ADVISORY COMMITTEE
ON
EVIDENCE RULES

April 28, 2023

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

April 28, 2023

Washington, D.C.

I. Opening Business

Opening business includes:

- Approval of the minutes of the Fall 2022 meeting.
- Report on the January 2023 meeting of the Standing Committee.
- Acknowledgement of the contributions of Judge Dick, Judge Schroeder, and Arun Subramanian, Esq.

II. Proposed Amendment on Illustrative Aids

At its Spring 2022 meeting, the Committee unanimously approved, for release for public comment, an amendment that would regulate the use of illustrative aids and would emphasize a distinction between illustrative aids and demonstrative evidence. Many comments were received on the amendment. At this meeting, final action will be taken on the proposal. The Reporter's memorandum on the proposed amendment, including a summary of public comment, is set forth behind Tab II of this agenda book.

III. Proposed Amendment to Rule 1006

At its Spring 2022 meeting, the Committee unanimously approved, for release for public comment, a proposed amendment to Rule 1006, to provide uniform treatment of summaries of voluminous admissible evidence. It would clarify, among other things, that a summary under Rule 1006 is evidence, as distinguished from an illustrative aid, which is not. The amendment received a few public comments. At this meeting, final action will be taken on the proposal. A memorandum on the proposed amendment, prepared by Professor Richter, is behind Tab III.

IV. Proposed Amendment to Rule 613(b)

At its Spring 2022 meeting the Committee unanimously approved, for release for public comment, an amendment to Rule 613(b). The amendment would generally require a party impeaching with extrinsic evidence of a prior inconsistent statement to provide the witness an opportunity to explain or deny the statement before the extrinsic evidence may be admitted. The proposal received a few public comments. At this meeting, final action will be taken on the proposal. A memorandum prepared by Professor Richter on the proposed amendment is behind Tab IV of the agenda book.

V. Proposed Amendment to Rule 801(d)(2)

At its Spring 2022 meeting the Committee unanimously approved, for release for public comment, an amendment to Rule 801(d)(2) to treat the situation in which a party has succeeded to a claim or defense and a hearsay statement is offered that would have been admissible against the predecessor under Rule 801(d)(2). The amendment would provide that such a statement is admissible against the party who succeeds to the claim or potential liability of the declarant or declarant's principal. The proposal received a few public comments. At this meeting, final action will be taken on the proposal. The Reporter's memorandum on the proposed amendment is behind Tab V.

VI. Proposed Amendment to Rule 804(b)(3)

At its Spring 2022 meeting the Committee unanimously approved, for release for public comment, a proposed amendment to Rule 804(b)(3), the hearsay exception for declarations against interest. The amendment would clarify that corroborating evidence must be considered in determining whether a declaration against penal interest is supported by "corroborating circumstances" that clearly indicate the trustworthiness of the statement. The proposed amendment received a few public comments. At this meeting, final action will be taken on the proposal. A memorandum on the amendment, prepared by Professor Richter, is behind Tab VI.

VII. Juror Questions of Witnesses

At its Spring 2022 meeting, the Committee unanimously approved, for release for public comment, an amendment adding a new provision providing procedural safeguards to be employed when the trial court decides to allow jurors to pose questions to witnesses. The Standing Committee sent the proposal back to the Committee for further research. The Committee held a symposium on juror questions, and the Reporter has done some further research at the request of the Committee. At this meeting, the proposal on juror questions is not an action item, but the Committee will discuss the new research and determine whether to proceed with further consideration of the amendment. The Reporter's memorandum on juror questions of witnesses is behind Tab VII.

VIII. *Crawford* Outline

The agenda book contains the Reporter's updated outline on circuit court cases applying the Supreme Court's Confrontation Clause jurisprudence. This outline is behind Tab VIII. It is not an agenda item for Committee action, but is submitted for background on the question whether any of the Evidence Rules need to be amended to accommodate the Confrontation Clause.

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure
(Standing Committee)

Chair	Reporter
Honorable John D. Bates United States District Court Washington, DC	Professor Catherine T. Struve University of Pennsylvania Law School Philadelphia, PA

Secretary to the Standing Committee

H. Thomas Byron III, Esq.
Administrative Office of the U.S. Courts
Office of the General Counsel – Rules Committee Staff
Washington, DC

Advisory Committee on Appellate Rules

Chair	Reporter
Honorable Jay S. Bybee United States Court of Appeals Las Vegas, NV	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Advisory Committee on Bankruptcy Rules

Chair	Reporter
Honorable Rebecca B. Connelly United States Bankruptcy Court Harrisonburg, VA	Professor S. Elizabeth Gibson University of North Carolina at Chapel Hill Chapel Hill, NC

Associate Reporter

Professor Laura B. Bartell
Wayne State University Law School
Detroit, MI

Advisory Committee on Civil Rules

Chair	Reporter
Honorable Robin L. Rosenberg United States District Court West Palm Beach, FL	Professor Richard L. Marcus University of California Hastings College of the Law San Francisco, CA
	Associate Reporter
	Professor Andrew Bradt University of California, Berkeley Berkeley, CA

Advisory Committee on Criminal Rules

Chair	Reporter
Honorable James C. Dever III United States District Court Raleigh, NC	Professor Sara Sun Beale Duke University School of Law Durham, NC
	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Advisory Committee on Evidence Rules

Chair	Reporter
Honorable Patrick J. Schiltz United States District Court Minneapolis, MN	Professor Daniel J. Capra Fordham University School of Law New York, NY

ADVISORY COMMITTEE ON EVIDENCE RULES

Chair	Reporter
Honorable Patrick J. Schiltz United States District Court Minneapolis, MN	Professor Daniel J. Capra Fordham University School of Law New York, NY

Members

James P. Cooney III, Esq. Womble Bond Dickinson LLP Charlotte, NC	Honorable Shelly Dick United States District Court Baton Rouge, LA
Honorable Mark S. Massa Indiana Supreme Court Indianapolis, IN	Honorable Marshall L. Miller Principal Associate Deputy Attorney General (ex officio) United States Department of Justice Washington, DC
Honorable Thomas D. Schroeder United States District Court Winston Salem, NC	Arun Subramanian, Esq. Susman Godfrey L.L.P. New York, NY
Honorable Richard J. Sullivan United States Court of Appeals New York, NY	Rene L. Valladares, Esq. Office of the Federal Public Defender Las Vegas, NV

Consultant

Professor Liesa Richter
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Honorable Robert J. Conrad, Jr. (*Criminal*) United States District Court Charlotte, NC	Honorable Carolyn B. Kuhl (*Standing*) Superior Court of the State of California Los Angeles, CA
Honorable M. Hannah Lauck (*Civil*) United States District Court Richmond, VA	

Advisory Committee on Evidence Rules

Members	Position	District/Circuit	Start Date		End Date
Patrick J. Schiltz	D	Minnesota	Member: Chair:	2020 2020	---- 2023
James P. Cooney III	ESQ	North Carolina		2022	2025
Shelly Dick	D	Louisiana (Middle)		2017	2023
Mark S. Massa	JUST	Indiana		2022	2025
Marshall L. Miller*	DOJ	Washington, DC		----	Open
Thomas D. Schroeder	D	North Carolina (Middle)		2017	2023
Arun Subramanian	ESQ	New York		2021	2023
Richard J. Sullivan	C	Second Circuit		2021	2023
R.L. Valladares	FPD	Nevada		2022	2024
Daniel J. Capra Reporter	ACAD	New York		1996	Open

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* Ex-officio - Principal Associate Deputy Attorney General

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Liaisons for the Advisory Committee on Appellate Rules	Andrew J. Pincus, Esq. *(Standing)* Hon. Daniel A. Bress *(Bankruptcy)*
Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Hon. D. Brooks Smith (*Standing*) Hon. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Paul J. Barbadoro (*Standing*)
Liaisons for the Advisory Committee on Evidence Rules	Hon. Robert J. Conrad, Jr. (*Criminal*) Hon. Carolyn B. Kuhl *(Standing)* Hon. M. Hannah Lauck (*Civil*)

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TAB 1

TAB 1A

Advisory Committee on Evidence Rules
Minutes of the Meeting of October 28, 2022
Sandra Day O'Connor College of Law
Phoenix, Arizona

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 28, 2022 at the Sandra Day O'Connor College of Law in Phoenix, Arizona.

The following members of the Committee were present:

Hon. Patrick J. Schiltz, Chair
Hon. Shelly Dick
Hon. Mark S. Massa
Hon. Thomas D. Schroeder
Hon. Richard J. Sullivan
Arun Subramanian, Esq.
James P. Cooney III, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure
Hon. Carolyn B. Kuhl, Liaison from the Standing Committee
Hon. Robert J. Conrad, Jr., Liaison from the Criminal Rules Committee
Hon. M. Hannah Lauck, Liaison from the Civil Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
H. Thomas Byron III, Esq., Rules Committee Chief Counsel
Timothy Lau, Esq., Federal Judicial Center
Professor Jessica Berch, Sandra Day O'Connor College of Law
Christopher Pryby, Rules Law Clerk, Rules Committee Staff

Present Via Microsoft Teams

Professor Daniel R. Coquillette, Consultant to the Standing Committee
Professor Catherine T. Struve, Reporter to the Standing Committee
Bridget Healy, Counsel, Rules Committee Staff
Shelly Cox, Management Analyst, Rules Committee Staff

I. Opening Business

Announcements

The Chair welcomed everyone to the meeting. He noted that Federal Public Defender Renee Valladares and Principal Associate Deputy Attorney General Marshall Miller could not be present due to work obligations. The Chair explained that Elizabeth Shapiro was present on behalf of the Department of Justice. The Chair introduced two new members of the Committee: Justice Mark Massa of the Indiana Supreme Court and James Cooney a Partner in Womble, Bond & Dickinson in North Carolina. The Chair also welcomed Judge Hannah Lauck, the new liaison to the Committee from the Civil Rules Committee.

Approval of Minutes

A motion was made to approve the minutes of the May 6, 2022 Advisory Committee meeting. The motion was seconded and approved by the full Committee.

Report of Standing Committee Meeting

The Chair then gave a report on the June 2022 Standing Committee meeting. He informed the Committee that the Standing Committee gave unanimous final approval to the proposed amendments to Rules 106, 615, and 702. He noted that the Judicial Conference subsequently approved the amendments and that all three had been passed on to the United States Supreme Court.

The Chair explained that the Standing Committee also approved the publication of proposed amendments to Rules 611(d), 613(b), 801(d)(2), 804(b)(3), and 1006. He noted that the Committee's proposal to add to Rule 611 procedural safeguards that would apply if a trial judge decided to allow jurors to pose written questions to witnesses was sent back to the Committee for further study.

II. Pending Amendment Proposals

The Chair opened the discussion by commenting on the top-notch quality of the morning symposium exploring rulemaking proposals with respect to illustrative aids and procedural safeguards for jury questions. He thanked Professor Capra for his tremendous work in finding highly qualified panelists and in moderating the discussion. He also thanked Professor Berch for her outstanding support in hosting the symposium. The Chair suggested that the Committee discuss all of the other amendment proposals currently before the Committee prior to turning to a discussion of the symposium and of illustrative aids and jury questions.

A. Rule 613(b) and a Prior Foundation for Extrinsic Evidence of a Prior Inconsistent Statement

The Chair asked Professor Richter to brief the Committee with respect to the proposal to amend Rule 613(b). Professor Richter directed the Committee's attention to the proposal that would require a prior foundation on cross-examination of a witness before offering extrinsic evidence of the witness's prior inconsistent statement. She explained that the proposed amendment would require that the witness have an opportunity to explain or deny a prior inconsistent statement before extrinsic evidence of that statement could be offered in the usual case, but would retain the trial court's discretion to delay or forgo the foundation under appropriate circumstances. She reminded the Committee that the flexible timing in the existing rule has the potential to cause inefficiencies and problems in practice. She noted that many judges require a prior foundation to avoid these difficulties notwithstanding the flexible timing embodied in the rule. She explained that the proposed amendment was designed to bring the rule into alignment with practice in this area.

Professor Richter informed the Committee that no public comments had been received to date with respect to the proposal. She suggested that the Committee change the second use of the word "prior" in the first sentence of the proposed Committee note to "before" to avoid using the word "prior" twice in the same sentence. All Committee members were in agreement with that minor change and offered no further comment on the proposal.

B. Party-Opponent Statements offered against Successors/ Rule 801(d)(2)

The Chair asked the Reporter to brief the Committee on the proposal to amend Rule 801(d)(2). The Reporter reminded the Committee that party-opponent statements admissible against a declarant or the declarant's principal are excluded by some courts when a successor party stands in the shoes of the declarant or the declarant's principal. The proposed amendment would make the statements admissible against a party who stands in the shoes of the declarant or the declarant's principal. The Reporter informed the Committee that no public comments had been received to date with respect to the proposal.

The Reporter explained that a member of the Standing Committee offered one suggestion with respect to the proposal. He called the Committee's attention to the final paragraph of the proposed committee note, which explains that the declarant's statement is not admissible against the successor in interest if it was made *after* the transfer of the interest to the successor. A member of the Standing Committee suggested that this limitation was sufficiently important to be included in rule text, rather than in the Committee Note. The Reporter opined that the limitation should not be added to rule text and was best left in the Committee Note for two reasons. First, he noted that the circumstance in which a transfer of interest precedes the declarant's statement is exceedingly rare; there are no reported cases on the subject. He suggested that such an unusual circumstance need not be treated in rule text. Second, the Reporter explained that capturing this concept would be linguistically complicated and could undermine the clarity of the principal advance of the amendment (making statements admissible against successors that would have been admissible against the declarant). The Chair agreed on

both points and suggested that the Committee should respectfully decline to add the note language to the rule text. Professor Coquillette also agreed, opining that the complex and exceptional concept of post-transfer statements would undermine the amendment if it were added to rule text. No Committee member voiced a contrary position.

Judge Bates pointed out that the rule text provides for admissibility when a party's claim or liability is "directly derived" from a declarant or declarant's principal. He noted that the final sentence of the first paragraph of the Committee note that appeared on page 169 of the Agenda materials discusses a party "that derives its interest from a declarant" without using the modifier "directly." He proposed adding the modifier "directly" to the Committee note to match rule text. All Committee members agreed, and the Reporter promised to make the change.

C. Rule 804(b)(3)

Professor Richter briefed the Committee on the proposed amendment to Rule 804(b)(3)(B), the hearsay exception for statements against interest. She reminded the Committee that the amendment would resolve a conflict in the courts by directing courts to consider "the totality of circumstances" as well as "evidence, if any, corroborating" the statement in determining whether a statement against penal interest offered in a criminal case is supported by corroborating circumstances that clearly indicate its trustworthiness. She noted that no public comments had been received to date.

Professor Richter explained that a member of the Standing Committee had offered one suggested change to the proposed amendment. The suggestion was to add rule text directing the court to consider evidence *contradicting* the proffered statement against penal interest, as well as evidence corroborating it. Professor Richter explained that it may not be advisable to add language about contradictory evidence to the text of the proposed amendment for three reasons. First, the existing text of the amendment that directs courts to consider corroborating evidence, if any, logically means that contradictory evidence cuts against admissibility. She noted that courts currently applying a similar requirement under Rule 807 properly recognize the impact of contradictory evidence even though contradiction is not included in rule text. Second, Professor Richter explained that the amendment to Rule 804(b)(3)(B) was designed to track the 2019 amendment to Rule 807 and that the text of Rule 807 does not expressly direct courts to consider contradictory evidence undercutting admissibility. She explained that Rules 804(b)(3) and 807 would utilize slightly distinct language to address the same issue if the concept of contradiction were added to the Rule 804(b)(3)(B) amendment. An argument could even be made that the two rules should be interpreted differently due to the use of distinct language. Finally, Professor Richter explained that, to the extent that there could be any question whether the amendment to Rule 804(b)(3)(B), as published, includes the consideration of information contradicting the statement against interest, the Committee note specifically addresses this issue in two separate places, stating that: courts should "consider not only the totality of the circumstances under which the statement was made, but also any evidence corroborating or contradicting it" and that "Courts must also consider evidence that contradicts the declarant's account."

The Chair agreed, while observing that he would favor adding contradiction to the text of the Rule 804(b)(3)(B) amendment if Rule 807 did not already address the concept without that language. But he added that judges and litigants might wonder why a contradiction consideration was included in Rule 804(b)(3)(B) but left out of Rule 807 if the Committee were to add it to the proposed amendment. The Committee agreed.

One Committee member noted that Rule 804(b)(3)(B) uses the term "corroborating" twice – once in requiring that a statement against penal interest be "supported by corroborating circumstances that clearly indicate its trustworthiness" and again in directing courts to consider "evidence, if any, corroborating" the statement. He queried whether the two uses of the term were redundant. The Reporter explained that both are necessary and that they are not redundant. The first use is a term of art --- "corroborating circumstances" --- that describes the *finding* the trial court must make to admit a statement against penal interest in a criminal case. The second and amended reference to corroborating evidence describes the information that a court should *use* in making the requisite finding. Because the Committee does not want to alter the original term of art used to describe the requisite finding, two uses of the term "corroborating" are necessary. The Chair concurred, noting that using the term twice may not be artful, but it is necessary to clarify that courts should look to the existence of corroborating evidence without disturbing the well-established term of art included in the original rule. Professor Richter closed the discussion by noting that the Committee should consider deleting the term "corroborating" from the second sentence of the Committee note on page 175 of the agenda and replacing it with the term "such" to make the note language more efficient. All agreed.

D. Rule 1006 Summaries

Professor Richter then briefed the Committee on the proposed amendment to Rule 1006 that would clarify the foundation necessary for admitting a summary as evidence of writings, recordings, or photographs too voluminous to be conveniently examined in court. She reminded the Committee that courts often conflate the principles applicable to summaries used only to illustrate testimony or other evidence and those applicable to Rule 1006 summaries that are admitted to prove the content of voluminous records.

Professor Richter explained that the Committee had received one public comment with respect to Rule 1006. Although the commenter expressed strong support for the proposed amendment, he suggested that the Committee add language to the text of the amended rule clarifying the longstanding part of the foundation for Rule 1006 summaries to be *admissible* even if they need not be *admitted*. Professor Richter explained that this admissibility requirement was not one that courts had misapplied and that it had not been included in the clarifying amendment proposal for that reason. Still, she noted that the issue seemed important to address and that the memo behind tab 7 had raised the same issue prior to receipt of the comment. She explained that the Committee could clarify the admissibility requirement in the Committee note to the amendment. But she opined that a modest modification to rule text would be superior to avoid any inference that the admissibility requirement of the foundation had been altered. She offered the Committee two options for modification of the amendment in a supplemental memo dated October 28, 2022. Option 1 would simply add the word "admissible"

before the word "voluminous" in the proposed amendment, to state clearly that the underlying materials must be admissible. Option 2 would provide that the "court may admit as evidence a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court but are otherwise admissible…." All Committee members agreed that the text of the amendment should be modified to include the admissibility requirement. In addition, all members of the Committee preferred Option 1 that would make the change with a single word.

The Committee also determined that it would reorder the words "voluminous, admissible" in the first sentence of the final paragraph of the Committee note on page 183 of the agenda materials so that it reads "admissible, voluminous" to track the order used in the language of the rule. Judge Bates opined that the first sentence of the final paragraph of the Committee note on page 183 of the agenda materials was grammatically incorrect. All agreed to modify the first sentence of the final paragraph of the Committee note so that it reads: "The amendment draws a distinction between summaries of admissible, voluminous information offered to prove a fact, and illustrations offered solely to assist the trier of fact in understanding the evidence."

E. Juror Questions to Witnesses

The Chair launched the discussion of juror questions by praising the high quality of the symposium hosted by the Committee on the morning of the meeting that explored issues of juror questions and illustrative aids. Professor Coquillette commented that it was one of the best symposia he had ever observed. The Chair noted that the Standing Committee had sent a proposed amendment providing procedural safeguards to be used when jurors are permitted to ask questions back to the Committee for further study. He queried whether the Committee wished to continue pursuing such a rule after listening to the panel presentation and, if so, whether the Committee wished to make any changes to the existing proposal.

One Committee member inquired whether there was data regarding the particular regions of the country allowing jurors to pose questions. The Reporter offered that the data was imperfect but that the practice appeared to be uncommon on the east coast, prevalent in the Seventh Circuit, common in California and "spotty" in the mid-west. Judge Bates noted that the practice is not followed on a court-by-court basis and that it is adopted by individual judges. He explained that not all California judges allow jurors to submit questions to witnesses.

Another Committee member stated that the chief objection to the proposed amendment is the fear that it would implicitly endorse the practice of allowing jurors to pose questions --- even though the provision disavows such an intent. He asked whether Committee members think that an amendment providing safeguards when juror questions are allowed would be perceived as an endorsement and whether it would have the effect of increasing the practice. The Reporter suggested that the proposed rule could not fairly be read as an endorsement because it specifically says that the safeguards apply only "*if*" the trial judge decides to allow the practice and states in the note that the amendment takes no position on whether juror questions should be allowed. He noted that the amendment likely would make trial judges more comfortable with the necessary safeguards should they decide to allow questions --- and it that way it might lead to

more use of the practice. The Committee member responded that he remained concerned about a perceived endorsement that could unintentionally increase the practice.

Another Committee member queried whether there are academics or judges who do not like the practice. He noted that the panel consisted of those who had used juror questions and who supported the practice. The Reporter noted that studies indicate that those who are opposed to the practice are generally those who have never tried it. Another Committee member offered that there was merit in trying to impose order on the practice where it exists, but opined that allowing jurors to pose questions fundamentally changes the nature of a trial. The Reporter noted that the problem the Committee was attempting to resolve concerned judges who already allow jurors to pose questions but have inadequate procedural regulation. Judge Bates inquired whether there are federal judges in Arizona who do not allow jurors to pose questions notwithstanding the prevalence of the practice in Arizona. The Reporter responded that he had not inquired of all Arizona federal judges but that Judge Campbell, for example, does permit juror questions, as does Judge Zipps, a member of the Standing Committee.

Another Committee member queried whether the procedural safeguards would fit better in Rule 614 governing questions by the judge. The Reporter noted that such a provision does appear in Indiana's counterpart to Rule 614, but opined that the provision was best included as a new subsection to Rule 611, because Rule 614 covers calling and questioning a witness, and jurors cannot call a witness --- so it is not a good fit. The Committee member asked whether the safeguards that are provided in Circuit caselaw are already sufficient to regulate jury questions and whether the Committee was simply transplanting those existing safeguards into a rule, making an amendment less necessary. The Reporter replied that the safeguards were not uniform in the Circuits and that the safeguards are characterized as "suggestions" rather than mandates in some cases. Another Committee member asked whether centralizing the procedural safeguards in an evidence rule would deprive the independent laboratories of the state and federal court systems of the opportunity to develop appropriate safeguards for this still emerging practice. The Reporter responded that an evidence rule would not stifle experiment and development if it sets minimum standards applicable to the practice, leaving room for additional safeguards above and beyond those specified in the rule.

Another Committee member queried whether such safeguards were best left in a best practices manual or jury instruction book. The Reporter noted that best practices manuals had not historically succeeded in improving practice. Judge Bates noted that the federal bench book had been very successful. He opined that safeguards would not fit in a jury instruction book because they are measures for the judge to take rather than instructions to the jury.

Judge Bates also cautioned the Committee to take a close look at the effect of juror questions in criminal trials. The Reporter explained that there are many trial judges already allowing juror questions in criminal cases and that the amendment would be designed to add safeguards when the court employs the practice. Judge Bates suggested that perhaps the safeguards should not be added to the evidence rules at all. They could go into the Federal Rules of Civil Procedure and regulate juror questioning, if any, in the civil context. Another Committee member voiced concerns about juror questions in the criminal context, explaining that a criminal trial is an adversarial proceeding in which the prosecution bears the burden of

proving its case beyond a reasonable doubt. He opined that he would be wary of allowing juror questions to alert the prosecution to defects in its case and explained that the result should simply be an acquittal if the government leaves unanswered questions. The Reporter noted that he had done substantial research on juror questioning and interviewed many judges and lawyers with experience with juror questioning in criminal cases --- and he had yet to find or hear of an example of a juror question that helped the prosecution prove its case by evidence it would not otherwise have presented.

The Reporter commented that the Committee needs to determine whether safeguards in the evidence rules would encourage juror questions and, if so, whether it is superior to leave safeguards to a hodgepodge of caselaw in the courts where juror questions are already being used. Judge Bates queried whether there are federal appellate cases finding error due to a lack of proper procedural safeguards when juror questions were allowed. The Reporter responded that there are plenty of cases finding errors, though they often find the errors to be harmless. Judge Bates then asked whether the appellate cases found that it was error to allow jury questions at all or whether they found error in the procedures used in permitting juror questions. The Reporter responded that the majority of cases involve errors in the methodology used for permitting juror questions. For example, a court erred in allowing juror questions without allowing the lawyers an opportunity to object to the questions. Another erred in browbeating jurors to ask more questions. And in another, the judge allowed the jurors to pipe up in the middle of lawyers' examinations to ask questions without allowing controls for vetting the questions.

Another Committee member asked whether the Committee could do a judicial survey to ascertain how many federal judges are currently allowing jury questions. He suggested that a rule providing procedural safeguards might well be needed if the number is significant. Professor Struve noted that a 2007 study found that juror questions were allowed in 11.4% of criminal cases and in 10.9% of civil cases. The Reporter suggested that the numbers have increased since 2007. Another Committee member noted that the NYU civil jury project found that 25% of judges in state and federal court permit juror questions. A Committee member commented that these numbers reflected not insignificant use of juror questions, necessitating safeguards. He queried whether the safeguards in the existing caselaw were adequate to deal with the existing use of juror questions. Allowing the safeguards to remain in caselaw would avoid enacting a rule that *could be perceived* as an endorsement of jury questions (even if the rule disavows such an endorsement). The Reporter noted that the safeguards in the existing caselaw may not be adequate to provide the requisite protection because some of them are characterized as "suggestions" rather than as mandates.

A Committee member noted that the discretionary practice of allowing juror questions came to California as part of a larger project to improve the role of the jury in the trial process. The practice was not designed primarily to allow jurors to obtain the information sought by their questions, but rather to improve their engagement and understanding and to ensure that jurors felt they had the tools to get to the right answer. Thus, juror questions were part of a broader project to develop best practices for jury cases. Other related advances were pre *voir dire* mini-opening statements to orient prospective jurors, instructions that preceded the introduction of evidence, plain language instructions, juror binders, juror notetaking – all designed to provide jurors better tools to decide cases. Another Committee member noted that Indiana had engaged

in the same process in the 1990's and that Indiana Rule 614 gives trial judges the discretion to allow juror questions in both civil and criminal cases. Another Committee member noted that the Seventh Circuit participated in a pilot project allowing juror questions and then instituted the practice after a favorable response.

A Committee member commented that judges and lawyers should constantly strive to improve the trial process, but that not all improvements belong in an evidence rule. The Reporter explained that the judges who do allow juror questions do so under the umbrella of Rule 611(a) and that the idea for an evidence rule offering safeguards for juror questions was part of a project designed to take some of the practices judges engage in under the vague auspices of Rule 611(a) and to make them more defined in rule text. He noted that the proposal to add a subsection to Rule 611 governing the proper use of illustrative aids was born out of this same initiative.

A Committee member pointed out that all judges allow jurors to pose questions after deliberations begin. He suggested that he leans toward proposing a rule to add procedural safeguards given that the practice is already permitted in a not insignificant number of courts. He argued that the issue is one of evidence because juror questions that are allowed will produce evidence in a case. Finally, he noted that there is no time in the heat of a trial to look through caselaw to locate appropriate safeguards and that judges need such things in one readily accessible location. The Reporter commented that the Advisory Committee note to the existing proposal points out that the rule is not an endorsement of the practice, but suggested that the note could make that point even more forcefully to avoid any inference of an endorsement. A Committee member also noted that the current text of the proposal imposes safeguards "if" the trial judge permits questions. He suggested that the rule text could further negate any inference of endorsement by adding another "if" to the heading for subsection (e)(2) of the proposed provision so that it reads: "Procedure If Court Allows Juror Questions." The Reporter summarized the plan to make the rule text even more provisional (or iffy) and to further negate any endorsement of the practice in the Committee note. He cautioned that the Committee would not want to say anything negative about the practice in the note, however, because that would put a thumb on the scale in the other direction.

The Chair asked the Reporter to return to the Committee with an alternate draft of the proposal to add procedural safeguards to be used when juror questions are allowed. The new version will aim to further ameliorate any concern about endorsing or encouraging the practice of allowing juror questions. He noted that it would be helpful to review findings made by the Ninth Circuit that led it to reject juror questions in criminal cases that were referenced during the morning symposium. One Committee member suggested that the alternative draft add a provision requiring that all jury questions be made part of the record – whether they are ultimately asked or not. Another Committee member suggested deleting subsection (e)(1)(F) of the proposed provision. All Committee members agreed that subsection (F) (requiring an instruction that jurors are not to act like advocates) added little and should be removed. The Reporter promised to redraft the provision with all comments in mind. Another Committee member asked whether it is inconsistent to tell jurors not to discuss a case until deliberations begin but then to allow them to ask questions that may reveal their thinking to other jurors. The Reporter replied that the panelists at the morning symposium who regularly allow juror questions

reported that most are clarifying only. For example, a juror might ask what an acronym thrown around at trial stands for. He also suggested that requiring anonymity of jurors asking questions as a safeguard may be unworkable in light of courtroom realities and promised to cut anonymity from the proposed rule.

F. Illustrative Aids

The Chair opened the discussion of proposed Rule 611(d), that would regulate the use of illustrative aids at trial. The proposal is currently out for public comment. He explained that he emerged from the morning symposium thinking that it would be very helpful to have a rule that provides a framework for judges and lawyers working with illustrative aids, despite the fact that several panelists expressed concerns about the issue of notice. He opined that it would still be very helpful to tell litigants that illustrative aids do not go to the jury room in the typical case and that it would still be very helpful to provide that all illustrative aids should be preserved for the record. He observed that the issue of notice of illustrative aids was the only portion of the proposal causing concern for panelists and that a notice requirement could be removed from the proposed amendment. He explained that an accompanying Committee note could explain that the issue of notice was to be resolved according to the trial judge's discretion on a case-by-case basis.

Judge Bates remarked that many panelists expressed concerns about including illustrative aids used during openings and closings in an amendment. The Chair replied that the concerns about openings and closings related exclusively to the notice issue and that those concerns would be eliminated if the notice requirement were eliminated from the rule. Another committee member asked whether something used by a lawyer during closing arguments even qualifies as an illustrative aid. He suggested that openings and closings should be excluded from the coverage of the rule. The Reporter reiterated that concerns about openings and closings are eliminated if there is no advanced notice required by the amendment. The Committee member responded that including openings and closings in the rule would create a potential objection available when a lawyer does something such as creating a timeline during a closing, and could cause mischief. Another Committee member asked whether the amendment could be written to cover illustrative aids summarizing only "evidence" as opposed to "argument." The Chair stated that it would not be advisable to exempt openings and closings from coverage as that could be seen as eliminating regulation of materials used during arguments. He noted that parties could object to an aid used during argument, such as a timeline, as misleading under current law. Thus, an amendment would not be creating the possibility of an objection where there is none currently. Another Committee member noted that the current proposal treats only aids that help the fact finder understand "admitted evidence" and explained that the Committee should add the word "argument" to rule text if it is intended to cover openings and closings.

The Chair asked whether the balancing test included in subsection (d)(1) could create any potential concerns. The Reporter argued that it would not because it reflects the balancing test courts currently apply in deciding whether to allow an illustrative aid. The Chair remarked that the balancing test would give judges and lawyers some common vocabulary to utilize in discussing the use of illustrative aids.

Judge Bates inquired whether subsection (d)(1)(B) of the current draft rule containing the notice provision should be eliminated altogether or whether it should retain the requirement that parties be afforded a "reasonable opportunity to object" to an illustrative aid. The Chair commented that Professor Richter had suggested eliminating the notice requirement from that subsection while retaining the requirement that lawyers receive a reasonable opportunity to object, leaving it to individual judges to determine what opportunity is reasonable for a given illustrative aid. The Chair thought that eliminating subsection (d)(1)(B) altogether made more sense because the subsection would achieve little once stripped of the notice requirement. There will always be an opportunity to object, whether or not there is language in the rule; again, the problem is notice. Another Committee member asked whether the rule would be eliminating any obligation to provide notice of an illustrative aid before revealing it to the jury if it removes the notice provision. The Chair responded that trial judges clearly possess the authority to order notice as appropriate, even without a provision in the rule, and that the Committee note could so state. Judge Bates cautioned the Committee against placing a substantive rule in the Committee note. The Chair suggested that the note could explain that there are an infinite variety of illustrative aids and that notice may vary markedly depending on the circumstance. He suggested that the note might provide examples of illustrative aids on different ends of the spectrum and suggest the type of notice that could be appropriate for each. The Reporter explained that the note should not include examples of notice if the rule contains no notice requirement.

Judge Bates also inquired whether the Advisory Committee note would explain when a power point is or is not an illustrative aid. The Chair said it would not and that it would be better to leave broad language that allows a trial judge to determine what qualifies in any given case.

A Committee member offered her thoughts that the proposed rule is a good one that would help distinguish between demonstrative evidence and illustrative aids and that would provide some common vocabulary around an issue that confuses judges and lawyers. She suggested that the proposed rule ought to preserve a judge's discretion to send an illustrative aid to the jury room in appropriate circumstances. Judge Bates suggested that the rule provide that "illustrative aids are not evidence and are not to go to the jury room absent consent" unless the judge for good cause orders otherwise.

