the confession is reliable, for the prosecutor, after all, has been arguing that Jones, not someone else, helped Smith commit the crime.

For another thing, the obvious deletion may well call the jurors' attention specially to the removed name. By encouraging the jury to speculate about the reference, the redaction may overemphasize the importance of the confession's accusation — once the jurors work out the reference. * * *

Finally, *Bruton's* protected statements and statements redacted to leave a blank or some other similarly obvious alteration, function the same way grammatically. They are directly accusatory. Evans' statement in *Bruton* used a proper name to point explicitly to an accused defendant. * * * The blank space in an obviously redacted confession also points directly to the defendant, and it accuses the defendant in a manner similar to Evans' use of *Bruton's* name or to a testifying codefendant's accusatory finger. By way of contrast,

the factual statement at issue in *Richardson* — a statement about what others said in the front seat of a car — differs from directly accusatory evidence in this respect, for it does not point directly to a defendant at all.

We concede certain differences between *Bruton* and this case. A confession that uses a blank or the word “delete” (or, for that matter, a first name or a nickname) less obviously refers to the defendant than a confession that uses the defendant’s full and proper name. Moreover, in some instances the person to whom the blank refers may not be clear: Although the follow-up question asked by the State in this case eliminated all doubt, the reference might not be transparent in other cases in which a confession, like the present confession, uses two (or more) blanks, even though only one other defendant appears at trial, and in which the trial indicates that there are more participants than the confession has named. Nonetheless, as we have said, we believe that, considered as a class, redactions that replace a proper name with an obvious blank, the word “delete,” a symbol, or similarly notify the jury that a name has been deleted are similar enough to *Bruton*’s unredacted confessions as to warrant the same legal results.

IV

The State, in arguing for a contrary conclusion, relies heavily upon *Richardson*. But we do not believe *Richardson* controls the result here. We concede that *Richardson* placed outside the scope of *Bruton*’s rule those statements that incriminate inferentially. We also concede that the jury must use inference to connect the statement in this redacted confession with the defendant. But inference pure and simple cannot make the critical difference, for if it did, then *Richardson* would also place outside *Bruton*’s scope confessions that use shortened first names, nicknames, descriptions as unique as the “red-haired, bearded, one-eyed man-with-a-limp,” and perhaps even full names of defendants who are always known by a nickname. * * *

* * * *Richardson* must depend in significant part upon the kind of, not the simple fact of, inference. *Richardson*’s inferences involved statements that did not refer directly to the defendant himself and which became incriminating “only when linked with evidence introduced later at trial.” The inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial. * * *

Nor are the policy reasons that *Richardson* provided in support of its conclusion applicable here. *Richardson* expressed concern lest application of *Bruton*’s rule apply where “redaction” of confessions, particularly “confessions incriminating by connection,” would often “not [be] possible,” thereby forcing prosecutors too often to abandon use either of the confession or of a joint trial. Additional redaction of a confession that uses a blank space, the word “delete,” or a symbol, however, normally is possible. Consider as an example a portion of the confession before us: The witness who read the confession told the jury that the confession (among other things) said,

Question: Who was in the group that beat Stacey?

Answer: Me, deleted, deleted, and a few other guys.

Why could the witness not, instead, have said:

Question: Who was in the group that beat Stacey?

Answer: Me and a few other guys.

Richardson itself provides a similar example of this kind of redaction. The confession there at issue had been “redacted to omit all reference to respondent — indeed, to omit all indication that anyone other than Martin and Williams participated in the crime,” and it did not indicate that it had been redacted.

The *Richardson* Court also feared that the inclusion, within *Bruton’s* protective rule, of confessions that incriminated “by connection” too often would provoke mistrials, or would unnecessarily lead prosecutors to abandon the confession or joint trial, because neither the prosecutors nor the judge could easily predict, until after the introduction of all the evidence, whether or not *Bruton* had barred use of the confession. To include the use of blanks, the word “delete,” symbols, or other indications of redaction, within *Bruton’s* protections, however, runs no such risk. Their use is easily identified prior to trial and does not depend, in any special way, upon the other evidence introduced in the case. * * *

For these reasons, we hold that the confession here at issue, which substituted blanks and the word “delete” for the respondent’s proper name, falls within the class of statements to which *Bruton’s* protections apply.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom the CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

* * *

* * * Today the Court struggles to decide whether a confession redacted to omit the defendant’s name is incriminating on its face or by inference. On the one hand, the Court “concede[s] that the jury must use inference to connect the statement in this redacted confession with the defendant,” but later asserts, on the other hand, that “the redacted confession with the blank prominent on its face * * * ‘facially incriminat[es]’” him.. The Court should have stopped with its concession: the statement “Me, deleted, deleted, and a few other guys” does not facially incriminate anyone but the speaker. The Court’s analogizing of “deleted” to a physical description that clearly identifies the defendant does not survive scrutiny. By “facially incriminating,” we have meant incriminating independent of other evidence introduced at trial. Since the defendant’s appearance at counsel table is not evidence, the description “red-haired, bearded, one-eyed man-with-a-limp,” would be facially incriminating — unless, of course, the defendant had dyed his hair black and shaved his beard before trial, and the prosecution introduced evidence concerning his

former appearance. Similarly, the statement “Me, Kevin Gray, and a few other guys” would be facially incriminating, unless the defendant’s name set forth in the indictment was not Kevin Gray, and evidence was introduced to the effect that he sometimes used “Kevin Gray” as an alias. By contrast, the person to whom “deleted” refers in “Me, deleted, deleted, and a few other guys” is not apparent from anything the jury knows independent of the evidence at trial. Though the jury may speculate, the statement expressly implicates no one but the speaker.