The Reporter noted that the Committee had not discussed whether to leave the term "substantially" in the balancing test currently in Rule 611(d)(1)(A). He commented that the proposed rule had been published with the term "substantially" in brackets to invite public comment on that point and that the Committee would get feedback on the issue for the Spring meeting. The Chair explained that the Reporter would return to the Committee in the Spring with a new draft of proposed Rule 611(d) that reflected the Committee's discussion. He remarked that the symposium had worked beautifully because it had provided the Committee with helpful feedback that improved the proposal.

III. Closing Matters

The Chair thanked the Committee and all participants for their contributions. He announced that the spring meeting would take place on April 28, 2023 in Washington D.C. He explained that public hearings on the published amendments had been set for January 20 and 27 of 2023, but that no requests to present had yet been received.

Respectfully Submitted,

Liesa L. Richter

TAB 1B

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
January 4, 2023

The Judicial Conference Committee on Rules of Practice and Procedure (the "Standing Committee") met in a hybrid in-person and virtual session in Fort Lauderdale, Florida, on January 4, 2023. The following members attended:

Judge John D. Bates, Chair
Elizabeth J. Cabraser, Esq.
Robert J. Giuffra, Jr., Esq.
Judge William J. Kayatta, Jr.
Judge Carolyn B. Kuhl
Dean Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.[*]
Andrew J. Pincus, Esq.
Judge Gene E.K. Pratter
Kosta Stojilkovic, Esq.
Judge D. Brooks Smith
Judge Jennifer G. Zipps

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Rebecca Buehler Connelly, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter

Advisory Committee on Civil Rules –
Judge Robin L. Rosenberg, Chair
Professor Richard L. Marcus, Reporter
Professor Andrew Bradt, Associate Reporter
Professor Edward H. Cooper, Consultant

Advisory Committee on Criminal Rules –
Judge James C. Dever III, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules –
Judge Patrick J. Schiltz, Chair
Professor Daniel J. Capra, Reporter

Others who provided support to the Standing Committee, in person or remotely, included Professor Catherine T. Struve, the Standing Committee's Reporter; Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, Secretary to the Standing Committee; Allison A. Bruff, Esq., Bridget M. Healy, Esq., and S. Scott Myers, Esq., Rules Committee Staff Counsel; Brittany Bunting–Eminoglu and Shelly Cox, Rules Committee Staff; Christopher I. Pryby, Law Clerk to the Standing Committee; Hon. John S. Cooke, Director of the Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate, FJC.

[*] Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco.

OPENING BUSINESS

Judge Bates called the meeting to order. He welcomed new Standing Committee members Judge D. Brooks Smith and Andrew Pincus; the new chairs of the Advisory Committees on Bankruptcy and Civil Rules, Judge Rebecca Connelly and Judge Robin Rosenberg; and the new Associate Reporter for the Civil Rules Committee, Professor Andrew Bradt. Judge Bates noted the departures of Judge Gary Feinerman from the Standing Committee and former Civil Rules Committee Chair Judge Robert Dow. He stated that he would work to find new members to fill the vacancies on the Standing and Civil Rules Committees. In addition, Judge Bates welcomed the members of the public who were attending remotely or in person.

Upon motion by a member, seconded by another, and without dissent: **The Standing Committee unanimously approved the minutes of the June 7, 2022, meeting.**

Judge Bates highlighted pending rules amendments, including new emergency rules arising out of the CARES Act and amendments to Evidence Rules 106, 615, and 702. These amendments will take effect on December 1, 2023, assuming that the Supreme Court approves them and absent any contrary action by Congress.

For the legislative update, Judge Bates observed that with the end of the 117th Congress, all pending legislation had expired. Law clerk Christopher Pryby noted that, of the Fiscal Year 2023 National Defense Authorization Act provisions that he had highlighted at earlier Advisory Committee meetings, none remained in the enacted version of the bill.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Judge Bates introduced this agenda item, which is under consideration by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees. He thanked Professor Struve for her leadership on this project and her coordination among the Advisory Committees, and he invited her to provide an update on those discussions.

Professor Struve began by acknowledging the group effort that had gone into the project so far, especially from the FJC team, including Tim Reagan, Carly Giffin, and Roy Germano, who had done phenomenal work that culminated in a study released in 2022.

This project originated from several proposals about electronic filing for self-represented litigants. The current rules provide for electronic filing as a matter of course by those who are represented by lawyers, but self-represented litigants must file nonelectronically unless allowed to file electronically by court order or local rule. The proposals take two main forms: one advocates a national rule presumptively allowing self-represented litigants to file electronically, while the other advocates disallowing categorical bans on, and setting a standard for granting permission for, electronic filing by self-represented litigants.

Recounting the FJC's findings, Professor Struve noted that, in the courts of appeals, there is a close split between the circuits that presumptively give self-represented litigants access to the Case Management/Electronic Case Filing system ("CM/ECF") and those that allow that access

with permission; one outlier circuit currently has a local provision prohibiting self-represented litigants from filing electronically. In the district courts, the picture is more mixed—the bulk of districts allow self-represented litigants to file electronically with permission, a bit less than 10% presumptively permit self-represented litigants to file electronically, and about 15% do not allow it at all. And in the bankruptcy courts, it is rare for self-represented litigants to have access to CM/ECF.

The fall Advisory Committee meetings provided an opportunity to get members' senses about the current situation and their reactions to the possibility of adopting a default rule of presumptive access to CM/ECF for self-represented litigants. Those discussions also considered potential alternate means of electronic access for self-represented litigants, like those that courts experimented with during the COVID-19 pandemic. The discussions also included the possibility of policy changes not based on rules amendments as well as the need for coordination with other committees of the Judicial Conference.

A second question concerns the rules governing service of papers during a lawsuit. As between any pair of litigants who are both users of CM/ECF, service is simple, because the notice of electronic filing produced when the paper is filed in CM/ECF constitutes service. By contrast, a form of service other than the notice of electronic filing is necessary when the party to be served is not a CM/ECF user. But when a party that is not a CM/ECF user files a paper by some other means, must that party separately serve the parties who *are* users of CM/ECF? Those parties will receive the notice of electronic filing after the court clerk scans and uploads the nonelectronic filing to CM/ECF. The rules nevertheless appear to require the non-CM/ECF user to serve these parties. The questions before the committees were: Why? Is this burden on self-represented litigants necessary? Should the rules be amended to eliminate this requirement? Some districts have eliminated the requirement for service on parties who are CM/ECF users, and those districts have generally reported positive experiences with that change.

Professor Struve reported a fair amount of interest in investigating the possibility of eliminating that requirement. But there are still some details to be worked out: (1) How does the court make clear to a nonelectronic filer which parties are, and which are not, on CM/ECF—and, thus, who does and does not need separate service? (2) Would the three-day rule work seamlessly with this change, or would it need some wording adjustments? For example, the time calculation might need to be clarified or adjusted to ensure no unfairness to a party if there is some delay between when the clerk receives a filing and when the clerk dockets it in CM/ECF. Professor Struve believes this proposal contains the germ of an idea that may be appropriate for a possible rule amendment, and she expressed her hope that the Advisory Committees would continue working on the project in the spring.

Returning to whether there should be a change in the default rule governing self-represented litigants' access to CM/ECF, Professor Struve surveyed the reactions of the Advisory Committees on that proposal. The Bankruptcy Rules Committee took a positive view of the overall idea, viewing it as a matter of access to the courts. Notably, the court-clerk representative on that committee supported the proposal, saying that it is helpful for filings to be electronic whenever possible. But there was some division of views on the committee, with a couple of members expressing the need for caution and raising important questions that are detailed in the committee's minutes and reports.

The Appellate Rules Committee took a somewhat positive view of the overall concept of access to CM/ECF for self-represented litigants, in line with the current policies of the courts of appeals. Professor Struve thought that the interesting question for this committee was whether the Appellate Rules should be amended to reflect or encourage that outcome, given that the courts of appeals are already increasing CM/ECF access for self-represented litigants (with greater celerity than the lower courts). A default rule of access to CM/ECF for self-represented litigants might be easiest to adopt in the Appellate Rules, given the movement in that direction in the courts of appeals. A question for the Appellate Rules Committee may be how to balance that consideration against the value of uniformity across the national sets of rules.

Professor Struve reported that there were more skeptical voices in the Civil Rules Committee on the proposal relating to CM/ECF access. Some members wondered whether the matter might be more appropriately treated by another Judicial Conference actor such as the Committee on Court Administration and Case Management ("CACM"). Overall, there was much less momentum on the Civil Rules Committee for a rule change.

Turning to the Criminal Rules Committee, Professor Struve first noted that this committee's interest was different from that of the other Advisory Committees. There are very few nonincarcerated, self-represented litigants appearing in situations covered by the Criminal Rules. (Professor Struve noted that, even in the districts that presumptively allow self-represented litigants CM/ECF access, that presumption of access typically excludes incarcerated litigants because of the logistical particulars of carceral settings. So, at least in the near future, even the most expansive grant of electronic-filing permission to self-represented litigants would likely not encompass incarcerated self-represented litigants.) But the committee had an excellent discussion of the service issue, and the committee would be open to exploring that question further.

Professor Struve concluded by welcoming the input of the Standing Committee members on any of these topics. She noted that the project continues to operate in an information-gathering mode, especially on the service issue and the various ways by which electronic-filing access could be expanded for self-represented litigants, including by working in tandem with other Judicial Conference actors.

Judge Bates thanked Professor Struve and opened the floor to comments and questions.

A practitioner member suggested that greater access for self-represented litigants is a good thing, but also that some fraction of self-represented litigants would abuse electronic-filing access. This member asked which would be easier for courts to administer: a rule requiring courts to deal with requests for permission, or a rule granting access by default and leaving the courts to deal with the task of revoking that access in particular cases? Professor Struve noted that Dr. Reagan and his colleagues at the FJC had talked with clerk's offices around the country and would be in a good position to answer that question. Dr. Reagan reported that, in speaking with personnel in several districts that had recently expanded self-represented litigants' access to CM/ECF, he and his colleagues heard that court personnel's fears were not particularly realized. He also observed that self-represented litigants can disrupt the work of the court regardless of their filing method. In fact, some courts appreciated receiving documents electronically because they did not have to receive things in physical form that would be unpleasant to handle. And every court is quite capable of limiting improper litigant behavior.

A judge member appreciated the thoroughness of the FJC report in obtaining input from clerk's offices and considering the pros and cons of a change in the rules and other issues that would arise. The member thought that the primary focus of this project ought to be learning about the experiences of clerk's offices. The clerk's office of the member's court had strong views on this matter, especially on who should bear the burden of the work generated by noncompliant self-represented litigants.

Ms. Shapiro asked whether the FJC report looked at whether self-represented litigants complied with redaction and privacy-protection rules. Dr. Reagan responded that the report did not get into the weeds with this question, but he did note that this same problem occurs with represented litigants as well. One appellate clerk had mentioned locking a document and later posting a corrected version; he was not sure whether that had to do with redaction problems. He stated that there is a way to configure CM/ECF so that the court must "turn the switch" before a submitted filing is made available in the record.

Judge Rosenberg reiterated her comments from the October Civil Rules Committee meeting, which reflected feedback from her court's clerk: Most courts are not equipped to accept self-represented litigants' filings through CM/ECF. So, while it is a good idea to expand electronic filing to all litigants, until all courts can comply, it is not advisable to amend the federal rules to establish a presumption in favor of allowing electronic filing. Additionally, different courts use different versions of CM/ECF, and the version used affects both the court and the filer. Further, there is not a unique identifier for many self-represented litigants. By contrast, attorneys have unique bar numbers.

Professor Struve responded that, if a court would not be able to function with a presumption in favor of electronic access for self-represented litigants, then that court could adopt a local rule to opt out of the presumption. It is true that, if the bulk of districts opted out, that might lead one to question the wisdom of the rule. As to the point about identifiers, Professor Struve suggested that the districts currently allowing presumptive or permissive electronic access by self-represented litigants would have had to solve that problem, so it would be helpful to ask those districts for their experiences with that issue.

Judge Bates concluded by recognizing that cases involving self-represented litigants make up a large part of the civil and bankruptcy dockets in federal court, and this is a project that the committees will continue to work on. He hoped that the committees and reporters would continue to provide a high level of participation, and he thanked Professor Struve and everyone else who had worked on the project with her so far.

Presumptive Deadline for Electronic Filing

Judge Bates reported on a joint committee project that arose from a suggestion by Chief Judge Chagares of the Third Circuit, the former chair of the Appellate Rules Committee, that the committees consider changing the presumptive deadline for electronic filing from midnight to an earlier time. Judge Bates observed that the FJC had done excellent research for this project, and that one of the relevant FJC reports was included in the agenda book. The status of the project is uncertain. The Civil Rules Committee has recommended that the project be dropped. But the Appellate Rules Committee recommended that the question of how to proceed be posed, in the

first instance, to the Joint Subcommittee on E-filing Deadlines, because that Subcommittee has not convened recently. Judge Bates agreed that the Joint Subcommittee should be asked to undertake a careful review of the project, and he noted that he would also continue to seek Chief Judge Chagares's input.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met in Washington, D.C., on October 13, 2022. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 134.

Information Items

Amicus Disclosures. Judge Bybee reported on this item. He described it as perhaps the highest-profile matter before the Advisory Committee. There has been a long exchange of correspondence between the Clerk of the Supreme Court and the chairs of the Senate and House Judiciary Committees over amicus practice, and, during the previous Congress, legislation was introduced in each house that would regulate amicus practice. The Supreme Court and its Clerk referred the matter to the Advisory Committee. The Advisory Committee has made some progress, but it seeks input from the Standing Committee on some important policy questions.

Judge Bybee directed the Standing Committee's attention to draft Rules 29(c)(3) and (c)(4) as set out in the agenda book; he noted that this was a working draft, not yet a proposal. Draft Rule 29(c)(3) would require an amicus to disclose any party that has a majority interest in or control of the amicus. Draft Rule 29(c)(4) would require the amicus to disclose any party that has contributed 25% or more of the amicus's gross annual revenue over the last 12 months. The Advisory Committee sought input on two questions: (1) Is 25% the right number? (2) Is the last 12 months the right lookback period, or should it be the previous calendar year? As to question (1), at the October 2022 Advisory Committee meeting, some members had expressed concern that, if the rule set one particular percentage—such as 25%—as the trigger for disclosure, then where a party's contributions were anywhere above that single threshold the amicus might not file a brief out of concern that the court would assign the brief little weight. An alternative suggestion was to require an amicus to disclose that the contribution percentage lay within some "band" of amounts—such as from 20% to 30%, 30% to 40%, and so on.

A practitioner member wondered whether there was a need to regulate this area. However, given that Congress has expressed an interest in the topic, the member suggested that perhaps it did make sense for the committees to consider possible rule amendments. The member thought 25% was a reasonable number because, in the member's experience, that contribution level would be highly unusual and could indicate that the amicus is acting as a front for a party. The member also thought it more administratively feasible to use the last calendar year than the last 12 months.

Judge Bates asked whether the current draft Rule 29(c)(3) would capture a situation in which a party and the party's counsel each had a one-third interest in the amicus. Should the rule capture that situation? The draft wording—"whether a party or its counsel has (or two or more

parties or their counsel collectively have) a majority ownership interest"—addresses a situation in which "two or more parties or their counsel" have a collective interest, but it is not clear if it captures situations in which a single party and its counsel have a collective interest. Should "a party or its counsel has" be "a party and/or its counsel have"?

Professor Garner opined that a hard contribution threshold might encourage parties to structure their contributions in such a way as to avoid meeting the threshold. He suggested that the Advisory Committee instead consider a rule requiring disclosure of "the extent to which" a party has contributed to the amicus. The court could decide for itself what contribution amount was de minimis. And an organization that goes to the trouble of preparing an amicus brief would be able to answer the contribution question with a fair degree of certainty.

Professor Hartnett responded that the Advisory Committee had some concern about requiring that amount of precision. Instead, requiring disclosure within a band of contribution percentages tried to address the structuring issue. The Advisory Committee also wanted to build into the rule a floor beneath which amici need not worry about having to make a disclosure.

Judge Bates noted that the rule could also be tweaked to require disclosure of a precise percentage above a floor. Those below that floor would not have to make a disclosure.

A practitioner member commented on the general view of practitioners in this area: If an amicus must make a disclosure, then its brief will probably not get much attention. A rule that requires a disclosure suggests that a brief containing that disclosure is tainted in some way. In many of these situations, an amicus would likely choose not to file a brief rather than to make a disclosure. So there should almost certainly be a floor before disclosures are required. There is also a First Amendment interest in this area (the member noted the decision in *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021))—and whatever rule is adopted must be examined through that lens. That interest further weighs in favor of a floor below which no disclosure is required. Because the disclosure requirement will change the dynamics of amicus filings, the calculus on whether and how to amend the rule should consider whether the benefits of disclosure outweigh the harm of deterring amicus filings.

Judge Bates agreed that the goal is not to dissuade the filing of amicus briefs but rather to provide information to the courts and public with respect to those who file these briefs.

A judge member had difficulty recalling any amicus briefs as to which it was not obvious who was filing the brief and as to which more information about the amicus would have made a difference. It is the brief's contents that matter, not its author. If other appellate judges feel similarly, then the member would not worry about trying to craft a rule that would require complete disclosure of all details about the amicus.

Judge Bybee noted that one concern is that parties are evading their own page limits by inserting their arguments into amicus filings. The judge member suggested skepticism about the gravity of that particular concern. He conceded that Congress's interest in the amicus-disclosure issue weighs in favor of careful consideration of a possible rule amendment. But, he suggested, if the courts of appeals generally feel that they are not being hoodwinked by amici or deluded into believing something about which they otherwise would have been more suspicious had amici's

relationships with the parties been apparent, that should temper the rulemakers' zeal for pursuing an all-encompassing, exhaustive disclosure requirement.

Another judge member disclaimed knowledge as to whether the 25% figure was "right," but stated that this figure was "not wrong." The member suggested that searching for the precisely "right" number was not worthwhile. Responding to Professor Garner's prior suggestion, this member warned against building into the rule any subjectivity that would allow a court to decide whether to require disclosure based on who the participants are. If a proposal is adopted, it should use an objective number rather than a moving target. As to the lookback period, the member suggested that the prior fiscal or calendar year would be more administrable than a moving 12-month period; the latter would require a lot of research and calculation.

A practitioner member acknowledged the focus on drawing a line between helpful disclosure requirements and unhelpful, unwarranted disclosure requirements. But the member also wondered whether a lower threshold might normalize disclosure, making it not such a negative thing. A lower threshold like 5% or 10% would generate a lot more disclosures, but such a disclosure would not necessarily discredit a brief as much as a disclosure in response to a higher threshold that is only infrequently met.

A judge member thought that a threshold above 25% would be too high. And if the threshold were set higher than 25%, a disclosure would really mark the amicus brief because it would be extremely unusual. The member also suggested that judges' views on the optimal level of disclosure are not the only consideration. Members of the public may not have the same information or reactions that judges do. Part of the value of the disclosures was to let the public know who is responsible for filing amicus briefs. This transparency concern is particularly strong when amicus filings are cited by judges as persuasive in their decisionmaking.

A practitioner member expressed doubt about the idea of normalizing disclosures. The purpose of a disclosure is to flag something relevant about a brief. The member questioned whether lowering the threshold would serve that purpose. Instead, the goal should be to identify a category of briefs to treat with caution.

Another practitioner member thought that more regulation of amicus briefs was not a good idea. If a relevant industry group files an amicus brief in a case on appeal, that tells the court that the industry is concerned about some issue—it does not matter only to the parties. The rule should encourage filing amicus briefs. Judges can pay attention to what they want to in those briefs. The member thought that 25% was the right threshold because it is objective and because, if a party is paying for 25% or more of the amicus organization's cost, it is largely a party-controlled organization. As to most big organizations that routinely file amicus briefs, the number would probably be 5% or less. The member also agreed that required disclosures may chill the filing of amicus briefs.

Professor Garner suggested that a rule requiring disclosure of "the extent to which" a party has contributed to the amicus could be combined with a provision stating a presumption that any contribution over 25% would be excessive. Judge Bates noted that this presumption would change the thrust of the rule by expressly stating how the court would view the brief. Judge Bybee did not think the Advisory Committee had been going in that direction; he could not remember a judge

having said anything like, "if the party contributes over 50%, I won't consider the brief." Instead, some judges have suggested that it is important to have more information, not less. Professor Hartnett agreed that the rule has governed only when disclosure is required; discounting a brief's weight has not been addressed in the rule's text. This kind of modification would significantly change how the rule operates.

Professor Hartnett sought more comment on the banding idea. He thought it might mitigate the risk of using a single number—if that number is too high, it works like an on–off switch; if too low, it does not give enough information because a court cannot tell how far the contribution amount is above the threshold. Banding would provide more information than a single threshold, while not requiring the same degree of precise calculation as the "extent to which" option. Would this idea work as a compromise?

Judge Bates agreed that using banding would require more information from an amicus than would a single percent threshold above which disclosure is required.

A practitioner member stressed that the disclosure requirement would need to include a floor beneath which disclosure is not required. This member suggested that, once there is a floor, having banding in addition would not do much work, especially if the floor is as high as 25%.

Another practitioner member liked the banding approach because it would provide more information to the courts and public. The question would then be where to start and end each band. More disclosure is better, and so long as it remains up to the judges to decide at what level a disclosure matters, then the rule introduces no presumption of taint.

A third practitioner member remarked that a member of a big amicus organization generally must undergo a rigorous application process before the organization will sign onto an amicus brief for that member. That process is useful because courts can then take that organization's reputation as a signal—if it signs a brief, then the issue is one that matters to more than just the litigants. The member liked the 25% threshold because it indicates that the amicus is not really a broad-based group that represents the industry. Lowering the threshold defeats the purpose of having amicus briefs and introduces a false perception of taint if there is a disclosure of a low percentage. The lower threshold would lead to too much micromanaging of amici. The member also expressed concern that a lower threshold could disadvantage plaintiff-side amici because bigger organizations tend to be on the defense side. And one can look at the website of a large organization to see if a party is a member.

An academic member expressed a preference for keeping the rule as simple as possible. That militates in favor of a single number. The member liked 25%—it is high enough that if an amicus is above that threshold, it will raise eyebrows. The difficulty with banding is that compliance could be complicated, particularly if there is no lower bound. Without a lower bound, if a party had bought a single table at a fundraiser for the amicus, the amicus would then have to divide the value of the contribution associated with buying that table by the amicus's overall revenue in order to determine the percentage value of its contribution. A disclosure requirement without a lower bound would discourage potential amici from filing. It would signal that courts do not want to hear their voices.

The conversation then turned to draft Rule 29(e). Judge Bybee introduced this draft rule, which appeared on page 137 of the agenda book. The draft rule would require an amicus to disclose any nonparty that contributed over $1,000 to the amicus with the intent to fund the amicus brief. Judge Bybee asked two questions: (1) Is the $1,000 figure the right threshold? This figure was meant to exclude disclosures for crowdfunded briefs. (2) Should the draft rule contain provisions like those in draft Rules 29(c)(3) and (c)(4), requiring disclosures of contributions even if they are not earmarked for funding an amicus brief?

Judge Bates remarked that a $1,000 cutoff, although high enough to address the crowdfunding issue, seems very low.

A judge member thought that this draft rule would require amici to make greater disclosures than parties themselves must. Parties may obtain funding from undisclosed sources, raising issues about third-party litigation funding. The draft rule overemphasizes the importance of amicus briefs and mistakenly suggests that courts are more concerned with who is speaking than with the merits of the argument. The member also thought that this is a policy question that should be deferred until the discussion of third-party litigation funding of parties; in the meantime, this member suggested, subpart (e) should be deleted from the draft. Professor Hartnett observed that the current rule requires disclosure if someone other than the amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. The member acknowledged that fact, but argued that proposed subdivision (e) would heighten the issue.

Judge Bates remarked that there may be greater First Amendment issues in requiring disclosure of nonparty contributions than in requiring disclosure of party contributions.

A practitioner member stated that adopting draft Rule 29(e) would be a mistake. It would open up a hornet's nest concerning intentionality. How can you determine whether someone intended to fund a brief? Suppose an organization told potential donors the topics of ten amicus briefs it intended to file over the coming year. Or suppose that a donor bought a ticket to a dinner at which a representative of the organization discussed some of its amicus filings. The member also thought that $1,000 was a low threshold.

Another practitioner member commented that the innovation in draft Rule 29(e) is really about contributions by members of amicus organizations—there is already a disclosure requirement as to contributions by nonmembers. The member differentiated two types of amicus organizations: larger organizations with annual budgets that include a chunk of money for amicus briefs, and organizations (typically smaller) that "pass the hat" to fund a particular amicus brief. Draft Rule 29(e), this member suggested, would unfairly burden such smaller organizations by requiring them to make disclosures, whereas dues payments probably would not have to be disclosed. Draft Rule 29(e) would make it harder for those smaller amici to file briefs.

A judge member thought that the draft rule could lead to an escalation of corporate screens and shielding to evade required disclosures. A would-be funder might set up an LLC to make the donation; would the rule also have to require disclosure of the LLC's funding? This judge sees briefs from a number of amici for which the funding is unknown. The draft rule aims for more disclosure than is currently required for dark-money contributions to political campaigns. There is a public interest in disclosure, but there are practical limitations on what the committees can do.

The member cautioned against increasing the complexity of the disclosure scheme (for example, with banding)—such new hurdles could be leapt over as easily as the current ones.

A practitioner member supported omitting draft Rule 29(e). Congress, this member suggested, is concerned about parties, not nonparties. Nonparties do not implicate the same concerns. The member also noted that, under the current Rule (as well as under draft Rule 29(c)(2)), if a party contributes any money intended to fund an amicus brief, the fact of the contribution must be disclosed.

Judge Bates asked why, in draft Rule 29(d), the language is limited to only a *party*'s awareness. Draft Rule 29(c) is worded in terms of *party or counsel*; why should 29(d) be different? Judge Bybee agreed with that wording change and, more generally, thanked the Standing Committee for its input.

Rule 39 (Costs). Judge Bybee briefly covered this and the remaining items. The Supreme Court suggested in *City of San Antonio v. Hotels.com, L.P.*, 141 S. Ct. 1628, 1638 (2021), that "the current Rules . . . could specify more clearly the procedure that . . . a party should follow" to bring its arguments about costs to the court of appeals. The real problem in this situation is a narrow one that is nevertheless important in some big cases. It involves the disclosure to parties of the consequences for costs on appeal if a supersedeas bond is filed or another means of preserving rights pending appeal is used. A subcommittee is currently working on this issue. It may be useful for the Appellate Rules Committee to coordinate with the Civil Rules Committee to see whether the Civil Rules might also require changes.

Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis ("IFP")). Form 4 concerns the disclosures required of a party seeking IFP status on appeal. The Advisory Committee has tried to simplify the form. Many of the circuits have ignored the form for years and have their own forms. The Advisory Committee is not purporting to change that fact, only to simplify the current national form. Also, the Supreme Court has incorporated the form by reference in Supreme Court Rule 39.1, so it would be advisable to ask if the Court has any input on changing the form.

Appellate Rule 6 (Appeal in a Bankruptcy Case) and Direct Appeals in Bankruptcy. Judge Bybee adverted briefly to this project, which dovetails with the Bankruptcy Rules Committee's project (discussed later in the meeting) to amend Bankruptcy Rule 8006(g) to clarify that any party may request permission to appeal directly from the bankruptcy court to the court of appeals. He noted that the Appellate and Bankruptcy Rules Committees are coordinating their work on Bankruptcy Rule 8006(g) and Appellate Rule 6.

Striking Amicus Briefs; Identifying Triggering Person. Rule 29(a)(2) allows a court to refuse to file or to strike an amicus brief that would lead to a judge's disqualification. A suggestion was made to modify this rule to require the court to identify the amicus or counsel who would have triggered a disqualification. After extensive discussion, the Advisory Committee removed this item from its agenda.

Appeals in Consolidated Cases. A suggestion to amend Rule 42 arose following *Hall v. Hall*, 138 S. Ct. 1118 (2018). After thorough discussion, the Advisory Committee removed this item from its agenda.

Judge Bates asked for comments on the other information items outlined in the Advisory Committee's report. Hearing none, he invited the Bankruptcy Rules Committee to give its report.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Connelly and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met in Washington, D.C., on September 15, 2022. The Advisory Committee presented one action item and three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 175.

After Judge Connelly recognized the work of Judge Dennis Dow, the Advisory Committee's previous chair, the committee began its report.

Action Item

Publication of Proposed Amendment to Official Form 410 (Proof of Claim). Judge Connelly reported on this item. The Advisory Committee sought the Standing Committee's approval to publish for public comment an amendment to Official Form 410. A creditor must file this form for the creditor's claim to be recognized in a bankruptcy case. Official Form 410 contains a field for a uniform claim identifier ("UCI"), which a creditor may fill in for electronic payments in Chapter 13 cases. The Advisory Committee has proposed a revision to remove both the specification of electronic payments and the reference to Chapter 13 cases, allowing a creditor to list a UCI for paper checks or electronic payments in any bankruptcy case.

Upon motion by a member, seconded by another, and without dissent: **The Standing Committee unanimously approved the publication for public comment of the proposed amendment to Official Form 410.**

Information Items

Rule 8006(g) (Certifying a Direct Appeal to a Court of Appeals). Professor Bartell reported on this item. As amended in 2005, 28 U.S.C. § 158 provides for direct appeals of final judgments, orders, or decrees from the bankruptcy court directly to the court of appeals upon appropriate certification and subject to the court of appeals' discretion to hear the appeal. Bankruptcy Rule 8006(g) requires that, within 30 days after certification, "a request for permission to take a direct appeal to the court of appeals must be filed with the circuit clerk in accordance with" Appellate Rule 6(c). The bankruptcy rule is in the passive voice and does not specify who may file that request for permission. Bankruptcy Judge A. Benjamin Goldgar proposed an amendment to clarify what he—and the Advisory Committee—believed to be the meaning of the rule: any party, not just the appellant, may file the request for permission.

At Professor Struve's request, the Bankruptcy and Appellate Rules Committees have worked together to draft amendments to ensure that Rule 8006(g) is compatible with Appellate

Rule 6(c). The Bankruptcy Rules Committee has approved an amendment to Rule 8006(g) that was the product of that collaborative effort. Because the Appellate Rules Committee has created a subcommittee to consider related amendments to Appellate Rule 6(c), the Bankruptcy Rules Committee will wait to seek approval for publication of amended Rule 8006(g) until publication is also sought for an amendment to the appellate rule.

Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case). Professor Gibson reported on this item. Bankruptcy Rule 3002.1 requires the holder of a mortgage claim against a Chapter 13 debtor to provide certain information during the bankruptcy case. This information lets the debtor and the trustee stay up-to-date on mortgage payments. Significant proposed amendments to Rule 3002.1 were published in August 2021, and the Advisory Committee received very valuable comments. The Advisory Committee has improved the proposal in response to those comments. Because the post-publication changes are substantial, re-publication would be helpful. The Advisory Committee still needs to review comments on proposed amendments to related forms. The committee will likely seek approval to republish the amended rule and related forms at the Standing Committee's June 2023 meeting.

Electronic Filing by Self-Represented Litigants. Professor Gibson reported on this item as well. She agreed with Professor Struve that the Advisory Committee had a positive response to the prospect of expanding electronic filing by self-represented litigants. Professor Gibson noted her surprise at this response, given that bankruptcy courts are currently the least likely to allow self-represented litigants to file electronically. She concurred with Professor Struve that there were a couple of committee members who raised concerns, particularly about improper filings. Other committee members noted that self-represented litigants could make improper filings even in paper form. The Advisory Committee needs to think about the serious privacy concerns raised earlier. But, overall, the Advisory Committee supported looking at how to extend electronic-filing access to self-represented litigants in coordination with the other Advisory Committees.

Judge Bates opened the floor to questions or comments regarding the Advisory Committee's report. Hearing none, he invited the Civil Rules Committee to give its report.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenberg and Professors Marcus, Bradt, and Cooper presented the report of the Advisory Committee on Civil Rules, which last met in Washington, D.C., on October 12, 2022. The Advisory Committee presented three action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 203.

After Judge Rosenberg recognized the work of Judge Robert Dow, the Advisory Committee's previous chair, and welcomed Professor Bradt as the new Associate Reporter, the committee began its report.

Action Items

Publication of Proposed Amendments to Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing

Discovery). Judge Rosenberg reported on this item. The Advisory Committee sought the Standing Committee's approval of proposed amendments to Rules 16(b)(3) and 26(f) for publication for public comment. These amendments would require the parties to focus at the outset of litigation on the best timing and method for compliance with Rule 26(b)(5)(A)'s privilege-log requirement and to apprise the court of the proposed timing and method. It can be onerous to create and produce a privilege log that identifies each individual document withheld on privilege grounds. The original submissions advocated revising the rule to call for the identification of withheld materials by category rather than identifying individual documents. The Advisory Committee examined that proposal as well as competing arguments for logging individual documents. Judge Rosenberg noted that there is a divide between the views of "requesting" and "producing" parties. The Advisory Committee concluded that the best resolution was to direct the parties to address the question in their Rule 26(f) conference, which would give the parties the greatest flexibility to tailor a privilege-log solution appropriate for their case. Thus, the proposed amendment to Rule 26(f)(3)(D) would add "the timing and method for complying with Rule 26(b)(5)(A)" to the list of topics to be covered in the proposed discovery plan. The proposed amendment to Rule 16(b)(3)(B)(iv) would make a similar addition to the list of permitted contents of a Rule 16(b) scheduling order. The proposed committee notes to the amendments stress the importance of requiring discussion early in the litigation in order to avoid later problems. The committee note to the Rule 26 amendment also references the discussion (in the 1993 committee note to Rule 26(b)(5)(A)) of the Rule's flexible approach.

Professor Cooper added that the privilege-log problem stems from Rule 26(b)(5)(A)'s text, which requires the withholding party to "describe the nature of" the items withheld "in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." That is a beautiful statement of the rule's purpose but it gives no guidance on how to comply. The Civil Rules Committee's Discovery Subcommittee acknowledged the complex policy concerns at play and it consulted widely and at length. The picture that emerged is one in which the producing parties can face significant compliance costs, while the receiving parties are concerned about overdesignation and that the descriptions they receive do not enable them to make informed choices about whether to challenge an assertion of privilege. In addition, problems may surface belatedly because the privilege log is provided late in the discovery process. The subcommittee realized that there would be no easy prescription for every case, and it concluded that parties are in the best position to solve the problem by working together in good faith. The proposed amendment adds only a few words, but it is intended to start a very important process.

Professor Marcus noted that the Advisory Committee has heard from many commenters. The amendment had evolved quite a bit and was now ready for public comment.

Judge Bates observed that, although the changes to the rules' text are modest, the proposed amendments are accompanied by three or four pages of committee notes. Some of that note discussion is historical, and some is explanatory, but some looks like best-practices guidance. He wondered whether this was unusual or a matter of concern.

Professor Marcus acknowledged the importance of that concern. He noted that this is a concise change to a rule that has a large body of contention surrounding it. Because the proposed amendment asks parties to discuss something that is not defined in the rule with great precision, it seems helpful for the committee note to provide some prompts for that discussion. Public comment

often focuses on the committee notes, and such comment might prompt the Advisory Committee to revise the note language after publication. But it seems more desirable to put some guidance into the proposed note rather than to provide a Delphic rule with no guidance.

Professor Cooper added that this issue was considered at the Advisory Committee meeting. The practice on committee notes has varied over time. For example, the 1970 committee notes to the discovery-rule amendments would put a treatise to modest shame, and served a good purpose at the time. And courts of appeals have said that committee notes can provide useful guidance for interpreting the rules. The note is subject to polishing, and public reaction may stimulate and help focus that polishing. It is challenging at best to improve on the present text of Rule 26(b)(5)(A)—how does one express in rule text that what may work in one case may not work in another? The note grew to these proportions in order to capture how the parties might try to alleviate problems that have emerged in practice but that are too varied and complex to incorporate into the rule's text.

Judge Bates expressed concern that, even if the note spurs more comments, because this is a contentious issue, the comments would reflect competing views of what the note should contain. Would the Advisory Committee then intend to resolve those competing views in deciding what goes in the committee note in terms of what is or isn't the best practice? Publication could make this process more complex, especially with so many bits of best-practice advice offered on a subject that is important to many litigants and counsel.

A practitioner member thought that the rule text was elegant and salutary and also noted appreciation of the existing rule's cross-reference to Evidence Rule 502. The long committee note would create the attention that the Advisory Committee wants, would focus practitioners on how to make the process work, and would address the existing problem of privilege logs coming late in the discovery process.

A judge member agreed with Judge Bates and stated that his initial reaction had been that the Standing Committee was being asked to approve a committee note, not a rule change. But then, the member said, he perceived a linkage between the rule text and the committee note. Because the rule was intended to be flexible, not one-size-fits-all, that is why it should be on the agenda early in the case. But the committee note could be greatly reduced to something like: "This was not intended to be an inflexible, one-size-fits-all rule. *See* the 1993 committee notes. This issue should be discussed early on in litigation, hence the proposed change." That might more appropriately focus the public comments.

Another practitioner member thought that the proposed amendment to the rule's text was an excellent addition that would treat both plaintiffs and defendants fairly. The committee note serves a purpose and is evenhandedly written. The note would help parties in privilege-log negotiations to push back against a view that all communications must be logged. A short note runs the risk of accomplishing little. This longer note would allow for good discussion between parties in order to alleviate costs and burdens.

A third practitioner member liked the rule change itself but agreed that the committee note was on the long side. The note is evenhanded but reads like something that would be better found in a treatise, not a committee note. There would be some benefit to stripping some examples out

of the note and allowing litigants and courts to develop the practice. Over time, a treatise would capture the best practices.

Professor Coquillette congratulated the Advisory Committee on an excellent rule, but agreed that the notes were too long and contained too much practical advice. The point is often made that lawyers look to treatises for practical advice. But those sources are behind paywalls, and some lawyers do not even read committee notes. So substantive changes should be in the rule text. Professor Coquillette observed that the committee notes could be revised after public comment.

A judge member suggested striking language in the draft committee note to the amendment to Rule 16(b)(3). Specifically, the clause "these amendments permit the court to provide constructive involvement early in the case" (agenda book page 211, lines 265–66) is inaccurate because a court does not need the rule's permission to be involved in discussions about complying with the privilege-log requirement. Professor Marcus asked the member whether the word "enable" would be better than "permit." The member thought that "enable" might still carry the implication that the court does not otherwise have the authority to manage the case by talking to counsel about what should be in a privilege log. Another judge member suggested replacing "permit" with "acknowledge the ability of."

A practitioner member offered suggestions for shortening the committee note to the Rule 26(f) amendment. The initial paragraphs were background. The paragraph starting on page 209 at line 200 recounted privilege-log practice. The next paragraph listed some examples that were probably worth having in the note. The paragraph discussing technology was useful to have in the note. Then there were the paragraphs about timing of privilege logs. The current draft's ten to twelve paragraphs, this member suggested, could probably be reduced to about four.

Judge Bates asked the representatives of the Advisory Committee whether they wanted to proceed with seeking the Standing Committee's approval for publication or to return to the Advisory Committee with the Standing Committee's feedback first. After conferring, Judge Rosenberg announced that she and the reporters would return to the Advisory Committee and the appropriate subcommittee with the Standing Committee's comments. The Advisory Committee would bring the proposed amendment back to the Standing Committee, with any warranted changes, at its June meeting. **No further action was taken on this item at this time.**

Appeals in Consolidated Cases. Judge Rosenberg reported on this item. This suggestion arose from *Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018), in which the Supreme Court observed that if its holding regarding finality of judgments in actions consolidated under Rule 42(a) "were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly." After extensive discussion and a thorough FJC study by Dr. Emery Lee, a joint subcommittee of the Appellate and Civil Rules Committees found that there was not a sufficient problem to warrant a rule amendment—that is, litigants were not missing the deadline by which to appeal a final judgment in a consolidated action. The item was therefore removed from the joint subcommittee's and the Civil Rules Committee's agenda.

Judge Rosenberg recommended that the joint subcommittee be dissolved. The Appellate Rules Committee's representatives concurred. Judge Bates noted that he was unsure whether the

joint subcommittee had been formed by a vote of the Standing Committee. Hearing no questions or comments about this item from the Standing Committee, Judge Bates asked whether anyone objected to removing the *Hall v. Hall* issue from ongoing review by the joint subcommittee and the Advisory Committees and dissolving the joint subcommittee. **Without objection, the joint subcommittee was dissolved.**

Presumptive Deadline for Electronic Filing. Judge Rosenberg briefly addressed this item, noting that the Advisory Committee had recommended that the proposal be removed from its agenda. But, based on Judge Bates's comments from earlier in the meeting, the joint subcommittee would reconsider the suggestion. **No further action was taken on this item at this time.**

Information Items

Multidistrict Litigation ("MDL"). Judge Rosenberg introduced this item by remarking that the MDL Subcommittee had first been formed in 2018 in response to comments about how important MDLs had become. No decision has yet been made on whether to recommend a rule change addressing MDLs. The subcommittee has instead focused on the question: if there *were* a rule change, what would the best possible rule be? Every MDL is different, and that has been the guiding principle throughout the iteration of different proposals. The subcommittee has been mindful of the importance of flexibility and of the many factors that bear on MDLs. The subcommittee explored putting MDL provisions into Rules 16 and 26 before ultimately developing the idea for a new Rule 16.1.

There are two versions of the draft rule, currently called Alternatives 1 and 2. The Advisory Committee has not yet considered and discussed the feedback of participants at the transferee judges' conference. Alternative 1 was well-received at the transferee judges' conference by many of the same judges who did not support an MDL-specific rule change four years ago.

MDLs make up anywhere from one-third to one-half of the federal docket. There are many new transferee judges who need to be educated about these cases. These judges also appoint new attorneys to leadership in MDLs, and these attorneys need to have proper direction and expertise. The *Manual for Complex Litigation* is being updated, but even if it were already up-to-date, people always begin by looking at the rules. So there needs to be something about MDLs in the rules.

The draft rule is designed to maintain flexibility. It has a series of guiding principles or prompts. Some prompts will apply in a specific MDL, but others may not. A judge need not go through every point listed in the draft rule. The goal is to put these points on the radar of the judges and counsel so that they start active case management early on.

Professor Marcus remarked that input from the Standing Committee would be extremely valuable to the subcommittee, especially as to the list of topics set out in Alternative 1 on page 219 of the agenda book. Judge Rosenberg agreed that the subcommittee would welcome comments on both Alternative 1 and Alternative 2. The goal is to have a more refined version to take to the full Advisory Committee meeting in March and potentially to the Standing Committee for approval for publication in June.

Judge Bates opened the floor for comments and questions.

An academic member noted that the Standing Committee had previously debated whether guidance on MDLs should go in a rule or in some other resource. This member queried whether it might make sense to wait to see the update of the *Manual for Complex Litigation*. The member suggested that Alternative 1's long list looked more like something that would go in the *Manual* than like rule text. Alternative 2 looked more rule-like, but this member would be more comfortable adopting Alternative 2's more spare approach if more detailed guidance could be found elsewhere, such as in the *Manual*. The academic member also noted others' suggestions that the rulemakers address the question of authority for some of the things that judges have done in managing MDLs, and the member questioned whether either alternative draft tackled that issue.

Judge Bates remarked that the next edition of the *Manual* would be a substantial update and would take a long time to complete. Judge Cooke estimated that it would take two to three years, probably closer to three years. Judge Bates noted that, given the three-year timeline for rule changes, it would take about six years for anything like draft Rule 16.1 to come into effect if the committees awaited the new *Manual*.

Judge Rosenberg observed that the *Manual* is not a quick read, and not every judge has or needs to have a desk copy. But as to whether this is a best-practices or a rules issue, she agreed with former chair Judge Dow's emphasis on making sure to put things in the rules—not every lawyer or judge reads the *Manual* or other resources, but everyone looks at the rules.

A judge member stated that a rule along the lines of Rule 16.1 would be helpful to judges and expressed a preference for Alternative 1 because it provides the information a court would need without having to read through a whole manual. It gives the court a lot of ideas and factors to consider in managing the case. Alternative 2 is too broad and vague to be helpful for a first-time MDL judge. Addressing the bracketed items in Alternative 1, such as the reference to a common benefit fund, the member expressed support for including those items in order to spark thought about what needs to be discussed.

Regarding Alternative 1, another judge member asked how the report called for by the rule would address items 6 through 14 if items 1 through 5 had not yet been resolved. If it is unknown who is leadership counsel or what leadership counsel's authority is, who engages in the discussion of items 6 through 14? Judge Rosenberg responded that draft Rule 16.1(b) discusses the designation of coordinating counsel for the preconference meet-and-confer. Coordinating counsel will not necessarily become permanent leadership counsel. Interim coordinating counsel and the judge can identify issues on which the judge needs feedback. These decisions can be changed, perhaps when leadership counsel is appointed or there is a major development in the MDL. This is not uncommon, that decisions made by leadership counsel need to be changed along the way. The rule contemplates that court-appointed coordinating counsel will help with the meet-and-confer and reporting to the court at the first conference on the first 14 issues or any additional issues the court deems necessary. The judge member asked what happens if there is dissension on the plaintiff side. Can coordinating counsel commit to anything in items 6 through 14? What if plaintiffs' counsel is split 50/50 on those issues?

To answer this question, Judge Rosenberg asked a practitioner member to talk about that member's experience with the issue. The member commented that there have been several large MDLs in which the court has appointed interim coordinating counsel to get the lawyers talking to

each other and resolve or narrow the issues. In situations where there is not unanimity on one side on some procedural priority, coordinating counsel presents the differing views to the court in an organized fashion at the initial conference. That doesn't give coordinating counsel absolute authority to make decisions unless there is a consensus. The emphasis is on the organizational and coordinating functions—to let the court see the range of views and make decisions in an orderly way.

Professor Marcus commented that the rule lets the judge direct counsel to report about the topics listed on page 219 of the agenda book. That would help orient the judge to the case and focus the lawyers on things that matter, even if they do not agree. That is better than a free-for-all. And requiring the lawyers to address relevant issues early on could help to avoid situations where the judge makes decisions based on incomplete information and later comes to question them, as Judge Chhabria described concerning his experience with the *Roundup* case. It may also be sensible to soften the language in proposed Rule 16.1(d) on page 220 to make clear that the management order after the initial conference is subject to revision. Overall, the point is to give the judge guidance in overseeing the case.

A judge member expressed continuing skepticism. There is some merit to the question about the court's authority. But the member asked how often transferee courts are reversed for acting without authority. If there is not a problem, perhaps not so much work needs to be done on a solution. This judge noted that the choice between the two alternative drafts only arises if one is first persuaded that a rule is needed at all.

Judge Bates observed that there might have been an authority question in *In re Nat'l Prescription Opiate Litigation*, 976 F.3d 664 (6th Cir. 2020).

A practitioner member stated that he has a bias because his firm litigates many MDLs on the defense side. The member's sense is that the plaintiffs' bar thinks that the MDL system basically works okay, while the defense bar does not think it is working, at least not in the big pharmaceutical MDLs. Rather, the system leads to settlements of meritless cases for billions of dollars. It is difficult for the rulemakers to work in an environment like that, where some people are relatively happy with the system and some are not. Both alternatives, especially the longer Alternative 1, are really about the plaintiffs' side. They may be potentially helpful, but they do not speak to defense concerns. The primary defense concern is that large MDLs are not vehicles for consolidating existing cases so much as encouraging more cases to be filed. The language coming closest to speaking to defense-side concerns is on page 219 of the agenda book, lines 568–69, about creating an avenue for vetting. But the proposed language ("*[w]hether the parties should be directed to* exchange information about their claims and defenses at an early point in the proceedings") was too agnostic. The member suggested considering deleting "whether the parties should be directed to" and starting with "exchange of information about". At least from an efficiency standpoint and from the defense bar's perspective, vetting is important.

The member also commented that, in previous versions, there had been debate about whether the exchange should be of "information" or "information and evidence." The member agreed that "evidence" seems awkward. But "information" is amorphous and may not be enough to determine whether cases in an MDL are meritorious. One suggestion is "exchange information

about the factual bases of their claims and defenses." That gets at the "evidence" concept without using the word "evidence."

Another practitioner member endorsed the idea of separating items 1 through 5 from items 6 through 13 in Alternative 1. This member expressed concern about the application of Alternative 1 before lead counsel is appointed, because then it would become an opportunity for would-be lead counsel to pontificate about the issues in items 6 through 13—that puts the cart before the horse. One of the most important things in an MDL is the appointment of lead counsel. The rules do not limit a judge's considerations in making that appointment. Does the judge consider the size of the claim? Counsel's experience level? The member has a bias toward the Private Securities Litigation Reform Act because it sets a process and criteria for appointing lead counsel. The member thought that transferee judges like that they can pick whom they want for lead counsel. The member predicted that this would become a controversy one day in a big MDL because there are no standards for that appointment. Perhaps a future Advisory Committee will add meat to that bone, but many of the topics listed in the current draft rule are obvious things that any competent MDL judge or defense counsel would want to consider.

A judge member thought that Alternative 1 is a particularly good framework to organize an MDL and indeed any complex case. The member suggested two big-picture additions. First, direct the parties in preparing their report and discussing the case to adhere to the principles of Civil Rule 1—just, speedy, and inexpensive dispositions. Counsel are not always aware of that rule. Second, there should be an emphasis on early determination of core factual issues—this might be early vetting—and core legal issues. Not necessarily dispositive legal issues, but core issues like a *Daubert* motion, an early motion in limine, or an early motion for summary judgment that will shape the law applicable to the case. Civil Rule 16(c)(2) concludes its long list of matters for consideration at a pretrial conference with "facilitating . . . the just, speedy, and inexpensive disposition of the action," thus referencing Rule 1. But because that is so important in a complex case, the reference to Rule 1 should be at the outset of the new rule, followed by a direction to focus on core issues of fact and law.

Judge Bates asked what the Advisory Committee thinks about the issue of settlement. There are questions concerning the court's role and authority, and settlement is a big issue in MDLs. Transferee judges historically have had different levels of involvement. Some think they have no authority to get involved. That is unlike class actions, where Rule 23 sets forth the judge's very involved oversight role. For normal civil cases, Rule 16(c)(2) tells the judge to focus on settlement and to use special procedures to assist in settlements. The question is what the proposed rule says about settlements in MDLs. In Alternative 1 on page 219, at lines 557–58, there is a reference to addressing a possible resolution. In Alternative 2 on page 220, line 598, there is also a reference to possible resolution. What is the message being sent to the bar and bench if that is where settlement winds up in the rule, especially compared to the more fulsome requirement in Rule 23? It is important to write these rules for the less-experienced judges and practitioners.

A practitioner member thought that another provision could be added to deal specifically with settlement—assessing whether there is a method for a prompt resolution of the claims. Over the years, more would probably be added to the rule, but something specifically dealing with considerations of early resolution, and settlement generally, would certainly be worth listing. But the problem of attorney jousting before the appointment of leadership counsel will still arise.

Another practitioner member thought that different language could solve the sequencing issue. The language would state that not all the considerations should be considered or decided at one initial conference; rather, they should be addressed in a series of conferences. Experienced MDL judges know that case management is an ongoing, iterative process; a single pretrial order is not enough. This language could avoid some confusion about how many of the considerations in the rule need to be addressed at one time. It would tell the court that this is a menu of items and let the court determine which are the priority items for the first conference and which to address in an ongoing fashion.

The previous practitioner member reiterated that, unless leadership counsel is appointed early, it makes no sense to deal with the other topics. It would be helpful, especially to inexperienced judges, to make clear in the rule that the appointment of leadership counsel should be dealt with up front.

Judge Rosenberg remarked that the subcommittee spent a lot of time on the settlement issue. Transferee judges thought that—unlike class actions, which have unrepresented parties—judges did not and should not manage, oversee, or approve settlements in MDLs. Some lawyers who looked at the draft rule may have had similar reactions. The subcommittee ultimately decided to take out that language. Still, it is important for the MDL process to have integrity and transparency, and so the subcommittee considered how a judge could ensure the process has those qualities without having the authority to approve a settlement. The solution was to give the judge a more proactive role in all aspects of case management, including appointing leadership counsel, determining leadership counsel's responsibilities, and having a regular reappointment process. Ensuring that the process is fair can promote trust in the outcome.

Judge Bates acknowledged the distinction between managing the process and reviewing the outcome, but suggested that the draft rule did not contain much guidance about what the judge should consider in appointing leadership counsel or about what other parties and counsel should be doing to create a process that will lead to a fair and just resolution of the claims.

Professor Marcus added that, with respect to settling individual claims asserted by claimants represented by other lawyers, appointment of leadership counsel is dicey. The subcommittee has given that scenario a lot of thought and discussion, including whether there could be a process by which a judge could "approve" the negotiation process for any settlements that come about. That is also dicey. On page 219 of the agenda book, in item 13, in brackets, another possibility is mentioned, which is to use a master to assist with possible resolution. Another question is: what happens if leadership counsel's own cases are settled—must different leadership counsel be appointed? MDLs involve different situations from Rule 23(e), and there is a "third-rail" aspect to this subject, so it is very valuable to have the Standing Committee's feedback while addressing it.

Judge Bates asked whether special masters have been widely used in managing and reaching settlements in MDLs. A practitioner member said yes, absolutely. In some of the biggest cases, special masters run the whole settlement process. Judge Bates asked if such a master reports to the court. A practitioner member gave an affirmative answer to this question, but remarked that these masters are not typically Rule 53 special masters. They are called "settlement masters" or "court-appointed mediators." It is an ad hoc appointment in terms of the roles and duties, but those

duties do typically include reporting to the court. The extent to which the master can report to the court on the substance of the negotiations is usually worked out among the parties. In the *Opiate* MDL, there were Rule 53 appointments of special masters who ultimately became involved in mediation and settlement. In the *Volkswagen* MDL, Judge Breyer invented a position called "settlement master," which was not based on Rule 53 but had many but not all of the same responsibilities and roles. Judge Breyer made the appointments after requesting input from the parties on whether to appoint a master and, if so, whom. The court need not follow the parties' recommendations, but in the member's experience, this topic is discussed with the parties and the court's determinations do not come as a surprise.

Judge Bates thought that judges who appoint masters would communicate with them. Should the master's reporting duty to the judge be one of the considerations under the rule?

Judge Rosenberg mentioned that the subcommittee had received feedback from some groups that did not like having the words "special master" in the draft rule. It might create a presumption that there should be a special master, even if not everyone wants one. This led to some discussion, and some thought it might be better to have the words "special master" in the rule so that the parties will talk about it, even if they disagree.

Judge Bates asked whether the rulemakers should be careful about referring to the appointment of a "special master." Might the reference be viewed as authorizing something outside of Rule 53? He intended no criticism of what any judge has done in the MDL process, but he asked whether the rulemakers want to give, through a casual reference in item 13 of a laundry list, an imprimatur to the idea that a judge can say, "I want a settlement master. Rule 53 doesn't fit, so I'm just going to create this role on my own."

Judge Rosenberg responded that the subcommittee has discussed this topic but has not yet brought it to the full Advisory Committee. The subcommittee is working on tweaking the language in response to feedback on that issue and others. As another example, in line 570 of the report in the agenda book, there is a reference to a "master complaint." The rules do not provide for a master complaint, but the Supreme Court has referred to master complaints, and so has the subcommittee. One piece of feedback was that the term should not be used. Does using it somehow give credibility to a form of complaint that the rules otherwise do not mention?

Judge Bates commented that one could go pretty far back in this line of thought. The rules do not authorize the appointment of leadership counsel, for example. There are a lot of things that may not have a specific basis in the existing rules.

A judge member noted that the draft rule does not make any reference to the transferor court. It rarely happens that the case is sent back, but the MDL framework does contemplate that the work of the transferee court ends at some point. An item could be added to suggest that the transferee court and lawyers should consider when a case should be sent back to the transferor court.

Professor Cooper commented that a suggestion had arisen that the rule should address remand. But it was unclear whether the suggestion meant addressing motions to remand to state court, in cases plaintiffs thought improperly removed, or remand to transferor courts.

The judge member thought that it sounds like there is a never-ending list of items that could be considered or called into question. At what point do we return to the concept of "first do no harm"? Is there a need for this rule? What is its usefulness?

Professor Marcus commented that there has been a decades-long debate about whether the transferor court, if a case goes back, can simply start from scratch and throw out what the transferee judge did with the case. Putting a time limit on transferee activities might produce some behaviors that should not be encouraged. Also, as Professor Cooper said, remand means two different things here. Under 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation ("JPML") has authority to remand to the transferor court, but the JPML usually awaits a suggestion from the transferee judge that this would be desirable. The transferee judge cannot do this unilaterally.

Judge Bates commented that there are some things, not listed in the draft rules, that might occur later on before the transferee judge, particularly bellwether trials. If the draft rule is viewed as a continuing conference obligation, should it address other items, such as how to manage and sequence any bellwether proceedings?

Judge Rosenberg responded that bellwether management was not included because it is far along in the MDL process and might be outside the realistic scope of what can and should be discussed in the early conferences.

Professor Marcus added that there are also various views about whether bellwethers are useful. It is probably unwise to urge the judge to map out possible use of bellwethers at the start of an MDL. He predicted that any rule will say that, except for extremely simple and small MDLs, one conference is not enough, and the management plan must be revisited as things move forward. So the rule's focus will probably be on the initial exercise, and the expectation will be that judges continue to oversee other events as they become timely. Bellwethers might be in that latter category.

Judge Rosenberg thanked the Standing Committee for its feedback.

Rule 41(a) (Dismissal of Actions). Judge Rosenberg reported on this item. The Advisory Committee formed a subcommittee to address a conflict about the scope of Rule 41(a)(1)(A), which allows a plaintiff to voluntarily dismiss without prejudice an "action" without obtaining a court order or the defendants' consent. The subcommittee's research showed that courts approach Rule 41 dismissals in different ways. The primary disagreement is whether Rule 41(a)(1)(A) requires dismissal of an entire action against all parties or whether it may be used to dismiss only certain claims or only claims against certain parties. The subcommittee has not reached a consensus on whether to pursue an amendment or what amendment to propose. An additional wrinkle is Rule 15, through which a plaintiff can amend a complaint to remove certain claims or defendants. The subcommittee is considering whether Rule 15 should be the vehicle by which a party should dismiss something short of the entire action.

Judge Bates remarked that this is a complex issue, and he solicited comments or feedback from the Standing Committee. Hearing none, Judge Rosenberg turned to the remainder of the report, and invited Professor Cooper to present the next item.

Rule 7.1 (Disclosure Statement). Professor Cooper addressed two suggestions made to the Advisory Committee about recusal disclosures. One suggestion, about "grandparent corporations," contemplates a company that owns a stake in a second company, which in turn has a stake in a third company. If, say, Orange Julius is a party to an action, then the current rule requires it to disclose that Dairy Queen is its owner. But the rule does not require Orange Julius to disclose that Berkshire Hathaway owns Dairy Queen. So if the judge in the action owns shares of Berkshire Hathaway, that judge may not have notice of a potential financial interest in the case's outcome. Should something be done to address this in the rule?

The other suggestion proposed a rule directing all parties and their counsel to consult the assigned judge's publicly available financial disclosures. The parties would either flag any interests that may raise a recusal issue or certify that they have checked and do not know of any. The Advisory Committee has not really dived into this. Rule 7.1 covers only nongovernmental corporate parties. There are all sorts of business organizations with complicated ownership structures that may involve interests a judge is not aware of. Should the Advisory Committee just say it is too complicated to try to go further than corporations?

In response to a question posed by Professor Cooper, Judge Bates suggested that, unless the Appellate or Bankruptcy Rules Committees feel otherwise, it makes sense for the Civil Rules Committee to take the lead in considering proposed amendments to Rule 7.1.

Other Items Considered. At this point, Judge Bates opened the floor for any remaining issues raised in the Civil Rules Committee's report. He asked a question about service awards for class-action representatives. Does the Advisory Committee view this issue as a matter of procedure or of substantive law? Judge Rosenberg responded that the issue was not a subject of much discussion at the last Advisory Committee meeting. Professor Marcus thought that there was no need to worry about the issue yet. There was a pending certiorari petition on the issue, so there might be more to learn by waiting.

Professor Marcus turned to Rule 45, about which a question had arisen: what does it mean to "deliver" a subpoena? By hand? By email? It may be that, in civil litigation, counsel can work this out. Is it worth trying to devise specifics on a method of delivery?

A judge member drew attention to the information item on standards and procedures for deciding in forma pauperis ("IFP") status, and suggested that that item warranted action. The member remarked that a *Yale Law Journal* article had described disparate practices on IFP status, which raised important issues of access to justice. The Appellate Rules Committee is looking at a standardized form for IFP status on appeal. The member suggested that someone should review this—if not the rulemakers, then a different committee of the Judicial Conference.

Judge Bates commented that the current view of the Advisory Committee was that it was not going to take any specific action on standards for IFP status. If the Rules Committees are not going to look further at this, should they encourage another Judicial Conference committee to do so? The only other logical Judicial Conference committee is CACM. Judge Rosenberg remarked that there is an Administrative Office pro se working group that may also be appropriate. Judge Bates suggested that perhaps the rulemakers could communicate to these entities that the Advisory Committee is not going to do anything with the topic for now but views it as an important question.

Another judge member informally asked the Advisory Committee to consider whether there is a need to address the Supreme Court decision in *Kemp v. United States*, 142 S. Ct. 1856 (2022), which held that a judge's error of law is a "mistake" under Rule 60(b).

Items Removed from Agenda. Judge Rosenberg concluded by noting items removed from the Advisory Committee's agenda. These included proposed amendments to Rule 63 (Successor Judge), Rule 17(a) (Real Party in Interest) and Rule 17(c) (Minor or Incompetent Person). There were no questions or comments from the Standing Committee on these items.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Dever and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which last met in Phoenix, Arizona, on October 27, 2022. The Advisory Committee presented two information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 297.

Information Items

Rule 49.1 (Privacy Protection for Filings Made with the Court). Judge Dever reported on this item. He explained that the Advisory Committee had considered and decided to remove from its agenda a proposal by Judge Furman regarding Rule 49.1. The rule's committee note refers to 2004 guidance from CACM that certain documents should remain confidential and not be made part of the public record. In *United States v. Avenatti*, 550 F. Supp. 3d 36 (S.D.N.Y. 2021), Judge Furman held that the common law and the First Amendment required appropriate disclosure of a defendant's CJA Form 23 and accompanying affidavit. Judge Furman suggested amending Rule 49.1(d) and removing the committee note's reference to the CACM guidance. The Advisory Committee concluded that the original committee note did not produce confusion about the constitutional or common-law rights of access, and it also hesitated to venture into potentially substantive issues through rule amendments.

Rule 17 (Subpoena). Judge Dever reported on this item as well. The Advisory Committee is analyzing a proposal by the New York City Bar to amend Rule 17 to allow defendants to more easily subpoena third parties for documents. As part of this process, the Advisory Committee has appointed a subcommittee, chaired by Judge Nguyen, to gather information about how federal courts apply the rule and how states handle these kinds of subpoenas. The goal is to determine whether there is a problem that warrants a rule change. There have been two Supreme Court cases interpreting the rule, both fairly atypical. The subcommittee has heard from a wide variety of experienced practitioners from the defense bar and the Department of Justice. The process is still in its early stages, and the Advisory Committee will continue to study these issues.

Judge Bates commented that the miniconference on the Rule 17 issue at the most recent Advisory Committee meeting had been very informative and had elicited several different perspectives that should be useful in the committee's ongoing study.

Judge Bates opened the floor to questions or comments regarding the Advisory Committee's report. Hearing none, he invited the Evidence Rules Committee to give its report.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra presented the report of the Advisory Committee on Evidence Rules, which last met in Phoenix, Arizona, on October 28, 2022. The Advisory Committee presented two information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 365.

Information Items

Rule 611 (Juror Questions for Witnesses). Judge Schiltz reported on this item. This proposal would add a new subsection (e) to Rule 611 to create safeguards if jurors are permitted to ask questions at trial. The proposed amendment was presented to the Standing Committee at the June 2022 meeting. Most comments then had been about whether jury questioning is a good thing at all; some members thought that it was not and that putting safeguards in the rule would only encourage judges to allow jurors to ask questions. The proposed amendment was returned to the Advisory Committee for further study on the pros and cons of juror questioning.

The Advisory Committee held a miniconference on the issue at its fall 2022 meeting in Phoenix, Arizona, which was coincidental but fortunate in that Arizona is a pioneer among the states in allowing juror questioning. The panel included federal and state judges and civil and criminal practitioners, all with a great deal of experience with juror questioning. All of them expressed the view that juror questioning was a positive thing with many benefits and few risks. They all supported the proposed rule. It was difficult to find opponents—one whom Professor Capra did find could not attend the miniconference. Afterward, the Advisory Committee thoroughly discussed the proposal. It will continue to discuss the proposal at its spring 2023 meeting and decide whether to pursue it.

Judge Bates thought the miniconference was a helpful exercise. Although it was one-sided—as it necessarily would be in Arizona—it gave the committee many issues to consider.

Professor Capra reiterated that it was difficult to find someone in Arizona who had anything critical to say about the practice. There were a couple of comments—one from a judge at the miniconference who said that juror questioning sometimes took too much time, and another from a prosecutor who said that sometimes there is a risk that questioning can get out of hand because the lawyers cannot control the witness. But there was a swarm of positive factors indicating that juror questioning is not the problem that some think it would be. Most juror questions are only for clarification, not attempts to take over the case or to pick or fill holes in one party's case.

Judge Bates raised a concern about juror questions in criminal cases. The criminal process is not a pure search for the truth—the prosecutor has the burden to prove guilt. He suggested that a juror question may unfairly help the prosecution by revealing a problem in the case that the prosecutor can then address or cure.

A judge member asked whether there was anecdotal information from actual jurors, such as information from a questionnaire asking whether they liked being able to ask questions. Professor Capra said that the judges reported that they generally discuss the process with jurors

and that reviews had been positive. One juror told a judge that he was glad he could ask questions so that he did not have to look up answers on the internet. Another juror said that it was nice to be able to ask questions; even if the juror did not do so, the juror still became more involved in the process. Judge Schiltz also commented that there have been studies showing that jurors give overwhelmingly positive feedback about the ability to ask questions.