Of course the Court is correct that confessions redacted to omit the defendant’s name are more likely to incriminate than confessions redacted to omit any reference to his existence. But it is also true — and more relevant here — that confessions redacted to omit the defendant’s name are less likely to incriminate than confessions that expressly state it. The latter are “powerfully incriminating” as a class; the former are not so. Here, for instance, there were two names deleted, five or more participants in the crime, and only one other defendant on trial. The jury no doubt may “speculate about the reference,” as it speculates when evidence connects a defendant to a confession that does not refer to his existence. The issue, however, is not whether the confession incriminated petitioner, but whether the incrimination is so “powerful” that we must depart from the normal presumption that the jury follows its instructions. I think it is not — and I am certain that drawing the line for departing from the ordinary rule at the facial identification of the defendant makes more sense than drawing it anywhere else.

* * * The Court minimizes the damage that it does by suggesting that “[a]dditional redaction of a confession that uses a blank space, the word ‘delete,’ or a symbol * * * normally is possible.” In the present case, it asks, why could the police officer not have testified that Bell’s answer was “Me and a few other guys”? The answer, it seems obvious to me, is because that is not what Bell said. Bell’s answer was “Me, Tank, Kevin and a few other guys.” Introducing the statement with full disclosure of deletions is one thing; introducing as the complete statement what was in fact only a part is something else. And of course even concealed deletions from the text will often not do the job that the Court demands. For inchoate offenses — conspiracy in particular — redaction to delete all reference to a confederate would often render the confession nonsensical. If the question was “Who agreed to beat Stacey?”, and the answer was “Me and Kevin,” we might redact the answer to “Me and [deleted],” or perhaps to “Me and somebody else,” but surely not to just “Me” — for that would no longer be a confession to the conspiracy charge, but rather the foundation for an insanity defense. To my knowledge we have never before endorsed — and to my strong belief we ought not endorse — the redaction of a statement by some means other than the deletion of certain words, with the fact of the deletion shown. The risk to the integrity of our system (not to mention the increase in its complexity) posed by the approval of such free-lance editing seems to me infinitely greater than the risk posed by the entirely honest reproduction that the Court disapproves.

NOTES

1. Can the *Bruton* problem be avoided by empaneling two separate juries?

Some courts have experimented with empaneling two juries in a single trial to resolve the *Bruton* problem. The jury hearing the case against the non-confessing codefendant is excused when the hearsay statement is introduced or referred to. A judge who tried such a case stated that before the confession was introduced, she excused both juries, and then called the confessing defendant's jury back to hear the confession. In that way, the jurors for the non-confessing defendant would not think that they were missing anything. See Santagata, *One Trial, Two Juries — It Works in Extraordinary Cases*, N.Y.L.J., May 11, 1988, p. 1. In *People v. Ricardo B.*, 73 N.Y.2d 228, 538 N.Y.S.2d 796, 535 N.E.2d 1336 (1989), the court held that the use of multiple juries "does not deny defendants their constitutional right to a jury trial or, in the absence of identified prejudice, to due process of law." The Court noted, however, that multiple juries should be used sparingly, because their use "can only magnify the problems inherent in joint trials because of the need to insulate the juries from inadmissible evidence or argument."

2. Does the *Bruton* problem require severance if the case is being tried to the judge?

Bruton has been held inapplicable to a bench trial of joined defendants, because the problem that the Court was concerned about in *Bruton* was the jury's inability to follow the judge's instruction not to use one codefendant's confession against another. *Rogers v. McMackin*, 884 F.2d 252 (6th Cir. 1989).

3. Does the prosecutor in a joint trial assume the risk of one codefendant prejudicing another?

Consider *Toolate v. Borg*, 828 F.2d 571 (9th Cir. 1987), where Toolate's codefendant, Frazier, took the stand and on direct examination shifted the blame to Toolate. He refused to be cross-examined, and the judge gave an instruction to the jury to disregard his testimony. Toolate's motion for a mistrial was denied. The Court held that *Bruton* required a mistrial under these circumstances, since Frazier's testimony was powerfully incriminating against Toolate, and the instruction was insufficient to protect Toolate's right to confrontation. The government argued that mistrial was not required because, unlike in *Bruton* where the prosecutor proffered the codefendant's confession, the prosecutor in *Toolate* had done nothing wrong. The Court rejected this argument and reasoned that the prosecutor who tries defendants jointly assumes certain risks.