A practitioner member asked whether a 50-state (and multidistrict) survey had been done to learn about the prevalence of the practice. Professor Capra responded that there are some data on that question. The state of Washington has a juror-questioning practice. About 15% to 20% of trials in federal courts allow juror questioning. The member commented that it would be a good idea to identify federal district judges who allow the practice and to get their feedback. Judge Bates observed that it is a judge-by-judge question, not a court-by-court question. The practitioner member reiterated that the Advisory Committee should try to determine the frequency of the practice outside of Arizona and to talk with federal judges who have done juror questioning and find out its pros and cons. Judge Schiltz noted that the Advisory Committee had the same questions and had asked Professor Capra to gather more data on them. Professor King commented that the National Center for State Courts has collected and published data about juror questioning in the states.

Judge Bates asked whether the Advisory Committee had considered whether there is a difference between the civil and criminal contexts and whether a rule might address one but not the other. Professor Capra responded that any safeguard that applies in the civil context would have to apply to the criminal context as well. Perhaps criminal cases could have additional safeguards, but no safeguards would apply only to the civil context.

Judge Schiltz commented that there had been a study in the Ninth Circuit that recommended permitting juror questioning in civil cases but not criminal cases. Judge Bates suggested, however, that there was more recent work in the Ninth Circuit that was more positive about juror questions. And Professor Capra noted that the Ninth Circuit pattern criminal instructions now address juror questions.

Rule 611 (Illustrative Aids). Judge Schiltz reported on this item as well. The Advisory Committee held a second miniconference in Phoenix on illustrative aids. Despite the fact that illustrative aids are used in virtually every trial, there is confusion over the difference between demonstrative evidence, which is admitted into evidence, and illustrative aids, which are not admitted into evidence and are used only to help the jury understand evidence that has been admitted. There are variations among judges' practices about notice requirements to opposing counsel, whether illustrative aids can go to the jury room, and whether the aids become part of the record.

This amendment would add a new subsection (d) to govern the use of illustrative aids. It would clarify the distinction between illustrative aids and demonstrative evidence, require notice, prohibit illustrative aids from going to the jury room absent a court ruling and proper instruction, and require they be made part of the record so that they would be available to the appellate court.

The miniconference featured a large panel of judges, professors, and practitioners, most of whom opposed the proposed rule. Since then, the Advisory Committee has also received about 40

comments on the rule. Most opposition is to the notice requirement. Practitioners adamantly opposed having to show their illustrative aids to their opponents, especially aids they wanted to use at closing. There were also practical concerns. The category of illustrative aids spans a wide variety. For example, if an attorney writes something on a chart as a witness is testifying, how does the attorney give prior notice to opposing counsel of that contemporaneously created illustrative aid? The Advisory Committee did receive a comment in support of the rule—including the notice requirement—from the Federal Magistrate Judges Association. At its spring 2023 meeting, the Advisory Committee will review the comments and decide whether to move forward, perhaps after excising the notice requirement.

Judge Bates, noting that this miniconference had also been very helpful to the Advisory Committee, opened the floor for comment.

A practitioner member raised concerns about the notice requirement from the member's colleagues in trial practice. Attorneys persuade juries in two ways: by words and by visuals. When both are aligned, people retain far more information than when only one method is used. An attorney would never show the outline of an opening statement or witness exam to an opponent—it puts the attorney at a strategic disadvantage because opponents can change what they will say in response. Sharing an illustrative aid is similar. And the effect of taking the notice requirement out would be that there is a transcript, an objection, and a discussion—the rule would treat illustrative aids the same as attorneys' oral statements. Requiring notice would put more disclosure obligation on the visual than the oral. Professor Capra responded that he thinks the Advisory Committee was comfortable with deleting the notice requirement, and it is likely that that is what will happen.

The member also commented that, as illustrative aids are defined—helping the factfinder understand admitted evidence—a strict reading would mean that a PowerPoint presentation could not be used in an opening because no evidence will have been admitted yet. Professor Capra responded that the Advisory Committee needs to decide whether the rule applies to openings and closings. If the rule were to apply to openings and closings, one could revise proposed Rule 611(d)(1)'s "understand admitted evidence" to read "understand admitted evidence or argument."

A judge member mentioned that, as a trial judge, the member would customarily make illustrative aids a part of the record. Now, after 20 years on the court of appeals, the member has had very little occasion to see an illustrative aid that is part of the trial record. The member continues to think that putting aids in the record is the better practice. The appellate courts are so far removed from the trial process that anything that gives them a better feel of what has been before the trier of fact is of great assistance.

A second practitioner member expressed support for rulemaking on this topic and commented on the centrality of slides in modern trials. The member is often concerned that the other side will do something crazy with illustrative aids in openings and closings. The member can sometimes work out an arrangement with the other side to mutually disclose trial materials. But sometimes things like closing slides are made the night before the closing argument—when is it practical to give notice for these aids? Putting aids in the record is an easy decision, as is making it clear that they do not go to jury deliberations. Notice might bother the member less than it does other lawyers because the member has seen people do crazy things at trial, and the damage is done even if the judge says something after the fact. The standard in proposed Rule 611(d)(1)(A)

("[substantially] outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time") gives a judge enormous power over what can be done—that might be good or bad. The member does not know what the standard should be; maybe it should be the same as applies to oral advocacy in a closing argument.

A third practitioner member largely agreed with the previous member's comments. The solution is probably not one-size-fits-all, so the member is not sure what to do about a notice requirement. The second practitioner member suggested that you do not want to show aids to opposing counsel so far in advance that they can change what they will do in response, but you do want to make sure that there are not any slides that are so outrageous that the judge should know about them in advance.

Professor Capra asked whether the solution might be to take out the notice requirement from the text but to put in language that summarizes the two previous members' comments—there is no one-size-fits-all notice requirement, but notice is preferred because it allows judges to decide in advance rather than after the fact. But the rule would leave the determination for the judge to make.

The second practitioner member agreed with Professor Capra's suggestion. The "Wild West" view of trials is dangerous, so having some notice is a good idea. But it should not be so much notice that each side can redo its slides in response to the other's.

The third practitioner member noted that it is much harder to unsee than unhear something. That is a qualitative difference between what is said and shown. Judge Bates observed that it would be valuable for the Advisory Committee to consider preserving judges' discretion to deal with the notice issue.

The first practitioner member reiterated opposition to a notice requirement. Leaving the notice requirement out of the rule does not strip a federal judge of inherent authority. Also, some slides' power comes from not disclosing them in advance. If this rule applies to openings and closings, notice disincentivizes parties from using powerful slides during those key parts of trial.

Professor Capra responded that many judges already use Rule 611(a) to control visual demonstrations in openings and closings. It did not make sense to him to exclude openings and closings from a rule specific to illustrative aids because there would then be two rules covering essentially the same thing, one during trial and one during openings and closings.

Updates on Other Rules Published for Public Comment.

Judge Schiltz briefly mentioned that there are several other proposed rules that are published for comment. The Advisory Committee has received almost no comments on those rules.

Judge Bates called for any further comments from the Standing Committee. Hearing none, Judge Bates thanked the Advisory Committees, their members, reporters, and chairs for their hard work.

OTHER COMMITTEE BUSINESS

Action Item

Judiciary Strategic Planning. This was the last item on the meeting's agenda. Judge Bates explained that the Standing Committee needed to give its recommendations to the Judicial Conference's Executive Committee about the contents of the strategic plan and what should receive priority attention over the next two years. The recommendations were due within a week after the meeting. Judge Bates requested comment on the priorities in the strategic-planning memorandum beginning on page 402 of the agenda book. No comments were offered.

Judge Bates then sought the Standing Committee's authorization to work with the Rules Committee Staff to give comments to the Executive Committee, on behalf of the Rules Committees, about the strategies and goals for the next two years. This procedure had been followed in the past, but he wanted to be sure that no one had any problem with it. **Without objection, the Standing Committee gave Judge Bates that authorization.**

New Business

Judge Bates then opened the floor to new business. No member raised new business.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Standing Committee members and other attendees for their valuable contributions and insights. The committee will next convene on June 6, 2023, in Washington, D.C.

TAB 1C

Agenda E-19 (Summary)
Rules
March 2023

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report is submitted for the record and includes the following for the information of the Judicial Conference:

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on January 4, 2023. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg, Chair, Professor Richard L. Marcus, Reporter, Professor Andrew Bradt, Associate Reporter, and Professor Edward H. Cooper, Consultant, Advisory Committee on Civil Rules; Judge James C. Dever III, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Allison Bruff, Rules Committee Staff Counsel; Christopher I. Pryby, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center; and

Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Department of Justice.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received an update on the coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees to consider suggestions to allow expanded access to electronic filing by pro se litigants and an update on a suggestion to change the presumptive deadline for electronic filing.

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee on Appellate Rules met on October 13, 2022. The Advisory Committee discussed possible amendments to Rule 29 (Brief of an Amicus Curiae), Rule 39 (Costs), and Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis).

The Advisory Committee has been considering potential amendments to Rule 29 for several years and received helpful feedback from the Standing Committee regarding the need for and scope of any potential additional requirements for disclosures by amici curiae, including disclosure requirements related to ownership, control, or funding by the parties or non-parties. In addition, the Advisory Committee is considering possible amendments to Rule 39 in the light of *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021), regarding the allocation of costs on appeal, specifically related to supersedeas bonds. The Advisory Committee is also considering possible amendments to Form 4 in response to a suggestion highlighting issues with the current

form, and has consulted clerks and senior staff attorneys in the circuits to determine the most relevant information on the form.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Official Form Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted a proposed amendment to Official Form 410 (Proof of Claim) with a recommendation that it be published for public comment in August 2023. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Official Form 410 (Proof of Claim)

The proposed amendment eliminates the language on the proof-of-claim form that restricts use of a uniform claim identifier ("UCI") to electronic payments in chapter 13, and thereby allows the UCI to be used in cases filed under all chapters of the Bankruptcy Code and for all payments whether or not electronic. Use of the UCI is entirely voluntary on the part of the creditor. The amended language allows a creditor to list a UCI on the proof-of-claim form in any case.

Information Items

The Advisory Committee met on September 15, 2022. In addition to the recommendation discussed above, the Advisory Committee continued consideration of proposed amendments to Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case) and related forms. A version of the amended rule published for comment in 2021 received a number of comments on proposed provisions designed to enhance the likelihood that chapter 13 debtors will emerge from bankruptcy current on their home mortgages. In light of the comments, the Advisory Committee is considering changes that would likely require republication in August 2023.

FEDERAL RULES OF CIVIL PROCEDURE

Information Items

The Advisory Committee on Civil Rules met on October 12, 2022. The Advisory Committee submitted proposed amendments to Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery) regarding privilege logs with a recommendation that they be published for public comment in August 2023. The proposed amendments would call for early identification of a method to comply with Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Specifically, the proposed amendment to Rule 26(f)(3)(D) would require the parties to address in their discovery plan the timing and method for complying with Rule 26(b)(5)(A). The proposed amendment to Rule 16(b) would provide that the court may address the timing and method of such compliance in its scheduling order. During the Standing Committee meeting, members expressed differing views concerning the length of and level of detail in the committee notes that would accompany the proposed amendments. The Advisory Committee was asked to reexamine the notes in light of that discussion, and to present the proposed amendments to the Standing Committee at its June 2023 meeting.

In addition, the Advisory Committee continues to consider a potential new rule concerning judicial management of multidistrict litigation proceedings. The MDL subcommittee has developed a sketch for a new Rule 16.1 directed to MDL proceedings. The new rule would prompt a meet-and-confer session among counsel before the initial case management conference with the transferee court. In two alternatives, the sketch of the rule provides various topics for discussion by counsel. The Advisory Committee continues to discuss the possibility of proposing a new Rule 16.1.

The Advisory Committee also discussed potential amendments to Rule 7.1 (Disclosure Requirement) regarding disclosure of possible grounds for recusal, Rule 41(a) (Dismissal of Actions) regarding the dismissal of some but not all claims or parties, Rule 45(b)(1) (Subpoena) regarding methods for serving a subpoena, and Rule 55 (Default; Default Judgment) regarding the directive that in some circumstances the clerk "must" enter a default or a default judgment.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on October 27, 2022. The Advisory Committee removed from its agenda a suggestion regarding Rule 49.1 (Privacy Protection For Filings Made with the Court) and considered a suggestion to amend Rule 17 (Subpoena).

The Advisory Committee considered a suggestion to amend Rule 49.1 by adding the phrase "subject to any applicable right of public access" before Rule 49.1(d)'s authorization permitting the court to order that filings be made under seal. This change had been proposed to address certain language in an earlier committee note that included a reference to the *Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files* (March 2004) issued by the Committee on Court Administration and Case Management (CACM). As quoted in the committee note, the CACM guidance provides that certain documents—including "financial affidavits filed in seeking representation pursuant to the Criminal Justice Act"—"shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access." Several reasons factored into the Advisory Committee's decision not to pursue the proposed amendment. One was the concern that the amendment would be perceived as taking a position on an issue of substantive law (that is, whether such financial affidavits are judicial documents subject to disclosure under the First Amendment or a common law right of access). Another was the

observation that such an amendment would not remove the earlier committee note's reference to the CACM guidance.

The Advisory Committee continues to consider a New York City Bar Association suggestion concerning Rule 17. The Advisory Committee formed a subcommittee to study the issue and, to gather more information about Rule 17 in practice, invited a number of experienced attorneys to participate in its fall meeting. The participants included defense lawyers in private practice, federal defenders, and representatives of the Department of Justice. The participants spoke about their experience with Rule 17 subpoena practice, and answered questions regarding the standards for securing third-party subpoenas and the role of judicial oversight in the process.

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee on Evidence Rules met on October 28, 2022. In connection with the meeting, the Advisory Committee held panel discussions on two suggestions concerning Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence). The first panel discussion related to a possible new Rule 611(e) regarding the practice of allowing jurors to pose questions for witnesses. The Advisory Committee will continue its research into juror questions, including how often the practice is used in federal courts and potential safeguards for the practice. The second panel discussion related to proposed new Rule 611(d) regarding illustrative aids, which was published for public comment in August 2022. Proposed Rule 611(d) would state the permitted uses of illustrative aids and would set procedures for their use. Finally, the Advisory Committee provided updates on other rules published for public comment, including Rule 613(b) (Witness's Prior Statement) regarding prior inconsistent statements, Rule 801(d)(2) (Definitions That Apply to This Article; Exclusions from Hearsay) related to hearsay statements by predecessors in interest, Rule 804(b)(3) (Exceptions to the Rule Against Hearsay—When the

Declarant Is Unavailable as a Witness) regarding the corroborating circumstances requirement, and Rule 1006 (Summaries to Prove Content) regarding summaries of voluminous records.

JUDICIARY STRATEGIC PLANNING

The Committee was asked to provide recommendations to the Executive Committee regarding the prioritization of goals and strategies in the 2020 *Strategic Plan for the Federal Judiciary* (*Plan*) to determine which strategies and goals from the *Plan* should receive priority attention over the next two years. The Committee's views were communicated to Chief Judge L. Scott Coogler, the judiciary planning coordinator, by letter dated January 10, 2023.

Respectfully submitted,

John D. Bates, Chair

Elizabeth J. Cabraser	Lisa O. Monaco
Robert J. Giuffra, Jr.	Andrew J. Pincus
William J. Kayatta, Jr.	Gene E.K. Pratter
Carolyn B. Kuhl	D. Brooks Smith
Troy A. McKenzie	Kosta Stojilkovic
Patricia Ann Millett	Jennifer G. Zipps

TAB 1D

Effective December 1, 2022

Current Step in REA Process:

- Effective December 1, 2022

REA History:

- Adopted by Supreme Court and transmitted to Congress (Apr 2022)
- Transmitted to Supreme Court (Oct 2021)
- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.	
AP 42	The amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. (These proposed amendments were published Aug 2019 – Feb 2020).	BK 8023
BK 3002	The amendment allows an extension of time to file proofs of claim for both domestic and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim."	
BK 5005	The changes allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified.	
BK 7004	The amendments add a new Rule 7004(*i*) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.	
BK 8023	The amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties.	AP 42(b)
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which went into effect February 19, 2020.	
Official Form 101	Updates are made to lines 2 and 4 of the form to clarify how the debtor should report the names of related separate legal entities that are not filing the petition.	

Effective December 1, 2022

Current Step in REA Process:

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REA History:

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- Transmitted to Supreme Court (Oct 2021)
- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
Official Forms 309E1 and 309E2	Form 309E1, line 7 and Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge.	
CV 7.1	An amendment to subdivision (a) was published for public comment in Aug 2019 – Feb 2020. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment. The amendments to (a) and (b) were approved by the Standing Committee in Jan 2021, and approved by the Judicial Conference in Mar 2021. The amendment to Rule 7.1(a)(1) requires the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change conforms the rule to the recent amendments to FRAP 26.1 (effective Dec 2019) and Bankruptcy Rule 8012 (effective Dec 2020). The amendment to Rule 7.1(a)(2) creates a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party.	AP 26.1 and BK 8012
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).	
CR 16	Amendment addresses the lack of timing and specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2022)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)
- Approved by Standing Committee (June 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Emergency Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subdivision (a)(4)(A)(vi) of Appellate Rule 4.	CV 87 (Emergency CV 6(b)(2))
AP 26	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 45, BK 9006, CV 6, CR 45, and CR 56
AP 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, BK 9006, CV 6, CR 45, and CR 56
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites.	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK 9006(a)(6)(A)	Technical amendment approved by Advisory Committee without publication add Juneteenth National Independence Day to the list of legal holidays.	AP 26, AP 45, CV 6, CR 45, and CR 56
CV 6	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CR 45, and CR 56
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of "A party may amend its pleading once as a matter of course within . . . 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the 22nd day after service of the pleading and extending to service of the responsive pleading or pre-answer	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2022)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)
- Approved by Standing Committee (June 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than."	
CV 72	The proposed amendment would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CR 62
CR 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 56
CR 56	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 45
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)–(d).	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the proposed consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits Stated in the Federal Rules of Appellate Procedure	Conforming proposed amendments would reflect the proposed consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word "statement" with "certificate": Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	AP 43
BK Restyled Rules	The third and final set of current Bankruptcy Rules, consisting of Parts VII-IX, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
BK Form 410A	The proposed amendments are to Part 3 (Arrearage as of Date of the Petition) of Official Form 410A and would replace the first line (which currently asks for "Principal & Interest") with two lines, one for "Principal" and one for "Interest."	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	The amendments would put the burden on the claim holder to identify the elements of its claim.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	
EV 611(d)	The proposed new subdivision (d) would provide standards for the use of illustrative aids.	EV 1006
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness's prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant's principal, hearsay statements made by the declarant or declarant's principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new subdivision (d) of Rule 611.	EV 611

TAB 1E

Legislation That Directly or Effectively Amends the Federal Rules
118th Congress
(January 3, 2023–January 3, 2025)

(Ordered by most recent legislative action; bills with more recent actions first.)

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
A bill to amend title 5, United States Code, to establish St. Patrick's Day as a Federal holiday	**H.R. 1625** *Sponsor:* Fitzpatrick (R-PA)	AP 26, 45; BK 9006; CV 6; CR 45, 56	Bill text not currently available	• 03/17/2023: Introduced in House; referred to Oversight & Accountability Committee
A bill to provide for media coverage of Federal court proceedings	**S. 833** *Sponsor:* Grassley (R-IA) *Cosponsors:* Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)	CR 53	Bill text not currently available	• 03/16/2023: Introduced in Senate; referred to Judiciary Committee
Facial Recognition and Biometric Technology Moratorium Act of 2023	**H.R. 1404** *Sponsor:* Jayapal (D-WA) *Cosponsors:* 10 Democratic cosponsors **S. 681** *Sponsor:* Markey (D-MA) *Cosponsors:* Merkley (D-OR) Warrant (D-MA) Sanders (I-VT) Wyden (D-OR)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1404/BILLS-118hr1404ih.pdf https://www.congress.gov/118/bills/s681/BILLS-118s681is.pdf **Summary:** Bars admission by federal government of information obtained in violation of bill in criminal, civil, administrative, or other investigations or proceedings (except in those alleging a violation of the bill itself)	• 03/07/2023: H.R. 1404 introduced in House; referred to Judiciary and Oversight & Accountability Committees • 03/07/2023: S. 681 introduced in Senate; referred to Judiciary Committee
Asylum and Border Protection Act of 2023	**H.R. 1183** *Sponsor:* Johnson (R-LA)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1183/BILLS-118hr1183ih.pdf **Summary:** Requires "an audio or audio visual recording of interviews of aliens subject to expedited removal" and requires the recording's consideration "as evidence in any further proceedings involving the alien"	• 02/24/2023: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Bankruptcy Venue Reform Act	**H.R. 1017** *Sponsor:* Lofgren (D-CA) *Cosponsor:* Buck (R-CO)	BK	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1017/BILLS-118hr1017ih.pdf **Summary:** Requires rulemaking under 28 U.S.C. § 2075 "to allow any attorney representing a governmental unit to be permitted to appear on behalf of the governmental unit and intervene without charge, and without meeting any requirement under any local court rule relating to attorney appearances or the use of local counsel, before any bankruptcy court, district court, or bankruptcy appellate panel."	• 02/14/2023: Introduced in House; referred to Judiciary Committee
Write the Laws Act	**S. 329** *Sponsor:* Paul (R-KY)	All	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s329/BILLS-118s329is.pdf **Summary:** Would prohibit "delegation of legislative powers" to any entity other than Congress. Definition of "delegation of legislative powers" could be construed to extend to the Rules Enabling Act. Would not nullify previously enacted rules, but anyone aggrieved by a new rule could bring action seeking relief from its application.	• 02/09/2023: Introduced in Senate; referred to Homeland Security & Government Affairs Committee
Supreme Court Ethics, Recusal, and Transparency Act of 2023	**H.R. 926** *Sponsor:* Johnson (D-GA) *Cosponsors:* Nadler (D-NY) Quigley (D-IL) Cicilline (D-RI) **S. 359** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 13 Democratic or Democratic-caucusing cosponsors	AP, BK, CV, CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr926/BILLS-118hr926ih.pdf https://www.congress.gov/118/bills/s359/BILLS-118s359is.pdf **Summary:** Requires rulemaking (through Rules Enabling Act process) of gifts, income, or reimbursements to justices from parties, amici, and their affiliates, counsel, officers, directors, and employees, as well as lobbying contracts and expenditures of substantial funds by these entities in support of justices' nomination, confirmation, or appointment. Requires expedited rulemaking (through Rules Enabling Act process) to allow court to prohibit or strike amicus brief resulting in disqualification of justice, judge, or magistrate judge.	• 02/09/2023: S. 359 introduced in Senate; referred to Judiciary Committee • 02/09/2023: H.R. 926 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Federal Police Camera and Accountability Act	**H.R. 843** *Sponsor:* Norton (D-DC) *Cosponsors:* Beyer (D-VA) Torres (D-NY)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr843/BILLS-118hr843ih.pdf **Summary:** Among other things, bars use of certain body-cam footage as evidence after 6 months if retained solely for training purposes; creates evidentiary presumption in favor of criminal defendants and civil plaintiffs against the government if recording or retention requirements not followed; bars use of federal body-cam footage from use as evidence if taken in violation of act or other law.	• 02/06/2023: Introduced in House; referred to Judiciary Committee
Relating to a National Emergency Declared by the President on March 13, 2020	**H. J. Res. 7** *Sponsor:* Gosar (R-AZ) *Cosponsors:* 68 Republican cosponsors	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hjres7/BILLS-118hjres7rfs.pdf **Summary:** Terminates the national emergency declared March 13, 2020, by President Trump. Would terminate authority under CARES Act to hold certain criminal proceedings by videoconference or teleconference.	• 02/02/2023: Received in Senate; referred to Finance Committee • 02/01/2023: Passed House (229–197) • 01/09/2023: Introduced in House
Restoring Judicial Separation of Powers Act	**H.R. 642** *Sponsor:* Casten (D-IL) *Cosponsor:* Blumenauer (D-OR)	AP	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr642/BILLS-118hr642ih.pdf **Summary:** Would give the D.C. Circuit certiorari jurisdiction over cases in the court of appeals and direct appellate jurisdiction over three-district-judge cases. A D.C. Circuit case "in which the United States or a Federal agency is a party" and cases "concerning constitutional interpretation, statutory interpretation of Federal law, or the function or actions of an Executive order" would be assigned to a multicircuit panel of 13 circuit judges, of which a 70% supermajority would need to affirm a decision invalidating an act of Congress. Would likely require new rulemaking for the panel and its interaction with the D.C. Circuit and new appeals structure.	• 01/31/2023: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
No Vaccine Passports Act	**S. 181** *Sponsor:* Cruz (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s181/BILLS-118s181is.pdf **Summary:** Prohibits disclosure by certain individuals of others' COVID vaccination status absent express written consent; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings; imposes civil and criminal penalties on disclosure	• 01/31/2023: Introduced in Senate; referred to Health, Education, Labor & Pensions Committee
No Vaccine Mandates Act of 2023	**S. 167** *Sponsor:* Cruz (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s167/BILLS-118s167is.pdf **Summary:** Prohibits disclosure by certain individuals of others' COVID vaccination status absent express written consent; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings; imposes civil and criminal penalties on disclosure	• 01/31/2023: Introduced in Senate; referred to Judiciary Committee
See Something, Say Something Online Act of 2023	**S. 147** *Sponsor:* Manchin (D-WV) *Cosponsor:* Cornyn (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s147/BILLS-118s147is.pdf **Summary:** Prohibits disclosure by providers of interactive computer services of certain orders related to reporting of suspicious transmission activity; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings	• 01/30/2023: Introduced in Senate; referred to Commerce, Science & Transportation Committee
Protecting Individuals with Down Syndrome Act	**H.R. 461** *Sponsor:* Estes (R-KS) *Cosponsors:* 19 Republican cosponsors **S. 18** *Sponsor:* Daines (R-MT) *Cosponsors:* 24 Republican cosponsors	CV 5.2; BK 9037; CR 49.1	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr461/BILLS-118hr461ih.pdf https://www.congress.gov/118/bills/s18/BILLS-118s18is.pdf **Summary:** Would require use of pseudonym for and redaction or sealing of filings identifying women upon whom certain abortions are performed.	• 01/24/2023: H.R. 461 introduced in House; referred to Judiciary Committee • 01/23/2023: S. 18 introduced in Senate; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Lunar New Year Day Act	**H.R. 430** *Sponsor:* Meng (D-NY) *Cosponsors:* 57 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr430/BILLS-118hr430ih.pdf **Summary:** Would make Lunar New Year Day a federal holiday.	• 01/20/2023: Introduced in House; referred to Oversight & Accountability Committee
Back the Blue Act of 2023	**H.R. 355** *Sponsor:* Bacon (R-NE) *Cosponsors:* 17 Republican cosponsors	§ 2254 Rule 11	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr355/BILLS-118hr355ih.pdf **Summary:** Would amend Rule 11 of the Rules Governing Section 2254 Cases to bar application of Civil Rule 60(b)(6) in proceedings under 28 U.S.C. § 2254(j).	• 01/13/2023: Introduced in House; referred to Judiciary Committee
Rosa Parks Day Act	**H.R. 308** *Sponsor:* Sewell (D-AL) *Cosponsors:* 31 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr308/BILLS-118hr308ih.pdf **Summary:** Would make Rosa Parks Day a federal holiday.	• 01/12/2023: Introduced in House; referred to Oversight & Accountability Committee
Fourth Amendment Restoration Act	**H.R. 237** *Sponsor:* Biggs (R-AZ)	CR 41; EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr237/BILLS-118hr237ih.pdf **Summary:** Would require warrant under Crim. Rule 41 to electronically surveil U.S. citizen, search premises or property exclusively owned or controlled by a U.S. citizen, use of pen register or trap-and-trace device against U.S. citizen, production of tangible things about U.S. citizen to obtain foreign intelligence information, or to target U.S. citizen for acquiring foreign intelligence information. Would require amendment of 41(c) to add these actions as actions for which warrant may issue. Would bar use of information about U.S. citizen collected under E.O. 12333 in any criminal, civil, or administrative hearing or investigation, as well as information acquired about a U.S. citizen during surveillance of non-U.S. citizen.	• 01/10/2023: Introduced in House; referred to Judiciary and Intelligence Committees

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Limiting Emergency Powers Act of 2023	**H.R. 121** *Sponsor:* Biggs (R-AZ)	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr121/BILLS-118hr121ih.pdf **Summary:** Would limit emergency declarations to 30 days unless affirmed by act of Congress. Current COVID-19 emergency would end no later than 2 years after enactment date; would terminate authority under CARES Act to hold certain criminal proceedings by videoconference or teleconference.	• 01/09/2023: Introduced in House; referred to Transportation & Infrastructure, Foreign Affairs, and Rules Committees
Kalief's Law	**H.R. 44** *Sponsor:* Jackson Lee (D-TX)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr44/BILLS-118hr44ih.pdf **Summary:** Imposes strict requirements on the admission of statements by youth during custodial interrogations into evidence in criminal or juvenile-delinquency proceedings against the youth	• 01/09/2023: Introduced in House; referred to Judiciary Committee

TAB 2

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Proposed Rule on Illustrative Aids and the Treatment of "Demonstrative Evidence"
Date: April 1, 2023

At its Spring, 2022 meeting, the Advisory Committee unanimously approved a possible amendment to Rule 611 that would set standards for allowing the use of illustrative aids, and would distinguish illustrative aids from demonstrative evidence. The Standing Committee unanimously approved the proposed amendment for release for public comment.

At the Fall 2022 meeting, the Committee convened a panel of experienced judges and lawyers to provide input to the Committee about the proposed amendment. Much concern was expressed about the proposal --- almost all of it about the proposed notice requirement. After the panel discussion, at the Committee meeting, the Committee voted to delete the notice requirement, but was still unanimously in favor a rule that would provide guidance about the use of illustrative aids and the distinction between demonstrative evidence and illustrative aids, which are not evidence.

In addition to the comments received at the panel discussion in Arizona, the Committee has received 137 public comments on the proposed rule.

This memo is divided into five parts. Part One sets forth the amendment and committee note as it has been issued for public comment. Part Two discusses the problems from the case law and the need for the amendment. Part Three discusses the comments received at the Arizona conference and in the public comment and analyzes whether changes need to be made to the proposal in light of those comments. Part Four sets forth possible language that would implement changes to the amendment in light of the comments received, and in response to certain questions left open in the amendment released for public comment. Part Five is a summary of the public comments received on the proposed amendment.

I. The Proposed Amendment and Committee Note as Issued for Public Comment

The proposed amendment and committee note provide as follows:

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

* * * * *

(d) Illustrative Aids.

(1) ***Permitted Uses.*** The court may allow a party to present an illustrative aid to help the finder of fact understand admitted evidence if:

(A) its utility in assisting comprehension is not [substantially][1] outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time; and

(B) all parties are given notice and a reasonable opportunity to object to its use, unless the court, for good cause, orders otherwise.

(2) ***Use in Jury Deliberations.*** An illustrative aid must not be provided to the jury during deliberations unless:

(A) all parties consent; or

(B) the court, for good cause, orders otherwise.

(3) ***Record***. When practicable, an illustrative aid that is used at trial must be entered into the record.

Committee Note

The amendment establishes a new subdivision within Rule 611 to provide standards for the use of illustrative aids. The new rule is derived from Maine Rule of Evidence 616. The term "illustrative aid" is used instead of the term "demonstrative evidence," as that latter term is vague and has been subject to differing interpretation in the courts.

[1] "Substantially" was placed in brackets to invite discussion about how the balancing test should be set. See the discussion advocating including the word "substantially" below.

"Demonstrative evidence" is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact.

Writings, objects, charts, or other presentations that are used during the trial to provide information to the factfinder thus fall into two separate categories. The first category is evidence that is offered to prove a disputed fact; admissibility of such evidence is dependent upon satisfying the strictures of Rule 403, the hearsay rule, and other evidentiary screens. Usually the jury is permitted to take this substantive evidence to the jury room, to study it, and to use it to help determine the disputed facts.

The second category—the category covered by this rule—is information that is offered for the narrow purpose of helping the factfinder to understand what is being communicated to them by the witness or party presenting evidence. Examples include blackboard drawings, photos, diagrams, powerpoint presentations, video depictions, charts, graphs, and computer simulations. These kinds of presentations, referred to in this rule as "illustrative aids," have also been described as "pedagogical devices" and sometimes (and less helpfully) "demonstrative presentations"—that latter term being unhelpful because the purpose for presenting the information is not to "demonstrate" how an event occurred but rather to help the finder of fact understand evidence that is being or has been presented.

A similar distinction must be drawn between a summary of voluminous, admissible information offered to prove a fact, and a summary of evidence that is offered solely to assist the trier of fact in understanding the evidence. The former is subject to the strictures of Rule 1006. The latter is an illustrative aid, which the courts have previously regulated pursuant to the broad standards of Rule 611(a), and which is now to be regulated by the more particularized requirements of this Rule 611(d).

While an illustrative aid is by definition not offered to prove a fact in dispute, this does not mean that it is free from regulation by the court. Experience has shown that illustrative aids can be subject to abuse. It is possible that the illustrative aid may be prepared to distort the evidence presented, to oversimplify, or to stoke unfair prejudice. This rule requires the court to assess the value of the illustrative aid in assisting the trier of fact to understand the evidence. Cf. Fed.R.Evid. 703; see Adv. Comm. Note to the 2000 amendment to Rule 703. Against that beneficial effect, the court must weigh most of the dangers that courts take into account in balancing evidence offered to prove a fact under Rule 403—one particular problem being that the illustrative aid might appear to be substantive demonstrative evidence of a disputed event. If those dangers [substantially] outweigh the value of the aid in assisting the trier of fact, the trial court should exercise its discretion to prohibit—or modify—the use of the illustrative aid. And if the court does allow the aid to be presented at a jury trial, the adverse party may ask to have the jury instructed about the limited purpose for which the illustrative aid may be used. Cf. Rule 105.

One of the primary means of safeguarding and regulating the use of illustrative aids is to require advance disclosure. Ordinary discovery procedures concentrate on the evidence that will be presented at trial, so illustrative aids are not usually subject to discovery. Their sudden appearance may not give sufficient opportunity for analysis by other parties, particularly if they are complex. The amendment therefore provides that illustrative aids prepared for use in court must be disclosed in advance in order to allow a reasonable opportunity for objection—unless the court, for good cause, orders otherwise. The rule applies to aids prepared either before trial or during trial before actual use in the courtroom. But the timing of notice will be dependent on the nature of the illustrative aid. Notice as to an illustrative aid that has been prepared well in advance of trial will differ from the notice required with respect to a handwritten chart prepared in response to a development at trial. The trial court has discretion to determine when and how notice is provided.

Because an illustrative aid is not offered to prove a fact in dispute, and is used only in accompaniment with testimony or presentation by the proponent, the amendment provides that illustrative aids are not to go to the jury room unless all parties consent or the court, for good cause, orders otherwise. The Committee determined that allowing the jury to use the aid in deliberations, free of the constraint of accompaniment with witness testimony or party presentation, runs the risk that the jury may misinterpret the import, usefulness, and purpose of the illustrative aid. But the Committee concluded that trial courts should have some discretion to allow the jury to consider an illustrative aid during deliberations; that discretion is most likely to be exercised in complex cases, or in cases where the jury has requested to see the illustrative aid. If the court does exercise its discretion to allow the jury to review the illustrative aid during deliberations, the court must upon request instruct the jury that the illustrative aid is not evidence and cannot be considered as proof of any fact.

While an illustrative aid is not evidence, if it is used at trial it must be marked as an exhibit and made part of the record, unless that is impracticable under the circumstances.

II. Background on the Need for the Amendment

Illustrative aids are used in virtually every trial, yet there is no Federal Rule that explicitly covers their use. This is not to say that courts are without power to control illustrative aids, as Rule 611(a) provides the court broad authority to run the trial. But technically, Rule 611(a) could be read to be inapplicable, as it grants control over "presenting evidence" --- and illustrative aids are not evidence. And the same is true for Rule 403, which requires the court to assess the "probative value" of "evidence." In any case, it is clear that there is no Federal Rule that specifically treats the use of illustrative aids.

The Committee has determined that a specific rule governing illustrative aids would be very helpful, because among other things courts have often failed to recognize the distinction between illustrative aids (which are not evidence), demonstrative evidence (offered to prove a fact), and summaries of voluminous evidence (which are evidence, as compared to illustrative summaries, which are not).

The problem of distinguishing between illustrative aids and demonstrative evidence is illustrated in *Baugh v. Cuprum S.A. de C.V.,* 730 F.3d 701, 703 (7th Cir. 2013) (Hamilton, J.). In *Baugh,* the trial court allowed an "exemplar" of the ladder involved in the accident at issue to be presented at trial, but only for the purpose of helping the defense expert to illustrate his testimony about how ladders operate. Over objection, the trial court allowed the jury to inspect and walk on the ladder during deliberations. The Seventh Circuit found that while allowing the ladder to be used for illustrative purposes was within the court's discretion, it was error to allow it to be provided to the jury for use in its deliberations. The court drew a line between exhibits admitted into evidence to prove a fact, and presentations used only to illustrate a party's argument or a witness's testimony. The court stated that the "general rule is that materials not admitted into evidence simply should not be sent to the jury for use in its deliberations."

The *Baugh* court thought that the problem it faced might have been caused by the vagueness of the term "demonstrative evidence":

> The term "demonstrative" has been used in different ways that can be confusing and may have contributed to the error in the district court. In its broadest and least helpful use, the term "demonstrative" is used to describe any physical evidence. *See, e.g., Finley v. Marathon Oil Co*., 75 F.3d 1225, 1231 (7th Cir.1996) (using "demonstrative evidence" as synonym for physical exhibits). . . .
>
> As Professors Wright and Miller lament, the term, "demonstrative" has grown "to engulf all the prior categories used to cover the use of objects as evidence.... As a result, courts sometimes get hopelessly confused in their analysis." 22 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 5172 (2d ed.); see also 5 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 9:22 (3d ed.) (identifying at least three different uses and definitions of the term "demonstrative" evidence, ranging from all types of evidence, to evidence that leaves firsthand sensory impressions, to illustrative charts and summaries used to explain or interpret substantive evidence). The treatises struggle to put together a consistent definition from the multiple uses in court opinions and elsewhere. See 2 McCormick on Evidence § 212 n. 3 (Kenneth S. Broun ed., 7th ed.) (recognizing critique of its own use of "single term 'demonstrative evidence,' " noting that this approach "joins together types of evidence offered and admitted on distinctly different theories of relevance").

The *Baugh* court declined to "reconcile" all the definitions of "demonstrative" evidence but did delineate the distinction between exhibits that are admitted into evidence to prove a fact and illustrative aids that are introduced only to help the factfinder understand a witness's testimony or a party's argument. Many courts have been confused about this evidence/not-evidence distinction.[2] Others courts, similarly, operate under an incorrect definition of "demonstrative evidence."[3]

The goal of an amendment is to provide a distinction in the rules between demonstrative evidence and illustrative aids, and to set forth standards for when illustrative aids can be used at trial. The amendment ties together with an amendment to Rule 1006, which would provide a clear distinction between summaries of voluminous evidence (covered by Rule 1006) and illustrative/pedagogical summaries (covered by Rule 611(d)).

A. General Description of the Case Law

What follows is a general description of the case law on "demonstrative evidence" and "illustrative aids" with the proviso that courts don't always get the distinctions right:

> 1. For evidence offered to prove a disputed issue of fact by demonstrating how it occurred, the demonstration must 1) withstand a Rule 403 analysis of probative value balanced against prejudicial effect; 2) satisfy the hearsay rule; and 3) be authenticated. Rule 403 is usually the main rule that comes into play when substantive "demonstrative evidence" is used. The most important question will be whether the demonstration is similar enough to the facts in dispute that it withstands the dangers of any unfair prejudice and jury confusion it presents.[4]

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[2] See, e.g., *Lillie v. United States*, 953 F.2d 1188, 1190 (10th Cir.1992) ("[A]ny kind of presentation to the jury or the judge to help the fact finder determine what the truth is and assimilate and understand the evidence is itself evidence.").

[3] For examples, see *United States v. Protho*, 41 F.4th 812, 822 (7th Cir. 2022) (referring confusingly to "demonstrative videos [the expert] created as pedagogical summaries to aid the jury in its understanding of admitted evidence."); *GCIU-Emp'r Ret. Fund v. Quad Graphics, Inc.,* 2019 WL 7945594, at *4 (C.D. Cal.) ("Demonstrative evidence is physical evidence that has no independent probative value, but which illustrates or demonstrates a party's testimony or theory of the case.... [It] is simply used as a testimonial aid."); *Bayes v. Biomet, Inc.,* 2022 U.S. Dist. Lexis 171325, at *13 (E.D. Mo.) ("demonstrative exhibits are not substantive evidence").

[4] *See, e.g., United States v. Stewart-Carasquillo,* 997 F.3d 408 (1st Cir. 2021) (finding no error in excluding a proposed demonstration of a disputed event --- whether one person could pull large bales of drugs out of the ocean and into a boat --- because the purported demonstration differed from the actual circumstances in substantial ways); *Krause v. County of Mohave,* 459 F.Supp.3d 1258, 1272 (D. Ariz. 2020) ("At a minimum, the animation's proponent must show the computer simulation fairly and accurately depicts what it represents.").

If the evidence satisfies Rule 403 and other evidentiary screens, it will be submitted to the jury for consideration as substantive evidence during deliberations. [But as evidence of confusion on this point, see *United States v. Towns,* 913 F.2d 434 (7th Cir. 1990), where a mask and a gun were admitted as substantive evidence in a bank robbery prosecution, as instrumentalities of the crime, but the trial judge refused to allow them to go to the jury during deliberations, and the appellate court affirmed.[5]]

2. For information offered only for pedagogical or illustrative purposes, the trial judge has discretion to allow it to be presented, after considering how much it will actually assist the jury in understanding a witness's testimony or a party's presentation, and balancing that helpfulness against the risk that the jury might misuse the information as evidence of a fact --- as well as other factors such as confusion and delay. This balance is conducted by most courts explicitly under Rule 611(a), which provides the trial court the authority to exercise "reasonable control over the mode and order of examining witnesses and presenting evidence"; and Rule 403 is sometimes cited as well.[6] The bottom line is that the aid cannot be misrepresentative, as that could lead the factfinder to draw improper inferences --- an important concern is whether the factfinder might treat the illustrative aid

[5] *See also Dachman v. Grau,* 2022 U.S. Dist. LEXIS 172836 (D.P.R.) (admitting a chart as "probative" "demonstrative evidence" but declaring that "in keeping with the designation of the chart as demonstrative evidence, it will not be admitted into evidence or go to the jury room").

[6] *See, e.g. United States v. Mendez*, 643 F. App'x 418, 423–24 (5th Cir. 2016) ("The photographs were part of a demonstrative aid to assist the jury in following along during the foreign language conversations. They are thus subject to Fed.R.Evid. 611."); *Apple, Inc. v. Corellium, LLC,* 2021 WL 2712131 (S.D. Fla. 2021) (allowing the use of an illustrative aid, relying on Rule 611(a), and noting that the aid would be useful in explaining a difficult concept to the jury; court refers to it as a "demonstrative aid"); *United States v. Edwards*, 2021 US Dist LEXIS 45421 (N.D. Ill.) (firearm was properly used as an aid to illustrate "racking" of a gun; the government made clear that the gun was not the defendant's and was not used in any crime; court relies on Rule 611(a) and refers to the use of the gun as a "demonstrative aid"); *United States v. Kaley,* 760 F. App'x 667, 681–82 (11th Cir. 2019) (finding under Rule 611(a) and Rule 403 that the illustrative aid fairly represented the evidence); *United States v. Crinel*, 2017 WL 490635, at *11–12 & Att.2 (E.D. La. Feb. 7, 2017) (directing modification to pedagogical aid so that it is not misleading, relying on Rule 611); *Johnson v. Blc Lexington Snf*, 2020 US Dist LEXIS 233263 (E.D. Ky.) (barring the use of an inflammatory and conclusory illustrative aid, sought to be used during opening and closing argument; relying on Rule 611(a) as requiring the court to "police the line between demonstration of evidence and demonization of an opposing party or witness"); *In re RFC*, 2020 US Dist LEXIS 23482 (D. Minn.) (chart offered as a pedagogical device was precluded, because it inaccurately summarized data in a database, and mischaracterized many transactions; relying on Rule 611).

as demonstrative evidence, i.e., proof of a fact.[7] These concerns about prejudicial illustrative aids apply equally to bench trials and jury trials.[8]

If the illustrative aid is sufficiently helpful and not substantially misleading or otherwise prejudicial, it may be presented at trial, but, as the court held in *Baugh*, in most courts *it may not be given to the jury for use in deliberations.*[9] Though some judges believe they have the discretion to allow the jury to use pedagogical aids, powerpoints, etc. in their deliberations, over a party's objection.

The case of *Rodriguez v. Vil. of Port Chester*, 2021 US Dist LEXIS 79597 (S.D.N.Y.), provides a good example of a court's approach to illustrative aids. The defendants sought to preclude evidence of a medical illustration of the plaintiff's injuries. The plaintiff intended to use the illustration as an aid to "help the jury understand the anatomy of the ankle and exactly which bones were broken and how the injury affected the entirety of the ankle." The defendants argued that the illustration was inappropriate because it constituted the artist's "interpretive . . . spin to verbal descriptions of x-rays and CT scans." The court found this argument meritless and concluded as follows:

> In determining the admissibility of . . . exhibits illustrating witness testimony, courts *must carefully weigh whether the exhibits are unduly prejudicial because the jury will interpret them as real-life recreations of substantive evidence that they*

[7] *See, e.g., Fusco v. General Motors Corp.,* 11 F.3d 259, 264 (1st Cir. 1993) (video offered as an illustrative aid was properly precluded because it "rife with misunderstanding because it looked "very much like a recreation of the evidence that gave rise to trial" and yet was not similar enough to the actual event to be admissible as substantive evidence); *United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991) (the defendant's summaries were properly excluded under Rule 403 because they did not fairly represent the evidence); *Arup Laboratories, Inc. v. Pacific Medical Laboratory Inc.*, 2022 WL 3082908, at *11 (D.Utah) (illustrative aid precluded because it is not a "fair and accurate" representation of the evidence); *United States v. Crinel*, 2017 WL 490635, at *11–12 & Att.2 (E.D. La. Feb. 7, 2017) (directing modification to pedagogical aid so that it is not misleading).

[8] *United States ex. rel. Morrell v. NortonLifeLock, Inc.* 2022 WL 278773 (D.D.C. 2022) (court in bench trial reviews bullet points in PowerPoints that will be used at trial as illustrative evidence, and excludes some as improper argument); *Houser v. Oceaneering Intl, Inc.,* 2022 WL 3162205 (W.D. La.) (illustrative aid precluded in a bench trial because "the plaintiff will not be able to sustain his burden of showing that the test/experiment depicted in the video is a fair and accurate depiction or representation of whatever it purports to depict or represent" and because the video was not sufficiently instructive).

[9] *See, e.g., United States v. Buck*, 324 F.3d 786, 791 (5th Cir.2003) ("It was proper for the diagram to be shown to the jury to assist in its understanding of testimony and documents that had been produced, but the diagram should not have been admitted as an exhibit or taken to the jury room."); *United States v. Cox,* 633 F.2d 871, 874 (9th Cir. 1980) ("It would appear to be the better practice to have excluded the illustrative evidence from the jury room. The role of such evidence is preferably that of a testimonial aid for a witness or as an aid to counsel during argument. Otherwise evidence of this sort may cause error in that it can present an unfair picture of the testimony at trial and can be a potent weapon for harm due to its great persuasiveness.").

must accept as true. . . . However, the Court can [minimize] such concerns through a limiting instruction explaining that the . . . exhibit is not substantive evidence, and simply because it was presented through a doctor does not replace the jurors' obligations to judge the facts themselves.

The Court therefore declines to preclude use of this illustration . . . However, the Court reserves ruling on its admissibility until trial, as its propriety as an exhibit will depend on whether it . . . accurately reflects the testimony and opinion of the witness whose testimony it is meant to explain.[10]

3. There is another related type of presentation that raises the substantive/pedagogical line: summaries and charts. Here, the line is the same though there is an additional rule involved: Rule 1006 covers summaries if they are to be admitted substantively. The conditions for admission under Rule 1006, when the rule is properly applied, are: 1) the underlying information must be substantively admissible (though not necessarily admitted); 2) the evidence that is summarized must be too voluminous to be conveniently examined in court; 3) the originals or duplicates must be presented for examination and copying by the adversary.[11] Rule 1006 summaries of the evidence are distinct from illustrative aids that are summaries; the latter are not offered into evidence to prove a fact.[12]

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[10] For other examples of recent court treatment of illustrative aids, see, e.g., *United States v. Nelson*, 2021 US Dist LEXIS 71421 (N.D. Cal. Apr. 13, 2021) (the government's illustrative aid regarding cellphone company records would help the jury make sense of that evidence; but an express statement in one of the slides that two defendants were "traveling together" suggested a degree of concerted action that was not supported by the underlying data, and was struck pursuant to Rule 403); *King v. Skolness (In re King)*, 2020 Bankr LEXIS 2866 (Bankr. N.D. Ga.): The defendants sought to introduce a spreadsheet created by illustrating certain transactions implicating that the money paid by the defendants was directly spent by the plaintiff for his own purposes. The court found that the spreadsheet was not admissible as an illustrative aid because "it presents cherry picked information to present a conclusion about where the money included therein was spent" and so the spreadsheet was "an ineffective method for determining the truth of the evidence presented as well as highly prejudicial to the Plaintiff."

[11] Note the proviso, "when properly applied." The Committee has a separate amendment on Rule 1006 for final action this meeting --- that proposed amendment addresses the line between summaries of admissible evidence under Rule 1006 and illustrative aids, which are not evidence, and specifies that illustrative aids are to be treated under the new rule, if enacted, on illustrative aids.

[12] *See, e.g., United States v. James,* 955 F3d 336 (3d Cir. 2020) (the defendant's objection to a government presentation under Rule 1006 was misplaced because it was used only as an illustrative aid; noting rather optimistically that "this is hardly a subtle evidentiary distinction"); *United States v. Posada-Rios*, 158 F.3d 832, 835 (5th Cir. 1998) ("Since the government did not offer the charts into evidence and the trial court did not admit them, we need not decide whether … they were not admissible under Fed. R. Evid. 1006 … . Where, as here, the party using the charts does not offer them into evidence, their use at trial is not governed by Fed. R. Evid. 1006."); *White Indus. v. Cessna*

Summaries offered for illustrative purposes are permissible subject to the court's discretion as currently exercised under Rule 611(a).[13] That is to say they may be considered by the factfinder (but not as evidence) so long as they are consistent with the evidence, not misleading and helpful to the jury in understanding the evidence. For example, in *United States v. Wood*, 943 F.2d 1048 (9th Cir. 1991), a complex tax fraud prosecution, the trial court allowed a government witness to testify to his opinion of Wood's tax liability, as summarized by two charts, but prohibited the defendant's witness from using his own charts. The court found that Rule 1006 was not applicable, because the charts were pedagogical devices and not substantive evidence. The court found no error in allowing the use of the prosecution's chart while prohibiting the use of the defense's chart, because the prosecution's chart was supported by the proof, while the chart prepared by the defense witness was based on an incomplete analysis.[14]

One distinction between summaries under Rule 1006 and illustrative summaries is that the latter can only be used *after* the underlying evidence has been introduced. *See, e.g., Fairholme Funds, Inc., v. Fed. House. Fin. Agency,* 2022 WL 13937460 (D.D.C.) (where the chart is illustrative, "and plaintiffs do not argue that the home price index data are sufficiently voluminous to warrant summarization under Rule 1006, the Court will not

Aircraft Co., 611 F. Supp. 1049 (W.D. Mo. 1985) ("[T]here is a distinction between a Rule 1006 summary and a so-called 'pedagogical' summary. The former is admitted as substantive evidence, without requiring that the underlying documents themselves be in evidence; the latter is simply a demonstrative aid which undertakes to summarize or organize other evidence already admitted.").

[13] *Does I-XIX v. Boy Scouts of Am.*, 2019 WL 2448318, at *2 (D. Idaho June 11, 2019) (noting that "a summary prepared by a witness from his own knowledge to assist the jury in understanding or remembering a mass of details is admissible, not under Rule 1006, but under such general principles of good sense as are embodied in Rule 611(a)")

[14] The court in *United States v. Bray*, 139 F.3d 1104, 1111 (6th Cir. 1998), gives some helpful guidance on the use of pedagogical aids, as distinct from summaries that are admitted under Rule 1006:

> We understand the term "pedagogical device" to mean an illustrative aid such as information presented on a chalkboard, flip chart, or drawing, and the like, that (1) is used to summarize or illustrate evidence, such as documents, recordings, or trial testimony, that has been admitted in evidence; (2) is itself not admitted into evidence; and (3) may reflect to some extent, through captions or other organizational devices or descriptions, the inferences and conclusions drawn from the underlying evidence by the summary's proponent. This type of exhibit is more akin to argument than evidence since it organizes the jury's examination of testimony and documents already admitted in evidence. Trial courts have discretionary authority to permit counsel to employ such pedagogical-device "summaries" to clarify and simplify complex testimony or other information and evidence or to assist counsel in the presentation of argument to the court or jury. This court has held that Fed.R.Evid. 611(a) provides an additional basis for the use of such illustrative aids, as an aspect of the court's authority concerning the mode of interrogating witnesses and presenting evidence.

allow Hartman to present her charts summarizing those data unless the data are first offered into evidence."

As stated in *Baugh,* when summaries are offered only for illustration, the general rule is that they should not be submitted to the jury during deliberations. *See, e.g., Pierce v. Ramsey Winch Co.,* 753 F.2d 416, 421 (5th Cir. 1985) (distinguishing between summaries that are admitted under Rule 1006 and "other visual aids that summarize or organize testimony or documents that have already been admitted in evidence"; concluding that summaries admitted under Rule 1006 should go to the jury room with other exhibits but summaries used as visual aids should not be sent to the jury room without the consent of the parties).[15]

It is undeniable that there is significant confusion about the difference between summaries admissible as evidence and summaries that are illustrative aids. For examples, see, e.g., *Arup Laboratories, Inc. v. Pacific Medical Laboratory Inc.,* 2022 WL 3082908, at *11 (D.Utah) (party argues that an exhibit is an admissible "illustrative exhibit under Rule 1006" --- which the court finds "overlooks the fact that illustrative exhibits are not the same as Rule 1006 summaries"); *United States v. Yousef,* 327 F.3d 56 (2nd Cir. 2003) (court holds that charts were properly admitted under Rule 1006 --- but then also holds that the trial judge did not err in informing the jury that the charts were not evidence); *United States v. Buck,* 324 F.3d 786 (5th Cir. 2003) (defendant argued that charts were inadmissible under Rule 1006 because the underlying evidence was not voluminous, but the court found that the chart was properly used as an illustrative aid --- though it noted that the chart was submitted to the jury during deliberations, it found that error to be harmless); *United States v. White,* 737 F.3d 1121 (7th Cir. 2013) (trial court admitted summaries under Rule 1006, instructed the jury that they were not evidence --- then allowed the jury to consider the summaries during deliberations).

B. Submission to the Jury?

One area of confusion and disagreement is over whether the court ever has discretion to send an illustrative aid to the jury over a party's objection. The *Baugh* court found that it was error to do so. *See also United States v. Harms,* 442 F.3d 367, 375 (5th Cir. 2006) (stating that illustrative aids "should not go to the jury room absent consent of the parties"); *United States v. Janati*, 374 F.3d 263, 272–73 (4th Cir. 2004) (pedagogical devices are considered "under the supervision of

[15] *See also United States v. Manahe,* 2023 WL 2314950 (D.Me.) (*"*Generally, a Rule 1006 summary chart is secondary evidence used as a substitute for the originals and thus can be used during jury deliberation, while a Rule 611(a) summary chart is not itself evidence and cannot replace the underlying documents during jury deliberation because of its argumentative nature.").

the district court under Rule 611(a), and in the end they are not admitted as evidence"). But *United States v. Robinson*, 872 F.3d 760, 779–80 (6th Cir. 2017), suggests some disagreement about the discretion of the trial judge to send illustrative aids to the jury room. In that case, the defendant argued that that the district court abused its discretion when it sent illustrative aids to the jury during deliberations; the aids had been displayed to the jury during the testimony of a government witness but had not been admitted into evidence. Over a defense objection, the district court sent these aids to the jury in response to the jury's request to have them, but also read a pattern jury instruction stating that the illustrative aids "were offered to assist in the presentation and understanding of the evidence" and "[were] not evidence [themselves] and must not be considered as proof of any facts." The Sixth Circuit stated that "the law is unclear as to whether it is within a district court's discretion to provide a deliberating jury with demonstrative aids that have not been admitted into evidence." The court found it unnecessary to decide this point because any error was harmless given that the summaries sent to the jury merely reiterated evidence already admitted at trial.[16]

Moreover, there are courts that have stated that the "better practice" to keep illustrative aids from the jury room but have found that it is not error to submit them for deliberation if the trial court gives a limiting instruction that they are not evidence. *See, e.g., United States v. Cox,* 633 F.2d 871, 874 (9th Cir. 1980).

The proposed amendment sets forth, as a default rule, that illustrative aids are not to be submitted to the jury, but leaves discretion to the court to allow it.

C. Benefits of a Rule Governing Illustrative Aids

The major benefit of the amendment is that it will provide some clarity and procedural regulation --- and user-friendliness --- to the use of illustrative aids. It will create a convenient source for standards governing the use of illustrative aids --- which currently are found in scattered and inconsistent case law. It would certainly help the neophyte figure out the limits of Rule 1006 and the distinction between summaries admissible under that rule and illustrative aids. And it would mean that the neophyte would not have to master the case law distinguishing "demonstrative evidence" offered to prove a fact from other visual aids that are offered only to illustrate an expert's opinion or the party's argument --- a daunting problem because, as discussed above, the courts use the term "demonstrative evidence" quite loosely. It is undeniable that the terms used are often slippery and vague, and that mistakes are sometimes made, as in *Baugh.*

[16] In *Verizon Directories Corp. v. Yellow Book USA, Inc.,* 331 F. Supp. 2d 136, 140 (E.D.N.Y. 2004), Judge Jack Weinstein also suggested that pedagogical devices and summaries not within Rule 1006 could be admitted into evidence and sent to the jury room in appropriate cases.

Probably the biggest benefit to the rule is to provide a nomenclature that will make this whole area easier to understand. The biggest problem here is the unregulated use of the term "demonstrative." Having a rule that distinguishes illustrative aids from demonstrative evidence could go a long way to alleviating some of the confusion in this area.

III. Possible Changes to the Amendment as Released for Public Comment

This section discusses the colorable arguments made in the public comment regarding the proposed amendment that would add a new Rule 611(d).

A. Deleting the Notice Requirement

Almost all of the negative comment on the rule has been targeted at the notice requirement. Detractors raise the following concerns: 1. Many illustrative aids are extemporaneous and notice cannot be provided; 2. Parties will have to give notice about illustrative aids that they may not ever use; 3. Notice should not be required for closing and opening arguments, because that would intrude into the lawyer's work product; 4. There will be less frequent use of illustrative aids if lawyers have to provide notice, and juries want and need more, not fewer, illustrative aids; and 5. It will give rise to motion practice and will delay the trial.

There are responses to the above arguments. The notice requirement as drafted has a good cause exception. And, because of concerns about applying the notice requirement, the proposed amendment does not in fact apply to illustrative aids used in opening and closing (though that itself is a problem, because aids used during opening and closing are still subject to regulation under the case law, and it is problematic to have a rule cover one kind of illustrative aid, while case law governs another). Moreover, a notice requirement helps to prevent a problematic illustrative aid from being submitted to the jury in the first place, thus avoiding the prejudicial effect that occurs when it is exposed to the jury.

In any case, the antipathy to a notice requirement, from both sides of the v., counsels caution. At the last meeting, the Committee voted to delete the notice requirement, and there is nothing in the interim that would call for changing that decision --- indeed the comments received since the last meeting are every bit as critical of the notice requirement as before.

Deleting the notice requirement from the amendment:

Deleting the notice requirement from the amendment will require a change to both the text and to one paragraph of the committee note.

Here is the change to the text:

(d) Illustrative Aids.

(1) ***Permitted Uses.*** The court may allow a party to present an illustrative aid to help the finder of fact understand admitted evidence if~~:~~

~~**(A)**~~ its utility in assisting comprehension is not [substantially] outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time~~; and~~

~~**(B)** all parties are given notice and a reasonable opportunity to object to its use, unless the court, for good cause, orders otherwise~~.

(2) ***Use in Jury Deliberations.*** An illustrative aid is not evidence and[17] must not be provided to the jury during deliberations unless:

(A) all parties consent; or

(B) the court, for good cause, orders otherwise.

(3) ***Record***. When practicable, an illustrative aid that is used at trial must be entered into the record.

Here is the change to the Committee Note:

*** * ***

One of the primary means of safeguarding and regulating the use of illustrative aids is to require advance disclosure. Ordinary discovery procedures concentrate on the evidence that will be presented at trial, so illustrative aids are not usually subject to discovery. Their sudden appearance may not give sufficient opportunity for analysis and objection by other parties, particularly if they are complex. That said, there is an infinite variety of illustrative aids, and an infinite variety of circumstances under which they might be used. Ample advance notice might be possible for a computer simulation of the accident giving rise to a lawsuit, but no advance notice may be possible for a handwritten chart written by an attorney as a witness responds to the attorney's questions on cross-examination. The amendment therefore leaves it to trial judges to decide whether, when, and how to require advance notice of an illustrative aid. ~~The amendment therefore provides that illustrative aids prepared for use in court must be disclosed in advance in order to allow~~

[17] This helpful addition was suggested by Judge Bates at the previous meeting and was approved by the Committee. It was also suggested in several public comments.

~~a reasonable opportunity for objection – unless the court, for good cause, orders otherwise. The rule applies to aids prepared either before trial or during trial before actual use in the courtroom. But the timing of notice will be dependent on the nature of the illustrative aid. Notice as to an illustrative aid that has been prepared well in advance of trial will differ from the notice required with respect to a handwritten chart prepared in response to a development at trial. The trial court has discretion to determine when and how notice is provided.~~

* * *

These changes have the benefit of emphasizing the importance of notice and yet leaving it to the court on a case by case basis. These changes are included in the proposed final draft in Section IV of this memo.

B. Extending the Rule to Illustrative Aids Used in Opening and Closing Arguments.

Assuming the notice requirement is deleted, discussion at the last Committee meeting indicated that the rule should be extended to cover opening and closing argument. The basic complaint about the application of the rule to openings and closings is that lawyers objected to showing their visual aids to the adversary before they were presented at trial. With that objection lifted, there seems to be no reason to exempt opening and closing argument from the basic requirements of the rule. Just like the illustrative aids used during trial, those used during opening and closing 1) must be helpful and cannot be unduly prejudicial; 2) should not be used by the jury during deliberations; and 3) ought to be entered into the record.

The consequence of excluding opening and closing arguments from the rule is confusion. Illustratives used in opening and closing would *still* be regulated, but under Rule 611(a). *See, e.g., Johnson v. Blc Lexington Snf*, 2020 US Dist LEXIS 233263 (E.D. Ky.) (barring the use of an inflammatory and conclusory illustrative aid, sought to be used during opening and closing argument; relying on Rule 611(a) as requiring the court to "police the line between demonstration of evidence and demonization of an opposing party or witness"). What is the point of having some illustratives governed by one rule and some by another (or, really by case law under an amorphous rule)? There may have been a point to it when Rule 611(d) required notice; but there is no point now.

At the very least, the proposed amendment has to be clear on whether it does or does not apply to openings and closings. The Magistrate Judges' Association, which supported Rule 611(d), nonetheless thought that it had to be clarified as to whether it was covering opening and closing arguments.

Extending the Rule to Opening and Closing Arguments:

Extending the rule to opening and closing arguments requires relatively minor changes to the text and committee note. ***Here is the change to the text (including the deletion of the notice requirement):***

(d) Illustrative Aids.

(1) ***Permitted Uses.*** The court may allow a party to present an illustrative aid to help the finder of fact understand admitted evidence **or a party's argument** if~~:~~

~~**(A)**~~ its utility in assisting comprehension is not [substantially] outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time~~; and~~

~~**(B)** all parties are given notice and a reasonable opportunity to object to its use, unless the court, for good cause, orders otherwise~~.

(2) ***Use in Jury Deliberations.*** An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:

(A) all parties consent; or

(B) the court, for good cause, orders otherwise.

(3) ***Record***. When practicable, an illustrative aid that is used at trial must be entered into the record.

There are several changes to the Committee Note needed to extend the rule to cover opening and closing arguments:

* * *

The second category—the category covered by this rule—is information that is offered for the narrow purpose of helping the factfinder to understand what is being communicated to them by the witness or party presenting evidence **or argument**. Examples include blackboard drawings, photos, diagrams, powerpoint presentations, video depictions, charts, graphs, and computer simulations. These kinds of presentations, referred to in this rule as "illustrative aids," have also been described as "pedagogical devices" and

sometimes (and less helpfully) "demonstrative presentations"—that latter term being unhelpful because the purpose for presenting the information is not to "demonstrate" how an event occurred but rather to help the finder of fact understand evidence that is being or has been presented.

* * *

Because an illustrative aid is not offered to prove a fact in dispute, and is used only in accompaniment with ~~testimony or~~ presentation **of evidence or argument** ~~by the proponent~~, the amendment provides that illustrative aids are not to go to the jury room unless all parties consent or the court, for good cause, orders otherwise. The Committee determined that allowing the jury to use the aid in deliberations, free of the constraint of accompaniment with witness testimony or party presentation, runs the risk that the jury may misinterpret the import, usefulness, and purpose of the illustrative aid. But the Committee concluded that trial courts should have some discretion to allow the jury to consider an illustrative aid during deliberations; that discretion is most likely to be exercised in complex cases, or in cases where the jury has requested to see the illustrative aid. If the court does exercise its discretion to allow the jury to review the illustrative aid during deliberations, the court must upon request instruct the jury that the illustrative aid is not evidence and cannot be considered as proof of any fact.

This rule is intended to govern the use of an illustrative aid at any point in the trial, including opening and closing argument.

While an illustrative aid is not evidence, if it is used at trial it must be marked as an exhibit and made part of the record, unless that is impracticable under the circumstances.