Codefendants * * * have the opportunity to sabotage each other's trial through unethical tactics. For example, if one codefendant comments prejudicially on another's refusal to testify, the latter's conviction must ordinarily be reversed. The result is the same if one codefendant calls the other as a witness, requiring him to invoke his Fifth Amendment privilege in the jury's presence.* * * One codefendant could also produce a mistrial for another by testifying to irrelevant, highly prejudicial matter, such as the latter's prior criminal record. These dangers are inherent in the joint trial process.

* * *

True, the government did not perpetrate the prejudice in this case, as it did in *Bruton*, and could not have prevented it. This is significant because the *Bruton* rule emerged in part to stop the government from using joint trials to circumvent the evidentiary rules that would apply in separate ones. That concern does not exist here. But *Bruton* rests, for good or ill, on the presumed inability of juries to disregard an incriminatory codefendant's confession. In that crucial respect, this case is identical to *Bruton*.

PROBLEM 15-1

Mary Lena, Steven Mabry, and Jan Nineot formed an investment company called the LMN company. The government has charged the three and their company with money laundering and conspiracy to engage in money laundering, alleging that they received money from drug traffickers and invested it in legitimate businesses. The indictment charges that numerous drug dealers were members of the conspiracy. The trial judge has severed Jan Nineot's trial from that of the other two defendants, because Nineot had open heart surgery and was unable to prepare for trial. Lena and Mabry are tried together along with the LMN company.

The government's first witness is an undercover agent, Lieutenant Styple. Unless indicated otherwise, each defense objection is made by all three defendants.

Direct Examination

Prosecution:	Did you have occasion to meet the defendants, Lena and Mabry?
Officer:	Yes, I did.
Prosecution:	How did that come about?
Officer:	A drug dealer named Orleo Basis introduced me to them and told them that I wanted them to invest some money that I earned trafficking in drugs.
Defendants:	(1) Objection. Hearsay.
Prosecution:	The statement is not offered for its truth; it's offered to show how the witness came to meet the defendant.
The court:	(2) _____.
Prosecution:	Why did Orleo introduce you?
Officer:	He and I had some conversations about drug dealing, and he said to me "I know where you can park your money. Mabry and his partners are good."
Defendants:	(3) Objection. Hearsay and Confrontation Clause.

- Prosecution:** Before you rule, your Honor, can I ask another question?
- The court:** Yes.
- Prosecution:** Did Orleo tell you anything about his own relationship to the defendants?
- Officer:** He told me that he laundered his money with them.
- Defendants:** (4) Objection. Hearsay and Confrontation Clause.
- Prosecution:** These are admissible coconspirator statements.
- Defendants:** Can't be. The witness wasn't conspiring with anybody. Moreover, I want the Court to know that I have issued a subpoena to Orleo. So, he is available to testify, and this is totally improper.
- The court:** (5) _____.
- Prosecution:** What happened when Orleo introduced you to the defendants?
- Officer:** Lena said to me, "We can hide your money, no problem."
- Defendants:** (6) Objection. Hearsay and Bruton.
- Prosecution:** It's not hearsay; it's an admission.
- Mabry:** It's not an admission by Mabry. I repeat. (5) Objection. Hearsay and Bruton.
- Prosecution:** It's a Rule 801 (d)(2)(E) admission.
- The court:** (7) _____.
- Prosecution:** Did you have occasion to speak to Nineot?
- Officer:** Yes I did.
- Prosecution:** What did he say?
- Officer:** He said that Lena was the best launderer in the business.
- Defendants:** (8) Hearsay and Confrontation. Nineot is now healthy. He can be called as a witness.
- Prosecution:** His statement is a declaration against interest and admissible against all the defendants.
- Defendants:** No way.
- The court:** (9) _____.
- Prosecution:** In addition, his statement is an admission.
- Defendants:** (10) Objection. Hearsay and Confrontation. He's not on trial here.
- The court:** (11) _____.
- Prosecution:** Were you present at the preliminary hearing in this case?
- Officer:** Sure, I was.
- Prosecution:** Were you there when Orleo testified?
- Officer:** Yes.
- Prosecution:** Tell the jury what Orleo said about the defendants.
- Defendants:** (12) Objection. Hearsay and Confrontation.
- Prosecution:** It's an admission and it's former testimony.

The court: (13) _____
Prosecution: Who made the arrests of the defendants in this case?
Officer: I did.
Prosecution: Did Lena say anything after you arrested her?
Officer: She said, "You've got me, and I'm sorry that I got Mabry involved."
Defendants: (14) Objection. Hearsay and Confrontation.
Prosecution: It's an admission and a declaration against interest.
Mabry: It's not an admission by Mabry, and there is no way to know if Lena will testify.
Prosecution: It's at least admissible against Lena.
The court: (15) _____

Cross-Examination

Defendants: You say you were at the preliminary hearing when Orleo testified.
Mabry: Isn't it true he said that he did not believe Mabry was aware of the money laundering?
Prosecution: (16) Objection. Hearsay. The defendant cannot object to the testimony and then offer it.
The court: (17) _____