If the Committee determines that opening and closing arguments are not to be covered, no change to the text of the rule needs to be made. But the following paragraph should be added to the Committee Note:

It is important to note that the proposed rule is not intended to regulate visual presentations or other aids that an attorney uses merely to guide the jury through an opening or closing argument. This rule covers illustrative aids designed to assist the jury in understanding evidence; a visual presentation that assists the jury in following an argument is therefore not an illustrative aid within the meaning of this rule.[18]

[18] Note that this explanation simply says that illustrative aids used in opening and closing are not covered because we say so, not because they are any meaningfully different from the illustrative aids that are covered. The note could

C. Is the Rule Hostile to Illustrative Aids?

A number of the public comments essentially state that the amendment is hostile to the use of illustrative aids --- that we should be moving forward to more visual aids, rather than backward, because of the big news that jurors learn visually. If these comments are valid, then some changes need to be made, because the Committee was clearly not intending to be hostile to illustrative aids. Rather, the goal of the rule is clarification.

This section analyzes the "hostility" claims as applied to the amendment's provisions.

1. Notice: A large part of the "hostility" claim was based on the notice requirement. The notice provisions did impose a limitation on the presentation of illustrative aids that may not have existed in every court. So in that sense it was more regulatory than current standards --- which is the argument, i.e., "you are making it harder." Moreover, strict notice requirements are likely, in the long run, to curb the use of illustrative aids, or at least make it more difficult and costly to use them. So the elimination of the notice requirement should go far to address the argument that the rule is hostile to illustrative aids.

2. Balancing Test: The comments do not specifically say that the balancing test indicates hostility toward illustrative aids. Indeed, most of the comments say that they are happy with the current regime in which the judge employs a Rule 403-type analysis to illustrative aids. The balancing test in the amendment would work the same way, it would simply explicate the factors to be employed much more instructively than Rule 403. Rule 403 speaks of the "probative value" of "evidence" --- which is inapt for assessing illustrative aids. So a claim that the Rule 611(d) balancing test itself is somehow hostile to illustrative aids is simply untrue. That said, the way the balancing test is *pitched* in the proposal issued for public comment can be thought to be a bit hostile, because there is no strong presumption of allowability --- and that is because the word "substantially" is placed in brackets. If the word "substantially" is included in the balancing test, then the rule is as embracing of illustrative aids as Rule 403 is as to probative evidence. But if not, then the rule is hostile, at least comparatively to Rule 403.

3. Entering into the record and keeping from the jury: Neither of these procedural requirements could fairly be thought of as being hostile to illustrative aids. The law in most courts is that they don't go to the jury. In some sense the rule is more generous, because it contains a

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also add that illustrative aids used in argument remain covered by Rule 611(a) --- which would be accurate, but also a confession that the rule has left confusion in its wake.

good cause exception to that limitation. And none of the comments focus on entering the aid into the record as problematic or burdensome.

Addressing the Hostility Concern:

Assuming that it is necessary to correct what appears to be an assumption of many lawyers – that the amendment is hostile to illustratives --- there are two further adjustments that can be made to the proposal (*in addition to the very important adjustment of deleting the notice requirement*):

a. Take "substantially" out of its brackets. The balancing test, as issued for public comment, has "substantially" in brackets. If those brackets are lifted, then the balancing test is weighted the same way as Rule 403: it becomes a rule of inclusion. If an illustrative aid does help the jury understand something, then it will be very unlikely to be barred under that test. It is hard to conclude that a rule is hostile to illustrative aids when it contains such a permissive balancing test. (There is more discussion on the "substantially" question in the next section.)

b. Add some language to the Committee Note. Language to the committee note could signal that there is no intent to be more restrictive on the use of illustrative aids. It doesn't have to be much. Here is some possible language:

> The intent of the rule is to clarify the distinction between demonstrative evidence and illustrative aids, and to provide the court with a balancing test specifically directed toward the use of illustrative aids. Illustrative aids can be critically important in helping the trier of fact understand the evidence or argument, and this rule should be read to promote their use.

In addition, one sentence in the current committee note might be thought to give out a "hostile" vibe, and so could easily be deleted (along with a couple of other, unrelated, clarifications):

> While an illustrative aid is by definition not offered to prove a fact in dispute, this does not mean that it is free from regulation by the court. ~~**Experience has shown that illustrative aids can be subject to abuse.**~~ It is possible that the illustrative aid may ~~be prepared to~~ distort the evidence presented, ~~to~~ oversimplify, or ~~to~~ stoke unfair prejudice. This rule requires the court to assess the value of the illustrative aid in assisting the trier of fact to understand the evidence. Cf. Fed.R.Evid. 703; see Adv. Comm. Note to the 2000 amendment to Rule 703. Against that beneficial effect, the court must weigh most of the dangers that courts take into account in balancing evidence offered to prove a fact under Rule 403—one particular problem being that the illustrative aid might improperly appear to be substantive demonstrative evidence of a disputed event. If those dangers

> [substantially] outweigh the value of the aid in assisting the trier of fact, the trial court should exercise its discretion to prohibit—or ~~modify~~ order the modification of[19]—the use of the illustrative aid. And if the court does allow the aid to be presented at a jury trial, the adverse party may ask to have the jury instructed about the limited purpose for which the illustrative aid may be used. Cf. Rule 105.

These changes are implemented in the final draft in Part IV of this memo.

D. Outweigh or Substantially Outweigh?

The rule requires the court to balance the positive value of the illustrative aid --- the degree to which it will assist the jury in understanding evidence --- against the risk of unfair prejudice, confusion and delay. Obviously the analog is to Rule 403, but the innovation is that instead of *probative* value, the benefit to be addressed is *educative* value.

The Rule 403 balancing test applies only if the prejudicial effect *substantially* outweighs the probative value. The question for the Committee is whether the balancing test should be pitched the same way (presumptively admissible, rarely excluded) when it comes to illustrative aids. This question was left in brackets to invite public comment. It did not receive much response from the public, but those who did comment were strongly in favor of including the word "substantially" in the balancing test. As discussed above, some comments argued that without the word "substantially" the rule would be interpreted as hostile to illustrative aids.

The argument against adding "substantially" was best made by Judge David G. Campbell in an email to me:

> I don't think I'd include "substantially" in Rule 611(d)(1)(A). This portion of the rule is talking about "unfair" prejudice, and I see no reason why illustrative aids should be allowed to introduce any degree of unfair prejudice into the trial. They are not evidence. Their purpose is simply to help the jury understand the evidence. It seems to me that such pedagogical tools should never be used to introduce unfair prejudice.[20]

[19] One of the presenters at the Arizona conference commented that the word "modify" sounds like the judge is actually modifying the illustrative. So this slight change to the committee note is made in response to that very careful observation.

[20] See also *Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial* 193 (Federal Judicial Center 2001) (arguing against a "substantial" tilted test because illustrative aids "are supposed to be useful, and they cannot be useful if they do not convey information clearly and without distraction").

Thus the argument can be made that the equities are different when the object of exclusion is an illustrative aid as opposed to probative evidence. Because illustrative aids are not evidence, any cost in their admission is less justified than when probative evidence is being offered. Put another way, we don't want to lose probative evidence unless the negative risks substantially outweigh, because probative evidence promotes the search for truth. But the cost of loss of an illustrative aid is not as serious.

It appears, however, that including the word "substantially" in the Rule 611(d) balancing test is the better solution, for at least two reasons:

> 1) As stated above, using "substantially" is a signal that the rule is welcoming to illustrative aids, not hostile. It will be a rule of inclusion.
>
> 2) There would be difficulty in having two separate balancing tests, one for probative evidence and one for illustrative aids. As the Committee witnessed at the Phoenix symposium, the line between demonstrative evidence and illustrative aids is a fuzzy one. It may be that the same item is both. It would be inviting error to have two balancing tests, one permissive and one less so, when the line between the two will sometimes be in doubt. This point was made by several public comments. As one public comment put it: "it will be confusing to have two different, yet substantially similar, standards—proposed Rule 611(d)'s merely outweighed standard and Rule 403's substantially-outweighed standard."

It should be noted that if the Committee decides *not* to include "substantially," this is an important difference from Rule 403, which would require the committee note to include a reference to the different balancing tests. Something like this:

> The balancing test set forth in the rule is pitched differently than Rule 403. The illustrative aid is precluded if the risk of unfair prejudice outweighs its educative value. The Rule 403 test requires that the risk of unfair prejudice *substantially* outweigh the probative value for the evidence to be excluded. The reason for the difference is that the cost of exclusion under Rule 403 is greater --- a loss of evidence that would further the search for truth. In contrast, the preclusion of an illustrative aid does not result in the loss of evidence.

But, again, adding the word "substantially" will avoid confusion and will do much to counter the impressions of some that the rule is hostile to illustrative aids. The final draft in Part IV lifts the brackets from "substantially".

E. A Definition of Illustrative Aids?

One of the complaints made in the public comments is that the amendment does not provide a definition of illustrative aids. In fact, though, it is rare to find a definition that starts off a rule of evidence.[21] For example, Rule 404 covers character evidence but it doesn't define what a character trait is. Rule 406 covers habit evidence but it provides no definition of habit. The major exception is hearsay, defined in Rule 801, but it wouldn't make much sense to have an entire article on hearsay without defining what it is.

Given the wide variety of illustrative aids, it would be perilous to try to provide a formal definition. But at any rate, the amendment *does* provide a flexible description of what it covers. It states that the court may allow a party "to present an illustrative aid *to help the finder of fact understand admitted evidence or argument*." That is exactly what an illustrative aid is. Further along, the rule emphasizes that an illustrative aid "*is not evidence*." And finally, the committee note provides a further, helpful description (if not definition):

> The second category—the category covered by this rule—is information that is offered for the narrow purpose of helping the factfinder to understand what is being communicated to them by the witness or party presenting evidence. Examples include blackboard drawings, photos, diagrams, powerpoint presentations, video depictions, charts, graphs, and computer simulations. These kinds of presentations, referred to in this rule as "illustrative aids," have also been described as "pedagogical devices" and sometimes (and less helpfully) "demonstrative presentations"—that latter term being unhelpful because the purpose for presenting the information is not to "demonstrate" how an event occurred but rather to help the finder of fact understand evidence that is being or has been presented.

Given all this, the complaint about a lack of formal definition seems to fall flat. Certainly, setting out the committee note description in the text of the rule is problematic. In sum, there appears to be no merit to the complaint that the rule does not provide a sufficient definition of what it covers.

That said, it might be useful to add an introductory sentence to the committee note, which currently dives straight into the distinction between illustrative aids and demonstrative evidence.

[21] Rule 101(b) is a definitions section added in the restyling, but the purpose was exactly that ---restyling. The definitions are intended for convenience, so that other rules did not have to be amended to have exactly consistent terminology.

It might be useful, in this introductory paragraph to indicate what is being covered, in addition to what is being distinguished. Here is a possibility:

> The amendment establishes a new subdivision within Rule 611 to provide standards for the use of illustrative aids. The new rule is derived from Maine Rule of Evidence 616. The term "illustrative aid" is used instead of the term "demonstrative evidence," as that latter term is vague and has been subject to differing interpretation in the courts. **An illustrative aid is any presentation offered not as evidence, but rather to assist the trier of fact to understand other evidence or argument.** "Demonstrative evidence" is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact.

That sentence is added to the final draft committee note, below.

F. Is the Rule Unnecessary?

Some commenters argued that the rule is unnecessary because courts already have the discretion to control the use of illustrative aids. It is true that there is case law already in place that controls the use of illustrative aids, as set forth earlier in this memo. But that critique misses the point of the amendment.

The point is not to create law. Instead, one goal of the rule is to clarify the distinctions between demonstrative evidence, voluminous summaries, and illustrative aids. The problem is not the existing law, per se, but that courts have used the term "demonstrative" and "summary" to cover illustrative aids, and so mistakes are made in how to treat demonstrative evidence and illustrative aids. So the rule is useful because it sets forth distinctions that are muddled in the case law.

The other goal of the rule is to provide a more specific --- and more easily found --- source of authority for regulating illustrative aids. Some courts currently use Rule 403 --- a rule that is not applicable on its face because it is about evidence, which is probably one of the reasons why there is confusion in this area. Courts also use Rule 611, but that is a formless pot of authority, which does not set forth a balancing test to apply --- and also is technically inapplicable because it deals with "examining witnesses and presenting evidence." It would seem that Rule 611(d) is helpful not only because it lays out important distinctions, but also because it has a balancing test particularized to review of illustrative aids. For these reasons, arguments that the law is just fine and should not be changed appear to miss the mark.

G. Should There Be a Cross-Reference to Rule 1006?

The proposed amendment to Rule 1006 (covering summaries of voluminous evidence that themselves are admissible evidence) refers the reader to Rule 611(d) for summaries that are illustrative aids. In other words, the distinction between summaries that are illustrative aids and those that are admissible as evidence is made clear, and the lawyer knows where to go if there is a summary that is an illustrative aid. In its public comment, American Association for Justice (AAJ) suggests that a corresponding directive should be added to the end of Rule 611(d):

> **(4) Summaries of Voluminous Materials Admitted as Evidence**. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible information is governed by Rule 1006.

There is an argument that such a "directional loop" is excessive. Practitioners would probably be looking for the summary rule first if they had a summary to proffer. Rule 1006 is about summaries. In contrast, Rule 611(d) is not about summaries, it is about an illustrative aid. So a reader might think that a direction to another rule is a bit confusing.

There are other examples in which a rule gives a direction to another rule, but there is no "directional loop" found in that other rule. For example, Rule 404 directs the reader to Rule 412 if character evidence is offered in a case involving sexual assault, but there is no reverse direction in Rule 412. Rule 404 also directs the reader to Rules 608 and 609 where character evidence is offered for impeachment, but again there is no reverse instruction in those rules.

On the other hand, it does no harm to add a corresponding provision in Rule 611(d) directing the reader to Rule 1006 for admissible summaries. To the extent that it is a question of style, I checked in with the style consultants, and their preference was not to have a provision in Rule 611(d) (because the rule deals with illustrative aids and not summaries). But they did not feel strongly about it.

The draft below adds the directional subdivision, and it is for the Committee to determine whether it should be included in the final.

H. "The Court May Allow"

As developed to this point in the memo, the first sentence of the amendment provides that:

> The court may allow a party to present an illustrative aid to help the finder of fact understand admitted evidence if its utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

Some comments have complained that "the court may allow" is unduly strict because it means that nothing can happen until the court permits the illustrative aid to be used. Some have gone so far as to say that this means that there will have to be a hearing before every illustrative aid could be used --- leading to the end of illustrative aids as we know them (and, of course, a blatant violation of the Seventh Amendment). These commentators suggest that the language should be changed to something like "a party may use an illustrative aid unless . . ."

With respect, this set of comments is quite overheated, and shows a lack of understanding of how the Federal Rules of Evidence are structured and how they work. Under the Federal Rules of Evidence, everything runs through the court --- but only after an opponent, by objection, has brought the matter to the court's attention. That is why Rule 103 is so important to how the Rules of Evidence are written. In the absence of hen's-teeth-rare plain error, the court rules only upon objection.

Most of the rules of evidence governing admissibility talk about what the court may (or must) do. Under Rule 405, "the court may allow an inquiry into specific instances of [a] person's conduct." Under Rule 406, the court "may admit" habit evidence regardless of whether it is corroborated or whether there was an eyewitness. Under Rule 407, "the court may admit" evidence of a subsequent remedial measure if offered for a proper purpose." Under Rule 408, "the court may admit" evidence offered for a proper purpose. Under Rule 410, "the court may admit" evidence for a proper purpose. The same goes in Rules 411 and 412. Under Rule 608, "the court may allow" inquiry into specific acts for impeachment.

If the court is not allowed to admit evidence, it is labeled as "inadmissible" --- such as in Rules 404, 412, and 608. The spectrum in the rules runs from "inadmissible" to "the court may exclude" (Rule 403) to "the court may admit" to "the court must admit." There is no indication that the term "the court may admit" means that the court is to act like some kind of grumpy landowner, excluding guests from his property. The openness of the term "the court may admit" is especially pronounced when the balancing test for admission is generous --- which it is in Rule 611(d) after the term "substantially" is added to that test. This is why Rule 404(b) is considered a rule of inclusion --- because it gives the court discretion to admit bad act evidence offered for a proper purpose, so long as the inclusive Rule 403 test is satisfied.

In Rule 611(d), the language is "the court may allow" – comparable to Rule 608(b), the term "allow" is used instead of "admit" because no evidence is being admitted. This iteration is

right in line with the other rules and there seems no good reason to change it --- especially given the paragraph in the committee note, referred to above, which states that the rule is not at all intended to be hostile toward the use of illustrative aids. Making the rule inconsistent with the approach of most of the other rules could sow confusion and undermine those other rules.

In sum, there is no reason to change the language "the court may allow" as it is perfectly consistent with other rules of evidence. The alternative is to provide that "a party may use" an illustrative aid but "the court may preclude the use" if the balancing test is not met. That says *exactly the same thing* but in a way that is different from most of the other evidence rules.

I. Move the Proposed Amendment Into a New Rule 107?

The Federal Bar Council submitted a comment strongly in favor of the proposed amendment. It suggested, however, that the amendment should not be located in Article VI of the Federal Rules, because that Article is entitled "Witnesses" and illustrative aids are not centrally about witnesses.

Of course, many illustrative aids are used during the testimony of a witness. They are offered to make the witness's testimony more understandable to the factfinder. It is true that other illustrative aids are not tied to witness testimony --- most obviously those presented in opening and closing. But because a high percentage of illustrative aids are at the least tied to witness testimony, a rule covering illustrative aids is not irrationally placed in Article VI.

More importantly, Rule 611 was chosen as a location because that is the rule that most courts have invoked to regulate illustrative aids --- Rule 611(a). While located in Article VI --- and targeted toward "the mode and order of examining witnesses and presenting evidence" --- we know that the Rule 611(a) power has been employed well beyond the witness/evidence limitations in the text. A memo prepared by the Reporter two years ago found Rule 611 to be the source of authority for switching parties from plaintiffs to defendants; putting time limits on trials; imposing sanctions; and allowing victorious defendants to remain at the table with defendants still in the case. So while Rule 611 is grounded in witnesses, its use extends beyond regulation of witnesses. If that is so, there is no reason why a rule on illustrative aids can't be housed in Rule 611.

If, however, the Committee agrees with the proposition that a rule on illustrative aids should be set somewhere other than Article VI, the question is, where? The Federal Bar Council suggests Article 10, which is entitled "Contents of Writings, Recordings, and Photographs." But that does not seem a comfortable fit at all. For one thing, there are illustrative aids that are not writings, recordings or photographs. A classic example is the ladder in *Baugh, supra.* The expert used it to illustrate how ladders are structured and how they operate. It was an illustrative aid, but it is not a writing, recording, or photograph. Moreover, Article X is known by all the "Best

Evidence Rule." That is hardly a place to put a rule that is not about admitting or excluding evidence. Nor is the alternative title --- the Original Document Rule --- a good place to treat illustrative aids that are not documents. Finally, if the new rule is located in Article 10, it would have to be placed at the end of the Article --- a new Rule 1009, placed after obscure rules about the procedures for applying the Best Evidence Rule. That is where rules go to die.

An alternative location for Rule 611(d) is in Article I, entitled "General Provisions." Most of these rules do not deal with admitting or excluding evidence, so conceptually the new rule would be more comfortable there than in Article X. If moved to Article I it would be a new Rule 107.

It is notable that in 2008 there was a proposal to redefine all references to "writings" as including electronically stored information, and when the suggestion was made to locate it in a new Rule 107, members of the Standing Committee objected that "nobody would find it there." (It ultimately got added as a definition in Rule 101 in the restyling). But if the Committee thinks that Rule 107 is a find-able place for the new rule to be, then there is nothing stopping the Committee from relocating the rule there.

Locating the Rule as a freestanding Rule 107 requires changes in numbering and lettering.[22] Taking the rule as including all the changes discussed so far, a new Rule 107 would look like this:

Rule 107. Illustrative Aids.

(a) ***Permitted Uses.*** The court may allow a party to present an illustrative aid to help the finder of fact understand admitted evidence or a party's argument if its utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

(b) ***Use in Jury Deliberations.*** An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:

(1) all parties consent; or

(2) the court, for good cause, orders otherwise.

(c) ***Record***. When practicable, an illustrative aid that is used at trial must be entered into the record.

(d) ***Summaries of Voluminous Materials Admitted as Evidence***. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible information is governed by Rule 1006.

[22] It would also require a change to the proposed amendment to Rule 1006, which refers to "Rule 611(d)."

Finally, minor changes would be required to two paragraphs of the Committee Note:

> The amendment establishes a new ~~subdivision within Rule 611~~ Rule 107 to provide standards for the use of illustrative aids. The new rule is derived from Maine Rule of Evidence 616. The term "illustrative aid" is used instead of the term "demonstrative evidence," as that latter term is vague and has been subject to differing interpretation in the courts. An illustrative aid is any presentation offered not as evidence, but rather to assist the factfinder to understand other evidence or argument. "Demonstrative evidence" is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact.
>
> * * *
>
> A similar distinction must be drawn between a summary of voluminous, admissible evidence offered to prove a fact, and a summary that is offered solely to assist the trier of fact in understanding the evidence. The former is subject to the strictures of Rule 1006. The latter is an illustrative aid, which the courts have previously regulated pursuant to the broad standards of Rule 611(a), and which is now to be regulated by the more particularized requirements of this Rule ~~611(d)~~ 107.

J. Commentary on the Fuzzy Line Between Demonstrative Evidence and Illustrative Aids

` A few comments have suggested that a rule on illustrative aids is problematic because it is often difficult to distinguish between an illustrative aid and demonstrative evidence. That is certainly true. The hypotheticals that were addressed by the panel in Phoenix showed the difficulty of determining the line between demonstrative evidence and illustrative aids. For example, in the *Baugh* case, *supra,* if the expert takes the same model ladder as the one that collapsed, and operates it for the jury, that could well be demonstrative evidence. If instead the expert is manipulating the ladder to show how ladders work, then it is probably an illustrative aid. And it could be both, depending on the expert's testimony.

But the mere fact that it is hard to distinguish between the two cannot be a reason for rejecting this rule. That would be like saying, because it is difficult at times to distinguish between expert and lay witnesses, there should not be a rule on the subject. Likewise, it's sometimes difficult to determine the line between habit and character, but that didn't stop the Advisory

Committee from drafting rules about it. One could well argue that when the difference between two concepts is fuzzy and difficult, that is precisely where are rule providing guidance is needed.

Rule 611(d) is not intended to legislate a clear line. It is intended to provide courts and lawyers with the terminology to help think through the distinctions between illustrative aids and demonstrative evidence. Surely that is better than lurching from case to case.

So the difficulties of delineation are no reason for rejecting the amendment. That said, Judge Schiltz has suggested that the amendment could be improved by adding a paragraph to the committee note recognizing that the distinction between an illustrative aid and demonstrative evidence can be elusive. The new addition could read like this:

> The rule does not purport to solve every question regarding the use of illustrative aids. There is no doubt that the distinction between an illustrative aid and demonstrative evidence can sometimes be elusive. The goal of the rule is to provide the court and the parties a structure and terminology to assist them in managing the presentation of illustrative aids at trial.

This paragraph is added to the final draft below.

K. Finder of Fact/Trier of Fact

The text of the rule as issued for public comment states that the court may allow a party to present an illustrative aid to help "the finder of fact" understand evidence. Upon reflection (not based in public comment, but just from looking over the rule for the 100th time), there is a good argument that the term should be changed to "trier of fact". That is not because "finder of fact" is somehow inaccurate. Rather, it is because the term "trier of fact" is used in the Evidence Rules, while "finder of fact" is not. "Trier of fact" is used in Rule 702 (expert testimony must help the trier of fact), 704(b) (mental state is for the trier of fact alone) and 901(b)(3) (authentication of handwriting by the trier of fact). One principle of proper style is to use the same term throughout the rules if it means the same thing. Therefore, the final draft changes all references to the factfinder in text and note to "trier of fact."

IV. Final Proposal

What follows is a draft of a final proposal for text and committee note that implements the suggested changes discussed above. **It is blacklined from the proposal issued for public comment.**[23] The changes are:

--- Deletion of the Notice Requirement

--- Application to Opening and Closing Arguments

--- Changes addressed to showing lack of hostility to illustrative aids --- including taking the brackets off "substantially."

--- Emphasis in the text that illustrative aids are not evidence.

--- Adding a subdivision directing the reader to Rule 1006 if a summary is offered as evidence.

--- A sentence in the introductory paragraph to the committee note to describe illustrative aids.

--- A paragraph in the committee note about the sometimes elusive distinction between demonstrative evidence and illustrative aids.

--- Helpful changes to the Note suggested by Judge Schroeder (footnoted for ease of reference).

--- Consistent references to "trier of fact."

--- A few style changes in the text and Note.

Note: If the Committee decides to move the Rule to Article I, Rule 107, all that is required is a minor adjustment in enumeration, and two minor changes to the committee note. The text of a Rule 107 is set forth after the clean copy of the text and note below.

[23] A clean copy can be found below, after the final draft.

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

* * * * *

(d) Illustrative Aids.

(1) ***Permitted Uses.*** The court may allow a party to present an illustrative aid to help the ~~finder~~ trier of fact understand admitted evidence or a party's argument if~~:~~

~~**(A)**~~ its utility in assisting comprehension is not ~~[~~substantially~~]~~ outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time~~; and~~

~~**(B)** all parties are given notice and a reasonable opportunity to object to its use, unless the court, for good cause, orders otherwise~~.

(2) ***Use in Jury Deliberations.*** An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:

(A) all parties consent; or

(B) the court, for good cause, orders otherwise.

(3) ***Record***. When practicable, an illustrative aid ~~that is~~[24] used at trial must be entered into the record.

(4) ***Summaries of Voluminous Materials Admitted as Evidence***. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible information is governed by Rule 1006.

Committee Note

The amendment establishes a new subdivision within Rule 611 to provide standards for the use of illustrative aids. The new rule is derived from Maine Rule of Evidence 616. The term "illustrative aid" is used instead of the term "demonstrative evidence," as that

[24] Suggested by the restylists.

latter term ~~is vague and~~[25] has been subject to differing interpretations in the courts. An illustrative aid is any presentation offered not as evidence, but rather to assist the trier of fact to understand other evidence or argument. "Demonstrative evidence" is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact.

Writings, objects, charts, or other presentations that are used during the trial to provide information to the ~~factfinder~~ trier of fact thus fall into two separate categories. The first category is evidence that is offered to prove a disputed fact; admissibility of such evidence is dependent upon satisfying the strictures of Rule 403, the hearsay rule, and other evidentiary screens. Usually the jury is permitted to take this substantive evidence to the jury room~~, to study it, and to~~ during deliberations, and [26]use it to help determine the disputed facts.

The second category—the category covered by this rule—is information ~~that is~~ offered for the narrow purpose of helping the ~~factfinder~~ trier of fact to understand what is being communicated ~~to them~~ by the witness or party presenting evidence or argument. Examples include blackboard drawings, photos, diagrams, ~~powerpoint presentations,~~[27]video depictions, charts, graphs, and computer simulations. These kinds of presentations, referred to in this rule as "illustrative aids," have also been described as "pedagogical devices" and sometimes (and less helpfully) "demonstrative presentations"—that latter term being unhelpful because the purpose for presenting the information is not to "demonstrate" how an event occurred but rather to help the ~~finder~~ trier of fact understand evidence that is being or has been presented.

A similar distinction must be drawn between a summary of voluminous, admissible ~~information~~ evidence offered to prove a fact, and a summary ~~of evidence~~ that is offered solely to assist the trier of fact in understanding the evidence. The former is subject to the strictures of Rule 1006. The latter is an illustrative aid, which the courts have previously regulated pursuant to the broad standards of Rule 611(a), and which is now to be regulated by the more particularized requirements of this Rule 611(d).

While an illustrative aid is by definition not offered to prove a fact in dispute, this does not mean that it is free from regulation by the court. ~~Experience has shown that illustrative aids can be subject to abuse.~~ It is possible that the illustrative aid may ~~be prepared to~~ distort or oversimplify the evidence presented, ~~to oversimplify,~~ or ~~to~~ stoke

[25] Suggested by Judge Schroeder. It's a good deletion, because the term "demonstrative evidence" is not vague, it's just been misconstrued.

[26] Thanks to Judge Schroeder for this clarification.

[27] Judge Schroeder, as well as a public comment, suggests cutting the term "powerpoint" because it may become outdated.

unfair prejudice.[28] This rule requires the court to assess the value of the illustrative aid in assisting the trier of fact to understand the evidence. Cf. Fed.R.Evid. 703; see Adv. Comm. Note to the 2000 amendment to Rule 703. Against that beneficial effect, the court must weigh most of the dangers that courts take into account in balancing evidence offered to prove a fact under Rule 403—one particular problem being that the illustrative aid might improperly appear to be substantive demonstrative evidence of a disputed event. If those dangers ~~[~~substantially~~]~~ outweigh the value of the aid in assisting the trier of fact, the trial court should exercise its discretion to prohibit—or ~~modify~~ order the modification of—the use of the illustrative aid. And if the court does allow the aid to be presented at a jury trial, the adverse party may ask to have the jury instructed about the limited purpose for which the illustrative aid may be used. Cf. Rule 105.

The intent of the rule is to clarify the distinction between demonstrative evidence and illustrative aids, and to provide the court with a balancing test specifically directed toward the use of illustrative aids. Illustrative aids can be critically important in helping the trier of fact understand the evidence or argument, and this rule should be read to promote their use.

The rule does not purport to solve every question regarding the use of illustrative aids. There is no doubt that the distinction between an illustrative aid and demonstrative evidence can sometimes be elusive. The goal of the rule is to provide the court and the parties a structure and terminology to assist them in managing the presentation of illustrative aids at trial.

Many courts require advance disclosure of illustrative aids, as a ~~One of the primary~~ means of safeguarding and regulating their use ~~of illustrative aids is to require advance disclosure~~.[29] Ordinary discovery procedures concentrate on the evidence that will be presented at trial, so illustrative aids are not usually subject to discovery. Their sudden appearance may not give sufficient opportunity for analysis and objection by other parties, particularly if they are complex. That said, there is an infinite variety of illustrative aids, and an infinite variety of circumstances under which they might be used. Ample advance notice might be possible for a computer simulation of the accident giving rise to a lawsuit, but no advance notice may be possible for a handwritten chart written by an attorney as a witness responds to the attorney's questions on cross-examination. The amendment therefore leaves it to trial judges to decide whether, when, and how to require advance notice of an illustrative aid. ~~The amendment therefore provides that illustrative aids prepared for use in court must be disclosed in advance in order to allow a reasonable~~

[28] Style improvements suggested by Judge Schroeder.

[29] Suggested by Judge Schroeder. It is an improvement, because it is less judgmental about the importance of notice, which amounts to a shout-out to the public comment.

~~opportunity for objection – unless the court, for good cause, orders otherwise. The rule applies to aids prepared either before trial or during trial before actual use in the courtroom. But the timing of notice will be dependent on the nature of the illustrative aid. Notice as to an illustrative aid that has been prepared well in advance of trial will differ from the notice required with respect to a handwritten chart prepared in response to a development at trial. The trial court has discretion to determine when and how notice is provided.~~

Because an illustrative aid is not offered to prove a fact in dispute~~,~~ and is used only in accompaniment with ~~testimony or~~ presentation of evidence or argument ~~by the proponent~~, the amendment provides that illustrative aids are not to go to the jury room unless all parties consent or the court, for good cause, orders otherwise. The Committee determined that allowing the jury to use the aid in deliberations, free of the constraint of accompaniment with witness testimony or party presentation, runs the risk that the jury may unduly emphasize the illustrative aid or the testimony of the witness with whom it was used, or otherwise[30] misinterpret the import, usefulness, and purpose of the illustrative aid. But the Committee concluded that trial courts should have some discretion to allow the jury to consider an illustrative aid during deliberations; that discretion is most likely to be exercised in complex cases, or in cases where the jury has requested to see the illustrative aid. If the court does exercise its discretion to allow the jury to review the illustrative aid during deliberations, the court must upon request instruct the jury that the illustrative aid is not evidence and cannot be considered as proof of any fact.

This rule is intended to govern the use of an illustrative aid at any point in the trial, including opening and closing argument.

While an illustrative aid is not evidence, if it is used at trial it must be marked as an exhibit and made part of the record, unless that is impracticable under the circumstances.

[30] Change suggested by Judge Schroeder.

Here is a clean copy of the proposed amendment, implementing all of the changes above:

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

* * * * *

(d) Illustrative Aids.

(1) ***Permitted Uses.*** The court may allow a party to present an illustrative aid to help the trier of fact understand admitted evidence or a party's argument if its utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

(2) ***Use in Jury Deliberations.*** An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:

(A) all parties consent; or

(B) the court, for good cause, orders otherwise.

(3) ***Record***. When practicable, an illustrative aid used at trial must be entered into the record.

(4) ***Summaries of Voluminous Materials Admitted as Evidence***. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible information is governed by Rule 1006.

Committee Note

The amendment establishes a new subdivision within Rule 611 to provide standards for the use of illustrative aids. The new rule is derived from Maine Rule of Evidence 616. The term "illustrative aid" is used instead of the term "demonstrative evidence," as that

latter term has been subject to differing interpretations in the courts. An illustrative aid is any presentation offered not as evidence, but rather to assist the trier of fact to understand other evidence or argument. "Demonstrative evidence" is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact.

Writings, objects, charts, or other presentations that are used during the trial to provide information to the trier of fact thus fall into two separate categories. The first category is evidence that is offered to prove a disputed fact; admissibility of such evidence is dependent upon satisfying the strictures of Rule 403, the hearsay rule, and other evidentiary screens. Usually the jury is permitted to take this substantive evidence to the jury room, during deliberations, and use it to help determine the disputed facts.

The second category—the category covered by this rule—is information s offered for the narrow purpose of helping the trier of fact to understand what is being communicated by the witness or party presenting evidence or argument. Examples include blackboard drawings, photos, diagrams, video depictions, charts, graphs, and computer simulations. These kinds of presentations, referred to in this rule as "illustrative aids," have also been described as "pedagogical devices" and sometimes (and less helpfully) "demonstrative presentations"—that latter term being unhelpful because the purpose for presenting the information is not to "demonstrate" how an event occurred but rather to help the trier of fact understand evidence that is being or has been presented.

A similar distinction must be drawn between a summary of voluminous, admissible evidence offered to prove a fact, and a summary that is offered solely to assist the trier of fact in understanding the evidence. The former is subject to the strictures of Rule 1006. The latter is an illustrative aid, which the courts have previously regulated pursuant to the broad standards of Rule 611(a), and which is now to be regulated by the more particularized requirements of this Rule 611(d).

While an illustrative aid is by definition not offered to prove a fact in dispute, this does not mean that it is free from regulation by the court. It is possible that the illustrative aid may distort or oversimplify the evidence presented or stoke unfair prejudice. This rule requires the court to assess the value of the illustrative aid in assisting the trier of fact to understand the evidence. Cf. Fed.R.Evid. 703; see Adv. Comm. Note to the 2000 amendment to Rule 703. Against that beneficial effect, the court must weigh most of the dangers that courts take into account in balancing evidence offered to prove a fact under Rule 403—one particular problem being that the illustrative aid might improperly appear to be substantive demonstrative evidence of a disputed event. If those dangers substantially outweigh the value of the aid in assisting the trier of fact, the trial court should exercise its discretion to prohibit—or order the modification of—the use of the illustrative aid. And if the court does allow the aid to be presented at a jury trial, the adverse party may ask to

have the jury instructed about the limited purpose for which the illustrative aid may be used. Cf. Rule 105.

The intent of the rule is to clarify the distinction between demonstrative evidence and illustrative aids, and to provide the court with a balancing test specifically directed toward the use of illustrative aids. Illustrative aids can be critically important in helping the trier of fact understand the evidence or argument, and this rule should be read to promote their use.

The rule does not purport to solve every question regarding the use of illustrative aids. There is no doubt that the distinction between an illustrative aid and demonstrative evidence can sometimes be elusive. The goal of the rule is to provide the court and the parties a structure and terminology to assist them in managing the presentation of illustrative aids at trial.

Many courts require advance disclosure of illustrative aids, as a means of safeguarding and regulating their use. Ordinary discovery procedures concentrate on the evidence that will be presented at trial, so illustrative aids are not usually subject to discovery. Their sudden appearance may not give sufficient opportunity for analysis and objection by other parties, particularly if they are complex. That said, there is an infinite variety of illustrative aids, and an infinite variety of circumstances under which they might be used. Ample advance notice might be possible for a computer simulation of the accident giving rise to a lawsuit, but no advance notice may be possible for a handwritten chart written by an attorney as a witness responds to the attorney's questions on cross-examination. The amendment therefore leaves it to trial judges to decide whether, when, and how to require advance notice of an illustrative aid.

Because an illustrative aid is not offered to prove a fact in dispute and is used only in accompaniment with presentation of evidence or argument, the amendment provides that illustrative aids are not to go to the jury room unless all parties consent or the court, for good cause, orders otherwise. The Committee determined that allowing the jury to use the aid in deliberations, free of the constraint of accompaniment with witness testimony or party presentation, runs the risk that the jury may unduly emphasize the illustrative aid of the testimony of a witness with whom it was used, or otherwise misinterpret the import, usefulness, and purpose of the illustrative aid. But the Committee concluded that trial courts should have some discretion to allow the jury to consider an illustrative aid during deliberations; that discretion is most likely to be exercised in complex cases, or in cases where the jury has requested to see the illustrative aid. If the court does exercise its discretion to allow the jury to review the illustrative aid during deliberations, the court must upon request instruct the jury that the illustrative aid is not evidence and cannot be considered as proof of any fact.

This rule is intended to govern the use of an illustrative aid at any point in the trial, including opening and closing argument.

While an illustrative aid is not evidence, if it is used at trial it must be marked as an exhibit and made part of the record, unless that is impracticable under the circumstances.

Here is a clean copy of the proposed amendment, implementing all of the changes above if the rule is moved to Rule 107:

Rule 107. Illustrative Aids.

(a) ***Permitted Uses.*** The court may allow a party to present an illustrative aid to help the trier of fact understand admitted evidence or a party's argument if its utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

(b) ***Use in Jury Deliberations.*** An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:

(1) all parties consent; or

(2) the court, for good cause, orders otherwise.

(c) ***Record***. When practicable, an illustrative aid used at trial must be entered into the record.

(d) ***Summaries of Voluminous Materials Admitted as Evidence***. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible information is governed by Rule 1006.

Committee Note

The amendment establishes a new Rule 107 to provide standards for the use of illustrative aids. The new rule is derived from Maine Rule of Evidence 616. The term "illustrative aid" is used instead of the term "demonstrative evidence," as that latter term has been subject to differing interpretations in the courts. An illustrative aid is any presentation offered not as evidence, but rather to assist the trier of fact to understand other evidence or argument. "Demonstrative evidence" is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact.

Writings, objects, charts, or other presentations that are used during the trial to provide information to the trier of fact thus fall into two separate categories. The first category is evidence that is offered to prove a disputed fact; admissibility of such evidence is dependent upon satisfying the strictures of Rule 403, the hearsay rule, and other evidentiary screens. Usually the jury is permitted to take this substantive evidence to the jury room, during deliberations, and use it to help determine the disputed facts.

The second category—the category covered by this rule—is information s offered for the narrow purpose of helping the trier of fact to understand what is being communicated by the witness or party presenting evidence or argument. Examples include blackboard drawings, photos, diagrams, video depictions, charts, graphs, and computer simulations. These kinds of presentations, referred to in this rule as "illustrative aids," have also been described as "pedagogical devices" and sometimes (and less helpfully) "demonstrative presentations"—that latter term being unhelpful because the purpose for presenting the information is not to "demonstrate" how an event occurred but rather to help the trier of fact understand evidence that is being or has been presented.

A similar distinction must be drawn between a summary of voluminous, admissible evidence offered to prove a fact, and a summary that is offered solely to assist the trier of fact in understanding the evidence. The former is subject to the strictures of Rule 1006. The latter is an illustrative aid, which the courts have previously regulated pursuant to the broad standards of Rule 611(a), and which is now to be regulated by the more particularized requirements of this Rule 107.

While an illustrative aid is by definition not offered to prove a fact in dispute, this does not mean that it is free from regulation by the court. It is possible that the illustrative aid may distort or oversimplify the evidence presented, or stoke unfair prejudice. This rule requires the court to assess the value of the illustrative aid in assisting the trier of fact to understand the evidence. Cf. Fed.R.Evid. 703; see Adv. Comm. Note to the 2000 amendment to Rule 703. Against that beneficial effect, the court must weigh most of the dangers that courts take into account in balancing evidence offered to prove a fact under Rule 403—one particular problem being that the illustrative aid might improperly appear

to be substantive demonstrative evidence of a disputed event. If those dangers substantially outweigh the value of the aid in assisting the trier of fact, the trial court should exercise its discretion to prohibit—or order the modification of—the use of the illustrative aid. And if the court does allow the aid to be presented at a jury trial, the adverse party may ask to have the jury instructed about the limited purpose for which the illustrative aid may be used. Cf. Rule 105.

The intent of the rule is to clarify the distinction between demonstrative evidence and illustrative aids, and to provide the court with a balancing test specifically directed toward the use of illustrative aids. Illustrative aids can be critically important in helping the of fact understand the evidence or argument, and this rule should be read to promote their use.

The rule does not purport to solve every question regarding the use of illustrative aids. There is no doubt that the distinction between an illustrative aid and demonstrative evidence can sometimes be elusive. The goal of the rule is to provide the court and the parties a structure and terminology to assist them in managing the presentation of illustrative aids at trial.

Many courts require advance disclosure of illustrative aids, as a means of safeguarding and regulating their use. Ordinary discovery procedures concentrate on the evidence that will be presented at trial, so illustrative aids are not usually subject to discovery. Their sudden appearance may not give sufficient opportunity for analysis and objection by other parties, particularly if they are complex. That said, there is an infinite variety of illustrative aids, and an infinite variety of circumstances under which they might be used. Ample advance notice might be possible for a computer simulation of the accident giving rise to a lawsuit, but no advance notice may be possible for a handwritten chart written by an attorney as a witness responds to the attorney's questions on cross-examination. The amendment therefore leaves it to trial judges to decide whether, when, and how to require advance notice of an illustrative aid.

Because an illustrative aid is not offered to prove a fact in dispute and is used only in accompaniment with presentation of evidence or argument, the amendment provides that illustrative aids are not to go to the jury room unless all parties consent or the court, for good cause, orders otherwise. The Committee determined that allowing the jury to use the aid in deliberations, free of the constraint of accompaniment with witness testimony or party presentation, runs the risk that the jury may unduly emphasize the illustrative aid of the testimony of a witness with whom it was used, or otherwise misinterpret the import, usefulness, and purpose of the illustrative aid. But the Committee concluded that trial courts should have some discretion to allow the jury to consider an illustrative aid during deliberations; that discretion is most likely to be exercised in complex cases, or in cases where the jury has requested to see the illustrative aid. If the court does exercise its

discretion to allow the jury to review the illustrative aid during deliberations, the court must upon request instruct the jury that the illustrative aid is not evidence and cannot be considered as proof of any fact.

This rule is intended to govern the use of an illustrative aid at any point in the trial, including opening and closing argument.

While an illustrative aid is not evidence, if it is used at trial it must be marked as an exhibit and made part of the record, unless that is impracticable under the circumstances.

V. Summary of Public Comment

Jacob Hayward, Esq., (2022-EV-0004-0003) supports the proposed amendment because it will "meaningfully contribute to and clarify federal evidence law."

Richard Cook, Esq., (2022-EV-0004-0005) contends that the proposed amendment is unnecessary because "Rules 403 and 611 already empower a trial judge in his discretion to admit or exclude such evidence and decide whether the evidence should go back to the jury room."

Anonymous, (2022-EV-0004-0006) opposes the amendment, arguing that it "would severely limit the ability of trial lawyers to present their evidence to a jury." He concludes that lawyers "have been using visual aids in courtrooms forever and it seems unnecessary to put parameters on the use of visual aids now."

Andrew Delaney, Esq., (2022-EV-0004-0007) opposes the proposed amendment as an effort to "restrict or sanitize" illustrative aids.

Graham Esdale, Esq., (2022-EV-0004-0008) recommends that the notice requirement of the proposed amendment be deleted. He states that the notice requirement "severely limits an attorneys ability to make on the fly changes in the mode and order of presenting evidence."

Robert Collins, Esq., (2022-EV-0004-0009) opposes the proposed amendment on the ground that "[l]imiting information that any party submits to show their position impugns the 7th Amendment right to a fair and impartial jury trial."

Robert Fleury, Esq., (2022-EV-0004-0010) opposes the proposed amendment, on the grounder that "[d]epriving the jury of illustrative aids that help them deliberate is unconscionable."

Ryan Babcock, Esq., (2022-EV-0004-0011) opposes the amendment because he disapproves of trial court exercise of discretion over illustrative aids.

Henry Fincher, Esq., (2022-EV-0004-0012) asserts that: "For at least 50+ years federal courts have dealt with demonstrative evidence and have applied the same standards for admission. There's no need to add additional hurdles that prevent juries from using tools to help them understand the situation."

James Lampkin, Esq., (2022-EV-0004-0013) opposes the proposed amendment because it is "duplicative" of Rule 611(a) but also because it is "unduly restrictive on a lawyer's ability to present evidence during the trial of a case."

Warner Hornsby, Esq., (2022-EV-0004-0014) states that the proposed amendment "unnecessarily and dangerously forces lawyers to provide mental impressions, strategies, and other usually protected thoughts to the other side."

The Federal Magistrate Judges Association (2022-EV-0004-0015) "applauds the effort to clarify the distinction between evidence introduced in summary form and illustrative aids offered to assist the trier of fact in understanding the evidence." The Association states that "the addition of Rule 611(d) imposing disclosure requirements for illustrative aids and guidance regarding their use is an improvement which will help clarify a sometimes contentious topic." The Association suggests "greater clarity regarding application of Rule 611(d) to Power Point presentations or other visual aids used by attorneys in opening statements or closing arguments."

Jason Roth, Esq., (2022-EV-0004-0016) opposes the amendment on the ground that it "would be detrimental to all real trial, lawyers, and negatively impact the presentation of evidence."

Frederick Hall, Esq., (2022-EV-0004-0017) argues that the proposed amendment "is unnecessary and adds another layer of complexity to already well understood requirements to lay a foundation for the use of demonstrative exhibits."

Troy Chandler, Esq., (2022-EV-0004-0018) submitted an opposing comment identical to many others, such as Charles Herd, 2022-EV-0004-0028**:**

> The proposed changes to Rule 611 regarding demonstrative aids will increase expense of litigation and cause unnecessary delays. Put two lawyers in a room and they can argue about anything. The proposed change encourages frivolous objections over what is " . . .the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time;" This language already exists in Rule 403 of the FRE and all state court equivalents. It leaves the discretion in the capable hands of the judge and should not be changed in a way that benefits the billable time sheets of hourly lawyers.

Andrew Seerden, Esq., (2022-EV-0004-0019) submitted an opposing comment identical to many others, such as Troy Chandler, 0018, and Charles Herd, 0028.

John Munoz, Esq., (2022-EV-0004-0020) opposes the amendment as a hindrance on the presentation of evidence" and states that "[m]ost trial judges can handle the issues as they arise without the necessity of additional regulations."

Anonymous, (2022-EV-0004-0021) opposes the amendment, concluding that it would "drastically limit the effectiveness and use of illustrative aids/exhibits in Federal Court" because there would be motion practice "over each demonstrative aid either party intends to use."

Christy Crowe Childers, Esq., (2022-EV-0004-0022) opposes the proposed amendment, contending that it would impose restrictions on illustrative aids that do not already exist.

Sherry Chandler, Esq., (2022-EV-0004-0023) states that the proposed amendment to Rule 611 is "are unnecessary and will add further time, expense, and judicial involvement in a smooth trial." She declares that "[i]f the court believes a certain type of evidence is improper or unhelpful, the court can rule on an objection if raised."

Amar Raval, Esq., (2022-EV-0004-0024) argues that adding a "new requirement" will lead to more arguments between counsel.

Attorney 911 (2022-EV-0004-0025) opposes the amendment by submitting the same comment as Andrew Seerden, (0019)).

Alyssa Wood, Esq., (2022-EV-0004-0026) opposes the proposed amendment, arguing that it "would make it drastically more difficult to bring in demonstratives that trial attorneys often rely on to teach their case to jurors." She is concerned that the notice requirement will raise questions such as "if attorneys have to turn over the entirety of their powerpoint presentation in advance of trial (and how far in advance), and if they intend to write something on the blackboard, does this have to be turned over in advance."

Morgan Adams, Esq., (2022-EV-0004-0026) opposes the amendment, arguing that it is "duplicative of Rule 403"; that the notice requirement cannot apply to evidence "created on the fly"; and that the notice requirement will result in unnecessary motion practice and delay of the trial.

Charles Herd, Esq., (2022-EV-0004-0028) opposes the amendment by submitting the same comment as Andrew Seerden, (0019), and Attorney 911, (0025)).

Scott Brazil, Esq., (2022-EV-0004-0029) opposes the amendment, in a comment identical to that of Andrew Seerden (0019) and Charles Herd (0028).

Tim Riley, Esq., (2022-EV-0004-0030) opposes the amendment because it sets forth "a new framework by which practitioners will be precluded from using such demonstrative aids due to lack of prior notice to opposing counsel." He asserts that an amendment is unnecessary because "the law is well-established that the trial court must weigh the utility of the aid in assisting the jury

in determining a disputed issue of fact, including an analysis as to whether the demonstrative aid is misleading because it is insufficiently similar to the issue or product at hand."

Daniel Horowitz, Esq., (2022-EV-0004-0031) objects to the notice requirement of the proposed amendment, arguing that he should not have to give notice and get permission to use a flip chart.

Darryl Nabors, Esq., (2022-EV-0004-0032) opposes the amendment on the ground that it would it would "drastically limit the effectiveness of illustrative aids and exhibits in Federal Court."

Alexander Melin, Esq., (2022-EV-0004-0033) contends that the proposed amendment "will create unnecessary motion practice, substantially increase the expense and burden of litigation, and basically make it unfeasible to use illustrative exhibits that are in all actuality noncontroversial and that have been used for years."

Anonymous, (2022-EV-0004-0034) opposes the amendment, in a comment identical to that of Charles Herd, (2022-EV-0004-0028).

Matthew Millea, Esq., (2022-EV-0004-0035) states that the presentation of illustrative aids has "never been a problem" and that the notice requirement of the proposed amendment "is vague, and is not consistent with how trials are usually conducted."

Anonymous (2022-EV-0004-0036) states that **"**the proposed changes to Rule 611 regarding demonstrative aids will increase expense of litigation and cause unnecessary delays."

Anonymous (2022-EV-0004-0037) concludes that the proposed amendment "will unnecessarily complicate trials" and that the trial judge "can resolve objections to any illustrative aid that arises."

Kevin Liles, Esq., (2022-EV-0004-0038) opposes the proposed amendment, submitting a comment identical to others including Troy Chandler, 0018, and Charles Herd, 0028.

Matthew Menter, Esq., (2022-EV-0004-0039) argues that "Rule 403 already allows courts the discretion to admit or exclude prejudicial or misleading evidence" and that "[c]hanging Rule 611 would invite and encourage frivolous objections and arguments by giving attorneys have a new standard to test."

Michael Crow, Esq., (2022-EV-0004-0040) opposes the proposed amendment because "lawyers have been using illustrative aids forever to assist jurors. there are sufficient rules for Judges to use their discretion in allowing or disallowing aids."

Ryan Skiver, Esq., (2022-EV-0004-0041) opposes the amendment on the ground that it "adds another layer of complexity for no reason, and will increase the time and expense associated with trials." He argues that illustrative aids "are already addressed in Rule 403." And he states that often "demonstrative evidence is created on the fly, with a witness on the stand, and can't be 'scheduled.'"

Shelton Williams, Esq., (2022-EV-0004-0042) opposes the amendment on the ground that it would make illustrative aids less likely to be used.

Thomas Ryan, Esq., (2022-EV-0004-0044) opposes the amendment, arguing that the notice requirements would allow one lawyer to improperly obtain the work product of another lawyer.

Charles Kettlewell, Esq., (2022-EV-0004-0045) opposes the amendment on the ground that it "would drastically limit the effectiveness and use of illustrative aids/exhibits in Federal Court."

Curtis Fifner, Esq., (2022-EV-0004-0046) contends that the proposed amendment would "deprive the jury of useful demonstrative aids that help them better understand the evidence and issues."

Dennis Lansdowne, Esq., (2022-EV-0004-0047) states: "The notion that in examining a witness, particularly on cross, counsel could not draw on a blackboard (or easel or overhead) without first providing it to opposing counsel is not only contrary to 200 years of practice in this country, it will deny the jurors needed explanation and stimulation."

Anonymous (2022-EV-0004-0048) opposes the amendment, stating: "There is no reason why mechanisms should be added to make it more difficult to aid a jury's understanding of complicated subjects."

Anonymous (2022-EV-0004-0049) opposes the amendment, out of a concern that the notice requirement will result in "gotcha" practice.

William Hommel, Esq. (2022-EV-0004-0050) states: "Most good trial lawyers will deal with demonstratives in their motion *in limine*. We don't need a rule to prop up lawyers that don't know how to try cases."

Anthony Gallucci, Esq., (2022-EV-0004-0051) objects to the amendment, asserting that "[a]dvanced disclosure is not always possible as many such demonstratives are made during trial as the case progresses" and that the notice requirement "would unfairly tip off opposing counsel on the contents of the presenter's opening statement, witness examination, and/or closing argument."

Robert Rutter, Esq. (2022-EV-0004-0052) opposes the amendment, arguing that "[t]rials are dynamic and illustrative aids are often developed at the last minute."

Zoe Littlepage, Esq., (2022-EV-0004-0053) opposes the amendment, claiming that it "aims to take trials back to the dark ages instead of forward to the realities of the 21st century." She asserts that the amendment "creates the impression that visual aids are discouraged and their value needs to be overtly proven, an outcome that would be opposite to what we all know is effective at trial."

John Meara, Esq., (2022-EV-0004-0054) argues that the proposed amendment would **"**make the use of demonstratives more difficult at trial." He opposes the notice requirement is specific, claiming that it is "unrealistic for counsel to prepare all demonstrative aids in advance."

Elizabeth Faiella, Esq., (2022-EV-0004-0055) opposes the amendment on the ground that it "would limit the ability of attorneys to use demonstrative exhibits during trial."

Rainey Booth, Esq., (2022-EV-0004-0056) states that "[a]n amendment that seeks to limit or dissuade the use of visuals, in any way, is harmful and regressive."

Margaret Simonian, Esq., (2022-EV-0004-0057) opposes the amendment, arguing that under the proposal a party "could argue a medical expert cannot draw a picture for the jury unless the expert draws it for the court and opposing counsel first, and then after that disruption continue the objection because the drawn arteries are significant to a disputed fact, and/or because the drawing is not accurate because it isn't exact."

Matt Leckman, Esq. (2022-EV-0004-0058) argues that "the inevitable outgrowth of this rule will be to restrict, not expand, the use of visual aids at trial." He specifically opposes the notice requirement, claiming that it **"**is directly at odds with the generally held truth that your opponent shouldn't be permitted to see your cross-examination playbook before you conduct it."

William Bailey, Esq., (2022-EV-0004-0059) opposes the amendment, arguing that it "shows an ill-advised hostility toward the use of visuals in trials at a time when the entire world is going in the other direction, using images as teaching and learning tools."

Thomas Wickwire, Esq., (2022-EV-0004-0060) opposes the amendment, arguing that it would prohibit the use of illustrative aids that are prepared shortly before trial.

Kyle Wright, Esq., (2022-EV-0004-0061) states: "The notion that in examining a witness, particularly on cross, counsel could not draw on a blackboard (or easel or overhead) without first providing it to opposing counsel is not only contrary to 200 years of practice in this country."

Mark Lanier, Esq., (2022-EV-0004-0062) argues that advance notice requirement will negatively affect cross-examination and will result in unnecessary motion practice and slow down trials.

William Cummings, Esq., (2022-EV-0004-0063) argues that the notice requirement improperly intrudes upon the lawyer's thought process, and opposes the rule more generally, asserting that "[v]isual presentation of evidence and illustrative aids should be encouraged, not discouraged."

Parker Lipman LLP, (2022-EV-0004-0064) opposes the proposed amendment, arguing that illustrative aids can be regulated under Rule 403 and that "[t]he advance notice requirement will give opposing counsel a preview of arguments or witness' examinations and thus interfere with counsel's strategy and work product and a trial's truth-seeking mission." The firm also states that any balancing test in the rule should use the word "substantially" to align with Rule 403. Otherwise, "it will be confusing to have two different, yet substantially similar, standards—proposed Rule 611(d)'s merely outweighed standard and Rule 403's substantially-outweighed standard."

Frank Gallucci, Esq., (2022-EV-0004-0065) opposes the notice requirement as unworkable and will work to erode the ability of trial lawyers to try cases "in a manner that best educates the trier of fact."

Jessica Ibert, Esq., (2022-EV-0004-0066) opposes the amendment, contending that it will result in "increased litigation expenses if parties are forced to create illustrative aids (that may or may not be used) well in advance of trial to meet the notice requirement in the proposed amendment."

Raeann Warner, Esq., (2022-EV-0004-0067) is concerned that "the rule as written is overbroad and may lead to less effective cross-examinations due to the requirement for 'notice.' When a witness is testifying at trial, an opposing lawyer may wish to use some type of illustrative aid – such as notes or a graph on a whiteboard – to help more effectively communicate with the witness and/or jury. It would be impossible to provide notice of that the opposing lawyer before the witness actually testified."

Timothy Bailey, Esq., (2022-EV-0004-0068) argues that the notice requirement of the rule is particularly unfair to plaintiffs, because illustrative aids "are strategic decisions about the manner in which we will present our case" and plaintiffs "would be forced weeks before the trial to tell the opposing party exactly how we were planning to present our case, including the order and flow of our evidence and what we view as critical evidence in that presentation."

Jackson Pahlke, Esq., (2022-EV-0004-0069) contends that the notice requirement would lead to motion practice and "likely result in attorneys forgoing many useful and well thought out

illustrations and instead having witnesses or experts just freehand draw on the spot which will be less effective in aiding the jurors in making their determination."

Robert Kleinpeter, Esq., (2022-EV-0004-0070) opposes the amendment, contending that the notice requirement is "impractical" and that the amendment would result in less use of illustrative aids.

Tyler Atkins, Esq., (2022-EV-0004-0071) opposes the amendment, arguing it "would restrict all litigants' freedom to present their case at trial by creating unnecessary hurdles to present evidence at trial" because "advance notice of illustrative aids far is simply not always possible."

James Tawney, Esq., (2022-EV-0004-0072) argues that under the amendment, attorney "could not write questions down or answers spontaneously at trial to help communicate, nor could we use unanticipated charts and diagrams due to the violation of the notice provision."

Michael Cruise, Esq., (2022-EV-0004-0073) agrees with the amendment's provisions that illustrative aids be made part of the record, and that because they are not evidence, they should ordinarily not go to the jury for deliberations. He disagrees with the notice requirement, arguing that it would be "impracticable" because "[d]emonstrative aids are normally prepared very close to the start of a trial by plaintiffs and defendants alike" and "requiring early notice will make litigation even more expensive for the parties than it already would be." He argues further that "parties often only realize the utility of an illustrative aid very close to trial, or even after the trial has begun" and "to restrict them with arbitrary notice requirements or other needless burdens risks causing real harm to the truth-finding process."

Frederick B. Goldsmith, Esq., (2022-EV-0004-0074) is utterly opposed to the notice requirements of the proposed amendment.

John Choi, Esq., (2022-EV-0004-0075) approves the parts of the rule that prohibit illustrative aids from going to the jury, and that require the aid to be preserved for the record. He is opposed to the notice requirement, stating that "[d]emonstrative aids are routinely prepared close to the start of a trial by plaintiffs and defendants alike. Illustrative aids can be expensive, and requiring early notice will make litigation even more expensive than it already is. Another reason is parties often realize the utility of an illustrative aid on the eve of trial, or after the trial has started. To restrict them with notice requirements or other procedures that create obstacles to the truth-finding process."

Alan Singer, Esq., (2022-EV-0004-0076) argues that the amendment "will create new burden, cause confusion, and adds a new barrier to persons seeking justice."

Caitlyn Bridges, Esq., (2022-EV-0004-0077) declares: "The disclosure requirement contains the implication that any plan to underline a sentence or circle a portion of a map becomes

the subject of disclosure. Attorneys, of course, often don't ever even plan an instance where they might decide to emphasize something in a document or draw something on a screen to aid a jury's understanding. The rule could lead to contentious (and unnecessary) arguments about what constitutes an illustrative aid and whether one attorney's decision to highlight a portion of a statement should have been disclosed."

Comment 2022-EV-0004-0078) was withdrawn.

Frank Verderame, Esq., (2022-EV-0004-0079) states: "If this committee believes in the right to a jury trial, the committee should leave some room for the application of common sense by the judge and the jury."

Bryan Edwards, Esq., (2022-EV-0004-0080) submitted a comment that is identical to many others, including Troy Chandler, Esq., (2022-EV-0004-0018).

Paul Levin, Esq., (2022-EV-0004-0081) states that the wording of the amendment should guarantee a permissive use of illustrative aids.

Jeffrey Jones, Esq., (2022-EV-0004-0082) opposes the notice requirement as creating problems for contemporaneous preparation of illustrative aids.

Don Huynh, Esq., (2022-EV-0004-0083) states that "[t]he jury should be permitted to view illustrative aids during deliberations, and if there are any objections made by either party regarding the admissibility of an illustrative aid, the aid should be part of the record so that any related evidentiary objections are more clearly evident and preserved on appeal."

The American College of Trial Lawyers (2022-EV-0004-0084) states that the bracketed "substantially" in the Rule 611(d) balancing test should be made part of the rule. Without that addition, the rule would require the utility of the aid to be merely outweighed, rather than substantially-outweighed, by its danger of unfair prejudice. That change would be "unwise" because "Rule 403's substantially outweighed standard has worked well for decades, and this change will create uncertainty and require further legal developments." The College also argues that the notice requirement is "unworkable" because "(a) it will encourage objections and slow down trials, interfere with effective crossexamination and the presentation of evidence, and discourage the use of illustrative aids, (b) is not feasible for spontaneously created illustrative aids, and (c) is unnecessary when a party is given a reasonable opportunity to object."

Leah S. Snyder, Esq. (2022-EV-0004-0085) objects to the notice requirement in the proposed amendment. She states that it "would eliminate the use of any drawings, sketches, graphs, drawings of experts, drawings of witnesses, use of a whiteboard, use of a pencil, pen, or highlighter during trial."

Christopher Seufert, Esq. (2022-EV-0004-0086) opines that it is difficult in some cases to determine what is an illustrative aid and what is not.

Michael Slack, Esq. (2022-EV-0004-0087) is opposed to the notice requirement, and also states that "it is important for the rule to presume that illustrative aids are usable at trial, while still allowing the court to prohibit or limit their use as necessary to avoid unfair prejudice, surprise, confusion, or wasting time.

Kevin Hannon, Esq., (2022-EV-0004-0088) is in favor of the notice requirement, but is opposed to the provision allowing the court for good cause to submit an illustrative aid to the jury. He states that if a party objects the illustrative aid "must not go to the jury or it becomes an adversarial tool."

The American Association for Justice (AAJ) (2022-EV-0004-0089) opposes the notice requirement; suggests that the text of the rule provide a definition of an illustrative aid; and suggests that the Committee adopt Maine Rule 616 rather than the proposed amendment. AAJ also suggests that a cross-reference to Rule 1006 should be added to the rule.

Samuel Cannon, Esq. (2022-EV-0004-0090) states that "[t]he goal of clarifying the rules regarding illustrative aids is admirable and is certainly an area where the rules currently provide little guidance." He opposes the proposed amendment, however, because of the notice requirement, and because it is unclear whether it applies to aids used during opening and closing arguments.

The Committee to Support Antitrust Laws (2022-0004-0091) complains that the proposed amendment does not provide a specific definition of illustrative aids. It also recommends that the notice requirement be deleted, and that the rule set forth a presumption of permissibility of illustrative aids.

Anonymous (2022-EV-0004-0092) states that "Judges are well-equipped to exclude unnecessary illustrative evidence without the addition of 611(d)."

Macgyver Newton, Esq., (2022-EV-0004-0093) states as follows: "I approve of the addition of FRE 611(d). The use of illustrative aids at trial is and has long been a useful, nearly indispensable tool to aid with jury comprehension of complicated evidence. Rules dealing with their use have been hodge-podge and varied based on the court. The current system also has the disadvantage of being unpredictable. Adding this rule helps regulate in a standardized way something that has been unregulated or unevenly regulated for decades. Illustrative aids can sometimes have a greater impact on a juror than admitted evidence itself; it is a welcome advancement in the FRE that handles their use in a consistent way."

Seth Cardeli, Esq. (2022-EV-0004-0094) complains that "a blanket rule that makes no differentiation to the type of illustrative aid could have the effect of requiring 'notice and a reasonable opportunity to object' to an illustrative aid that is drawn on a pad of paper during a cross examination." He recommends that the regulation of illustrative aids should be left to the individual practices of trial judges.

Christopher Johnson, Esq. (2022-EV-0004-0095) states that the "advance disclosure requirement is unnecessary and almost impossible to comply with without severely hampering a lawyer from being presenting information in the most effective way." He agrees with the requirement that illustrative aids be preserved for the record. "This is a commonsense practice that will assist appellate courts understand the nuances of a trial as well providing helpful context. Moreover, since the jury viewed such materials during trial, it only makes sense that there should be some record made of those materials, even if not evidence."

Paul Byrd, Esq. (2022-EV-0004-0096) opposes the notice requirement, arguing that "[i]t is not fair to the client to handcuff their lawyer to only the arguments and visual aids that the lawyer might with the benefit of 20/20 hindsight could or should have thought of weeks before the trial started."

Jonathan Halperin, Esq. (2022-EV-0004-0097) supports the amendment, concluding that "a formal rule governing the use of illustrative aids is long overdue." He suggests, however, that additional examples be provided to show the distinction between demonstrative evidence and illustrative aids. And he suggests that the enforcement of the notice requirement be conditioned on a finding of prejudice.

Seth Carroll, Esq. (2022-EV-0004-0098) opposes the notice requirement, concluding that it would likely limit flexibility, "and could arguably restrict the use of necessary illustrative evidence developed during the course of trial."

The Federal Courts Committee of the New York City Bar Association (2022-EV-0004-0099) states that the amendment "provides valuable clarification as to when a summary may be used to prove a fact that could otherwise be adduced only through laborious examination of voluminous evidence and when an illustration, although not itself evidence, may be used to help the trier of fact understand admitted evidence." The Committee, however, opposes the provision allowing the court to permit the jury to have access to illustrative aids during deliberation, upon a showing of good cause. The Committee states that if an illustrative aid is in the jury room, "it will be difficult for the jury to distinguish illustrative aids from summaries, and there is a risk that any attorney advocacy that they contain would be considered by the jury outside the context of the opposing advocacy."

The National Association of Criminal Defense Lawyers (NACDL) (2022-EV-0004-0100) "strongly supports the proposal to add a new paragraph (d) to Rule 611 for the purpose of distinguishing between 'demonstrative evidence' and 'illustrative aids.'" The NACDL contends

that "illustrative aids are, not infrequently, subject to abuse" and that the proposed amendment should go a long way toward curbing that abuse. NACDL recommends that the word "substantially" not be added to the balancing test, because unlike information evaluated under Rule 403, illustrative aids are not evidence, and have no direct probative value. NACDL argues that "[e]very illustrative aid, by its nature, creates a risk of confusion in the minds of jurors, who are not trained to distinguish between what is and is not evidence, and the significance of that difference."

Colleen Libbey, Esq., (2022-EV-0004-0101) objects to the notice requirement, arguing that it would improperly interfere with legitimate use of illustrative aids.

Mark Larson, Esq., (2022-EV-0004-0102) opposes the notice requirement, arguing that it would preclude the use of illustrative aids that are developed during the trial.

Greg Gellner, Esq., (2022-EV-0004-0103) argues that the notice requirement "would stifle creativity and hinder the best presentation of evidence."

The National Employment Lawyers Association (2022-EV-0004-0104) opposes the notice requirement and contends that the proposed amendment imposes a "presumption" against the use of illustrative aids.

Richard Friedman, Esq., (2022-EV-0004-0105) opposes the amendment on the ground that some representations that might be considered illustrative aids might also be considered as evidence.

Wayne Parsons, Esq., (2022-EV-0004-0106) states that illustrative aids "are often developed just before trial, or during trial, based upon the evidence in the case, the lawyer observations of the jury during testimony, and the attorneys' trial judgment. Notice requirements will force the parties to decide on an Illustrative Aid, before the lawyers know what will be helpful to the fact-finder." He concludes that notice requirements will reduce the use of illustrative aids.

Bryce Montague, Esq., (2022-EV-0004-0107) states that "illustrative aids/demonstratives are often indicative of a trial lawyer's work product and/or legal strategy, which opposing counsel and the Court have no right to obtain prior to its presentation at Court" and that they are often "cannot be scripted beforehand."

The Federal Bar Council (2022-EV-0004-0108) supports the proposed amendment, concluding that it "will provide an important service to courts and litigants." It suggests, however, that the rule is more properly placed in article 10, rather than article 6, which covers "witnesses."

Sean Domnick, Esq., (2022-EV-0004-0109) states: "It is often quite impossible to exchange this type of demonstrative aid, which merely helps explain or illustrate a point, in advance. Furthermore, it will invade the trial strategy of the parties and their counsel in advance."

Jeremy McGraw, Esq., (2022-EV-0004-0110) opposes the notice requirement: "Requiring an intelligent and creative attorney to turn over their work product and to risk the disclosure of trial plans and attorney thinking in advance of trial only serves to benefit those attorneys who may not work as hard for their clients."

Mark Kittrick, Esq., (2022-EV-0004-0111) argues that the notice requirement can intrude on work product and will reduce the use of illustrative aids.

Brian McKeen, Esq., (2022-EV-0004-0112) suggests that "it would be better to amend FRE 403 and simply state that FRE 403 also applies to illustrative aids, although they are not substantive evidence." He also suggests that the notice requirement should be amended to provide dates certain, and that the good cause standard should be replaced with a list of specific factors.

Sahar Malek, Esq., (2022-EV-0004-0113) argues that the rule should contain a specific definition of illustrative aids, and contends that the notice requirement will make it more difficult to employ illustrative aids.

Walter McKee, Esq., (2022-EV-0004-0114) opposes the amendment on the ground that it "has the court on the frontline of determining whether a party is going to present an illustrative aid." He also argues that it should be up to the parties to determine whether an illustrative aid should be made part of the record.

Amy Zeman, Esq., (2022-EV-0004-0115) opposes the amendment because it does not contain an explicit definition of illustrative aids, and because the notice requirement is "one size fits all."

Nolan Niehus, Esq., (2022-EV-0004-0116) argues that the notice requirement mandates that all illustrative aids "be prepared well in advance and gives the opposing side a large peek behind the curtain of the attorneys work product." He also argues that the rule is unnecessary "as it just seeks to apply the standard in FRE 403, which would already apply to a demonstrative exhibit."

Joseph Miller, Esq., (2022-EV-0004-0117) opposes the notice requirement on the ground "it will invade the sacred attorney work product and mental impressions so the opposition can then draft a counter to those mental impressions" and "it will ultimately be an exercise in futility, because most lawyers cannot identify the illustrative aids they will use weeks and months before trial without observing in trial testimony." He also opines that the rule should provide a specific definition of illustrative aids.

Joseph Bauer, Jr., Esq., (2022-EV-0004-0118) opposes the notice requirement, arguing that "requiring lawyers from both sides to exchange illustrative aids weeks before trial creates an unnecessary expense." He opposes the balancing test in the rule on the ground that courts are already employing Rule 403 to regulate illustrative aids.

Andrew Lampros, Esq., (2022-EV-0004-0119) states that the notice requirement "will impinge on the right to a thorough and sifting cross examination, a cornerstone of our jury system."

Benjamin Bailey, Esq., (2022-EV-0004-0120) contends that the amendment is misplaced in Rule 611 because it does not deal with witnesses; that the notice requirement would be disruptive and would result in improper disclosure of work product; and that illustrative aids are currently being regulated by courts without any problem at all.

Andres Lampros, Esq., (2022-EV-0004-0121) adds to his previously posted comment: "unnecessary and a bad idea."

Patrick Kirby, Esq., (2022-EV-0004-0122) opposes the amendment on the ground that it "might arguably" infringe the Seventh Amendment right to a jury trial, and that the notice requirement would force the parties to prepare their cases far in advance of trial.

Andrew Fuller, Esq., (2022-EV-0004-0123) argues that the rule is unnecessary because courts already have the discretionary authority to regulate the use of illustrative aids. He opposes the notice requirement on the ground that "[f]orcing attorneys to disclose the content of their illustrative exhibits weeks, or even days, in advance of the trial forces attorneys to inappropriately preview their arguments to the other side before trial has even started."

Wyatt Montgomery, Esq., (2022-EV-0004-0124) states that the notice requirement the "would invade the mental impressions of attorneys by informing opponents of potential trial strategy."

Mark Lanier, Esq., (2022-EV-0004-0125) opposes the notice requirement, arguing that " it will give adverse witnesses and their counsel a preview of the cross-examination planned for the witness and allow them to preempt or script around the illustrative aid. Scripting of that kind interferes with the truth-seeking function of the trial and alone justifies exclusion of the notice provision from the rule."

Genevieve Zimmerman, Esq., (2022-EV-0004-0126) and (2022-0004-0129) contends that the Federal Rules of Evidence currently provide "adequate guidelines" for lawyers using illustrative aids. She specifically opposes the notice requirement as designed to "hamstring trial counsel's ability to nimbly and persuasively communicate their case to the trier of fact."

Michael Romano, Esq., (2022-EV-0004-0127) argues that the notice requirement will lead to extensive pretrial determinations and that the rule is unnecessary because courts already have discretion to regulate the use of illustrative aids.

Christine Spagnoli, Esq., (2022-EV-0004-0128) states that the notice requirement "could lead to micro-managing by federal judges of simple examinations of witnesses through the use of a white board or a flip chart. Do federal judges really have the time to referee disputes over whether sufficient notice has been provided when counsel attempts to use a flip chart during the examination of a witness?"

Jordan Lebovitz, Esq., (2022-EV-0004-0130) objects to the notice requirement, arguing that "[t]o be forced to identify, and then share, these demonstrative drawings or outlines is contrary to the purpose of a trial, and inconsistent with the use of advocacy in a Courtroom."

The D'Amore Law Group, PC (2022-EV-0004-0131) supports the proposed amendment: "As plaintiff's attorneys we are often tasked with explaining large amounts of complicated evidence and data to a jury. In this role illustrative aids are routinely used during the trial to aid with these explanations." It approves of the safeguards in the rule and agrees that the trial court should have discretion to allow such aids to be viewed by the jury during deliberations.

Dov Sacks, Esq., (2022-EV-0004-0132) opposes the amendment, claiming that the language that the court may allow the use of an illustrative aid "effectively requires the party presenting the illustrative aid to make a prima facie showing before the court can even consider allowing it."

Rhett Wallace, Esq., (2022-EV-0004-0133) argues that the proposed amendment is unnecessary because courts are currently regulating the use of illustrative aids under Rule 403. He believes that the amendment would require a hearing before any illustrative aid can be used. He opposes the notice requirement because, as he interprets the rule, "both parties would have to reveal their cross-examination strategies in advance, thereby giving this witness the chance to prepare, undermining the purpose of cross-examination in the first place."

Gabrielle Holland, Esq., (2022-EV-0004-0134) argues that the balancing test in the proposed amendment is unnecessary because courts are already excluding unfair illustrative aids under Rule 403. She opposes the notice requirement, concluding that "requiring the attorneys for both sides to exchange Illustrative aids weeks ahead of the trial date creates an unnecessary expense" and "[r]equiring courts to hold hearings to approve every illustrative aid imposes and unnecessary burden on already busy trial courts." She states that "Proposed 611(d)(3) is a good idea. It is beneficial to label and properly paginate with Bates Numbers all exhibits presented to the trier of fact. This helps the record remain organized."

DiCello Levitt LLC (2022-EV-0004-0135) is opposed to the notice requirement, concluding that "any proposal that would mandate advanced disclosure of illustrative aids by a plaintiff would allow defendants would gain an unfair advantage and access to the plaintiff's litigation plan."

William Rossbach, Esq. (2022-EV-0004-0136) believes that the proposed amendment is hostile toward illustrative aids, because it states that "the court may allow" them. He prefers a rule which would state that a party may use illustrative aids, with the court having the authority to exclude them. He complains that the text of the rule does not set forth an explicit and all-encompassing definition of illustrative aids. And he opposes the notice requirement as an improper limitation on trial strategy and the questioning of witnesses.

Rachel Sykes, Esq., (2022-EV-0004-0137) asserts that the language stating that "the court may allow a party to present an illustrative aid" is "problematic because it inherently infringes on the court's ability to act as gatekeeper and could therefore limit the court's discretion to make evidentiary rulings." She opposes the notice requirement as a problematic limit on the lawyer's ability to uses illustrative aids extemporaneously at trial.

Bailey & Oliver Law Firm (2022-EV-0004-0138) interprets "the court may allow" as setting the default position of not allowing any illustrative aids unless a judge finds they are appropriate for a particular reason." And the firm opposes the notice requirement as an impediment on the use of illustrative aids.

Michael Warshauer, Esq., (2022-EV-0004-0139) contends that the balancing test is unnecessary because courts are currently using Rule 403 to control illustrative aids. He opposes the notice requirement, interpreting to have no good cause exception, with the court having to rule on every illustrative aid that will be used at trial: "Requiring the attorneys for both sides to exchange Illustrative aids weeks ahead of the trial date creates an unnecessary expense. Requiring courts to hold hearings to approve every illustrative aid imposes and unnecessary burden on already busy trial courts." He agrees with the provision requiring all illustrative aids to be part of the record, noting that some courts do not do this.

Anthony Petru, Esq., (2022-EV-0004-0140) argues that the notice requirement would be unfair to plaintiffs, who go first, and that the rule is unnecessary, because Rule 403 is currently used by the courts to govern the use of illustrative aids.

TAB 3

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Liesa L. Richter
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Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Rule 1006: Summaries to Prove Content of Voluminous Writings, Recordings, or Photographs
Date: April 1, 2023

A proposed amendment to Rule 1006 was published for notice and comment in August 2022. Rule 1006 provides an exception to the Best Evidence rule that permits the use of a summary to prove the content of otherwise admissible writings, recordings, or photographs too voluminous to be conveniently examined in court. The amendment would clarify certain aspects of the Rule that have caused repeated problems for some federal courts. The difficulties courts experience in applying Rule 1006 largely stem from confusion about the distinction between a summary offered as an illustrative or pedagogical aid pursuant to Rule 611(a) and a Rule 1006 summary offered as alternative evidence of underlying voluminous content. The amendment would clarify that Rule 1006 summaries are admitted "as evidence" and that they may be admitted "whether or not" the underlying voluminous materials have been admitted. In addition, the amendment would add a new subsection (c) expressly stating that Rule 1006 does not govern the use of illustrative aids and directing courts and litigants to Rule 611 for standards governing the use of illustrative aids.[1] The proposed amendment and committee note, as published for public comment, read as follows:

Rule 1006. Summaries to Prove Content

(a) **Summaries of Voluminous Materials Admissible as Evidence.** The ~~proponent~~ court may admit as evidence ~~use~~ a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court, whether or not they have been introduced into evidence.

(b) **Procedures.** The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

[1] As discussed in the Reporter's memorandum on illustrative aids, the Committee is considering whether to keep the proposed amendment governing illustrative aids in Rule 611 or whether to house it in a separate Rule 107. Should the Committee decide to add a new Rule 107 to govern illustrative aids, the cross-reference in proposed Rule 1006(c) would need to be modified to reference that provision rather than Rule 611.

(c) **Illustrative Aids Not Covered.** A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 611(d).

Committee Note

Rule 1006 has been amended to correct misperceptions about the operation of the Rule by some courts. Some courts have mistakenly held that a Rule 1006 summary is "not evidence" and that it must be accompanied by limiting instructions cautioning against its substantive use. But the purpose of Rule 1006 is to permit alternative proof of the content of writings, recordings, or photographs too voluminous to be conveniently examined in court. To serve their intended purpose, therefore, Rule 1006 summaries must be admitted as substantive evidence and the Rule has been amended to clarify that a party may offer a Rule 1006 summary "as evidence." The court may not instruct the jury that a summary admitted under this rule is not to be considered as evidence.

Rule 1006 has also been amended to clarify that a properly supported summary may be admitted into evidence whether or not the underlying voluminous materials reflected in the summary have been admitted. Some courts have mistakenly held that the underlying voluminous writings or recordings themselves must be admitted into evidence before a Rule 1006 summary may be used. Because Rule 1006 allows alternate proof of materials too voluminous to be conveniently examined during trial proceedings, admission of the underlying voluminous materials is not required and the amendment so states. Conversely, there are courts that deny resort to a properly supported Rule 1006 summary because the underlying writings or recordings – or a portion of them -- *have been* admitted into evidence. Summaries that are otherwise admissible under Rule 1006 are not rendered inadmissible because the underlying documents have been admitted, in whole or in part, into evidence. In most cases, a Rule 1006 chart may be the only evidence the trier of fact will examine concerning a voluminous set of documents. In some instances, the summary may be admitted in addition to the underlying documents.

A summary admissible under Rule 1006 must also pass the balancing test of Rule 403. For example, if the summary does not accurately reflect the underlying voluminous evidence, or if it is argumentative, its probative value may be substantially outweighed by the risk of unfair prejudice or confusion.

Although Rule 1006 refers to materials too voluminous to be examined "in court" and permits the trial judge to order production of underlying materials "in court", the rule applies to virtual proceedings just as it does to proceedings conducted in person in a courtroom.

The amendment draws a distinction between summaries of voluminous, admissible information offered to prove a fact, and summaries of evidence offered solely to assist the trier of fact in understanding the evidence. The former are subject to the strictures of Rule 1006. The latter are illustrative aids, which are now regulated by Rule 611(d).

A. Committee Changes After Publication

The Committee has unanimously agreed to make two modest changes to the amendment since it was published for notice and comment. First, the Committee agreed to add the word "admissible" to the text of Rule 1006(a) to clarify that the voluminous records underlying a Rule 1006 summary must be "admissible" even though they need not be admitted at trial. Records underlying a Rule 1006 summary have always had to satisfy admissibility requirements and federal courts have displayed no confusion regarding this part of the Rule 1006 foundation.[2] The Committee unanimously agreed that an amendment clarifying the proper foundation for a Rule 1006 summary should expressly include this part of the foundation. Second, the Committee agreed to a modest change to the first sentence of the final paragraph of the committee note to distinguish illustrative aids from admissible summaries more clearly. The version of the Rule 1006 amendment at the conclusion of this memorandum reflects these changes.

B. Public Comment on Rule 1006

The public comment period closed on February 16, 2023. Of the 137 total comments received, seven addressed the proposed amendment to Rule 1006. The comments were generally supportive and included only modest suggestions.

1. Comments Regarding the Admissibility of the Underlying Records

The Federal Magistrate Judges' Association and Jacob Hayward both suggested one addition to the text of Rule 1006 to clarify that the underlying voluminous records presented in summary form must be "admissible" in evidence even though they need not be admitted. The FMJA proposed the following language to add this clarification:

> The court may admit as evidence a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs <u>that are otherwise admissible</u> but that cannot be conveniently examined in court, whether or not they have been introduced into evidence.

Mr. Hayward proposed a slight variation on this language:

> The court may admit as evidence a summary, chart, or calculation to prove the content of voluminous writings, recordings, photographs, or other documents that cannot be conveniently examined in court <u>but are otherwise admissible</u>, regardless of whether they have been introduced into evidence.

As noted above, the Committee has already considered this concern at its Fall 2022 meeting. To avoid any inference that this well-accepted part of the Rule 1006 foundation is eliminated by the amendment, the Committee determined that it is important to clarify that the underlying voluminous records must be *admissible*, even though they need not be admitted. The Committee decided to make this clarification by adding the modifier "admissible" to the text of

[2] *See, e.g.*, *United States v. Trevino*, 7 F.4th 414 (6th Cir. 2021) (Rule 1006 summary of voluminous marijuana sales records appropriate where underlying sales records would have been admissible under the business records exception to the hearsay rule).

Rule 1006(a). As noted above, the final version of the proposed amendment at the conclusion of this memorandum reflects this change upon which the Committee has already agreed.

2. Accurate and Non-argumentative Summaries: Comment of the National Association of Criminal Defense Lawyers

The NACDL supports the proposed amendment to Rule 1006 but argues that the committee note cautioning against inaccurate or argumentative summaries should be strengthened. In support of the amendment, the NACDL explains:

> The amendment would make clear that accurate and non-argumentative summaries of voluminous materials are directly admissible, whether or not the underlying materials are themselves introduced into evidence, so long as those materials are made available to the adversary in time – which ordinarily should be well in advance of trial – to allow both the underlying voluminous materials and the summary itself to be fully examined and evaluated.

The NACDL suggests that the paragraph in the committee note referencing exclusion of a Rule 1006 summary under Rule 403 should be strengthened "to state expressly that a summary that does not accurately and non-argumentatively present the relevant contents of the underlying materials inherently lacks probative value, which in turn would necessarily be (not just "may be") substantially outweighed by the risk of confusion, waste of time, and unfair prejudice."

Rule 1006 releases parties from the requirement that they admit originals or duplicates to prove the content of writings, recordings, or photographs as a matter of convenience when the underlying records are voluminous. Federal courts have long required that a summary admitted into evidence through Rule 1006 be an accurate and non-argumentative reflection of the voluminous underlying content for which it substitutes.[3] Because Rule 611 illustrative aids are not evidence, they are permitted to contain reasonable inference and argument based upon admitted evidence. Federal courts have sometimes permitted inference and argument to be included in admitted Rule 1006 summaries due to the frequent confusion over the distinction between illustrative aids and Rule 1006 summaries.[4] Indeed, confusion on this point was one reason for considering an amendment to Rule 1006.

Early drafts of the proposed amendment to Rule 1006 included these well-accepted parts of the Rule 1006 foundation in rule text to avoid any inference that they have been eliminated.

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[3] *See United States v. White*, 737 F.3d 1121, 1135–36 (7th Cir. 2013) ("Because a Rule 1006 exhibit is supposed to substitute for the voluminous documents themselves, however, the exhibit must accurately summarize those documents. It must not misrepresent their contents or make arguments about the inferences the jury should draw from them."); *United States v. Moore*, 843 F. App'x 498, 504 (4th Cir. 2021) (stating that the purpose of Rule 1006 "is to reduce the volume of written documents that are introduced into evidence by allowing in evidence accurate derivatives."); *United States v. Oloyede*, 933 F.3d 302, 311 (4th Cir. 2019) (a district court abuses its discretion by admitting a proffered summary under Rule 1006 that amounts to "a skewed selection of *some* of the [underlying] documents to further the proponent's theory of the case.") (emphasis in original).

[4] *United States v. Melgen*, 967 F.3d 1250, 1260 (11th Cir. 2020) ("Under [FRE 1006], 'the essential requirement is not that the charts be free from reliance on any assumptions, but rather that these assumptions be supported by evidence in the record.'") (citation omitted).

The Committee ultimately decided to relegate this portion of the foundation to the committee note using the reference to Rule 403 balancing that the NACDL addresses. For the same reason that the Committee decided to add language to the text of the amended rule clarifying that the underlying records must be "admissible," the Committee may wish to clarify that a Rule 1006 summary must be an "accurate and non-argumentative" reflection of the underlying content.[5] The Committee could accomplish this by adding a sentence to the committee note as the NACDL suggests, explaining that an inaccurate or argumentative summary has no probative value. Now that all other elements of the Rule 1006 foundation are included in rule text, however, it may make sense to reconsider adding those elements to the text of the amended rule. The omission of only one portion of the foundation from rule text could create an inference that Rule 1006 summaries need not be accurate and non-argumentative. The final version of Rule 1006 at the end of this memorandum includes drafting options for the Committee's consideration to address the issue of accurate and non-argumentative summaries – one that adds this part of the foundation to the text of the amended rule and another that strengthens the committee note, as suggested by the NACDL.

3. Comments Regarding Cross-Reference to Rule 611 in Rule 1006(c)

Two comments offered contradictory suggestions regarding the cross-reference between amended Rule 611 and 1006. The cross-reference in Rule 1006(c) was included to address the frequent confusion courts have displayed concerning the distinction between a Rule 1006 summary and an illustrative aid. Federal courts sometimes erroneously require Rule 1006 summaries to be accompanied by limiting instructions cautioning that they are "not evidence." Federal courts sometimes mistakenly demand that all records underlying a Rule 1006 summary be admitted in evidence. And federal courts sometimes allow impermissible inference and argument to creep into Rule 1006 summaries of voluminous content. All these mistaken applications of Rule 1006 stem from conflation of the standards governing Rule 1006 summaries and those governing Rule 611 illustrative aids. The amendment is designed to correct this confusion and to clarify the difference between a Rule 1006 summary admitted as substantive evidence of the content of voluminous documents and an illustrative aid designed to assist in understanding other admitted evidence. The cross-reference was included in Rule 1006(c) to draw this distinction in rule text.

Professor Friedman supports the proposed amendment to Rule 1006, explaining that he views subsections (a) and (b) of the proposal as "sensible." But he expresses his view that the Committee should delete subsection (c) of the proposed amendment that contrasts illustrative aids with Rule 1006 summaries and that cross-references proposed Rule 611(d), seemingly due to his opinion that the amendment governing illustrative aids should not be adopted. Were the Committee to elect *not* to proceed with an amendment regarding illustrative aids, proposed Rule 1006(c) would need to be modified or deleted.

In contrast, the American Association for Justice advocates *adding* a parallel cross-reference to amended Rule 611 distinguishing illustrative aids covered by that provision from the admitted summaries governed by Rule 1006. The AAJ reports that its members rely upon Rule

[5] *See* Memorandum from Liesa L. Richter to Evidence Advisory Committee (April 1, 2022), available at evidence_agenda_book_may_6_2022.pdf (uscourts.gov).

1006 in many different contexts, making frequent use of the provision. The AAJ supports the proposed amendment to Rule 1006, noting that the amendment would make "useful clarifications" that do "not change or alter the purpose of the rule." The only change suggested in conjunction with Rule 1006 is to proposed Rule 611(d) governing illustrative aids. In addition to other detailed comments by the AAJ directed to Rule 611(d), the AAJ proposes that the Committee add to Rule 611(d) a parallel cross-reference to Rule1006 to mirror the cross-reference included in proposed Rule 1006(c). Whether to add a parallel cross-reference to amended Rule 611(d) is a matter for the Committee to consider in connection with Rule 611. The Reporter's memorandum regarding illustrative aids addresses this issue.

4. A Specific Timeframe for Producing Underlying Records

Proposed Rule 1006(b) includes the procedures for admitting a Rule 1006 summary. It requires that the proponent of a summary "make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place." Mr. Patrick Miller suggests that the amendment should include a specific timeframe within which the proponent of a Rule 1006 summary must make the underlying voluminous materials available to the other side. He suggests either a 5- or 15-day window within which to turn over underlying documents and opines that such a time limit is consistent with time limits in the Federal Rules of Civil Procedure.

Mr. Miller is correct that such specific time periods and deadlines are more consistent with the Federal Rules of Civil Procedure than the Federal Rules of Evidence. Very few provisions in the Evidence Rules create rigid time constraints. The notice provisions for Rules 404(b) (governing the admissibility of a criminal defendant's "other crimes, wrongs, or acts") and 807 (governing the admissibility of hearsay under the residual exception) were recently amended.[6] Both amended notice provisions require "reasonable written notice" "before trial" that affords the opponent a "fair opportunity" to meet the evidence, leaving the precise timing of the notice to the discretion of the trial judge on a case-by-case basis.[7] The Committee considered including a specific 14-day time period for notice of Rule 404(b) evidence in criminal cases in 2018.[8] The Reporter noted the problem of including a specific time period given that the Evidence Rules do not contain a time counting provision to aid in calculating the number of days.[9] Furthermore, the Reporter noted that a precise time period could create rigidity unhelpful to the trial process, though such rigidity can be ameliorated by a good cause exception to such requirements. The Committee ultimately concluded that a rigid time period was not advisable, finding that a trial judge should

[6] Rule 404(b) was amended in 2021 and Rule 807 was amended in 2019.

[7] Both provisions include an exception to the pre-trial notice requirement for good cause.

[8] *See* Memorandum from Daniel J. Capra to Evidence Advisory Committee, at 290 (April 1, 2018), available at agenda_book_advisory_committee_on_rules_of_evidence_-_final.pdf (uscourts.gov).

[9] *See* Fed. R. Civ. Pro. 6 (providing methods for counting the various time periods included in the Rules).

determine appropriate timing for a given case in the context of a pre-trial order.[10] For these reasons, it would seem ill advised to include a precise timing requirement in the procedures subsection of Rule 1006(b). That said, both Rules 404(b) and 807 require that an opponent receive notice that affords a "fair opportunity" to meet the evidence. The Committee could consider adding similar language to the Rule 1006(b) disclosure requirement to create consistency among these provisions. The version of Rule 1006 at the conclusion of this memorandum includes such language in brackets for the Committee's consideration.

It should be noted that there are a few specific time periods provided in the Federal Rules of Evidence akin to those suggested by Mr. Miller. Federal Rule 412, the rape shield rule, requires a motion seeking to admit evidence of a victim's past sexual conduct "at least 14 days before trial." Rules 413, 414, and 415, governing the admissibility of a defendant's past acts of sexual assault or child molestation, require notice to the defendant "at least 15 days before trial." These Rules were originally enacted directly by Congress. This may explain the use of specific time periods generally incompatible with the Rules. Furthermore, these Rules target evidence in sex offense cases, which have received special attention and treatment due to policy concerns over the protection of alleged victims. This subject matter may justify more precise delineation of pretrial obligations.

Rule 803(10) creates a hearsay exception for evidence of the absence of a public record when offered to prove that a particular event did not occur. It permits the absence of a public record to be shown through a certification. The exception requires a prosecutor who intends to offer a certification to provide written notice at least 14 days before trial and requires an objection by the defendant within 7 days of receiving such notice. It does authorize a court to set a "different time for the notice or the objection."[11] This notice and demand procedure was added to Rule 803(10) to comply with the Supreme Court's opinion in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), stating that a testimonial certificate may be admitted against a criminal defendant consistent with the Sixth Amendment if the accused is given advance notice and does not demand the presence of the certificate's preparer at trial. As noted by the Advisory Committee's note to the Rule 803(10) amendment, it was designed to "incorporate[], with minor variations, a "notice and demand" procedure that was approved the *Melendez-Diaz* Court."[12] Thus, precise timelines were included in this provision to ensure compliance with constitutional obligations articulated by the Supreme Court. There is no such compelling need for precision in connection with Rule 1006 procedures. But if the Committee disagrees, it could easily add a precise time period for pre-trial disclosure to Rule 1006(b) if it is so inclined, as follows:

> **(b) Procedures.** The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at least 14 days before trial, unless

[10] *See* Minutes of the Meeting of the Evidence Advisory Committee (April 2018), available at ev_minutes_april_2018_final_0.pdf (uscourts.gov).

[11] Fed. R. Evid. 803(10)(B).

[12] *See* Advisory Committee's 2013 note to Fed. R. Evid. 803(10).

the court sets a different time ~~a reasonable time and place~~. And the court may order the proponent to produce them in court.

5. A Rule 611(d) Suggestion: Preventing Illustrative Aids from Going to the Jury Room Absent Consent

The New York City Bar Association offers its support for the proposed amendment to Rule 1006. It argues only that an amendment to Rule 611 governing illustrative aids should prevent an illustrative aid from going to the jury room absent the consent of all parties to avoid treating Rule 1006 summaries -- that *are* admitted as evidence --, and illustrative aids -- that *are not evidence* -- similarly at trial. The issue of sending Rule 611 illustrative aids to the jury room is covered by the Reporter's memorandum regarding Rule 611(d).

C. Proposed Rule 1006

As explained above, the Committee approved two changes to Rule 1006 at its Fall 2022 meeting: 1) it added the modifier "admissible" to the text of Rule 1006(a) to clarify that the underlying voluminous records must meet admissibility requirements even though they need not be admitted; and 2) it modified the final paragraph of the committee note to distinguish between Rule 1006 summaries and Rule 611 illustrative aids more clearly. These two changes are reflected with the changes tracked in the final draft amendment below.

Public comment offered two additional suggestions for modifying Rule 1006: 1) to emphasize that Rule 1006 summaries admitted to prove the contents of underlying materials must be accurate and non-argumentative; and 2) to include more precise procedural requirements for the pre-trial disclosure of underlying records under Rule 1006(b).[13] Drafting options for implementing these changes are included in the final version of both the rule text and committee note below in brackets.

[13] The comments concerning the cross-reference to Rule 611(d) contained in Rule 1006(c) relate only to the propriety of an amendment regarding illustrative aids. These comments will, therefore, be addressed in the context of the Committee's determination regarding an illustrative aid amendment.

Rule 1006. Summaries to Prove Content

(a) **Summaries of Voluminous Materials Admissible as Evidence.** The ~~proponent~~ court may admit as evidence ~~use~~ a[n accurate and non-argumentative] summary, chart, or calculation to prove the content of admissible voluminous writings, recordings, or photographs that cannot be conveniently examined in court, whether or not they have been introduced into evidence.

(b) **Procedures.** The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place [so that they have a fair opportunity to meet the evidence].[14] And the court may order the proponent to produce them in court.

(c) **Illustrative Aids Not Covered.** A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 611(d).

Committee Note

Rule 1006 has been amended to correct misperceptions about the operation of the Rule by some courts. Some courts have mistakenly held that a Rule 1006 summary is "not evidence" and that it must be accompanied by limiting instructions cautioning against its substantive use. But the purpose of Rule 1006 is to permit alternative proof of the content of writings, recordings, or photographs too voluminous to be conveniently examined in court. To serve their intended purpose, therefore, Rule 1006 summaries must be admitted as substantive evidence and the Rule has been amended to clarify that a party may offer a Rule 1006 summary "as evidence." The court may not instruct the jury that a summary admitted under this rule is not to be considered as evidence.

Rule 1006 has also been amended to clarify that a properly supported summary may be admitted into evidence whether or not the underlying voluminous materials reflected in the summary have been admitted. Some courts have mistakenly held that the underlying voluminous writings or recordings themselves must be admitted into evidence before a Rule 1006 summary may be used. Because Rule 1006 allows alternate proof of materials too voluminous to be conveniently examined during trial proceedings, admission of the underlying voluminous materials is not required and the amendment so states. Conversely, there are courts that deny resort to a properly supported Rule 1006 summary because the underlying writings or recordings – or a portion of them -- *have been* admitted into evidence. Summaries that are otherwise admissible under Rule 1006 are not rendered

[14] Although rigid time periods are rare in the Federal Rules of Evidence, the Committee could also consider adding a 14-day time period to Rule 1006(b) as discussed above in Section B.4.

inadmissible because the underlying documents have been admitted, in whole or in part, into evidence. In most cases, a Rule 1006 chart may be the only evidence the trier of fact will examine concerning a voluminous set of documents. In some instances, the summary may be admitted in addition to the underlying documents.

A summary admissible under Rule 1006 must also pass the balancing test of Rule 403. [A summary that presents the contents of underlying materials inaccurately or in an unduly argumentative manner inherently lacks probative value, such that it should be excluded due to the risk of confusion and unfair prejudice.] [~~For example, if the summary does not accurately reflect the underlying voluminous evidence, or if it is argumentative, its probative value may be substantially outweighed by the risk of unfair prejudice or confusion.~~] [15]

[Consistent with the original rule, the amendment requires that the proponent of a Rule 1006 summary make the underlying voluminous records available to other parties at a reasonable time and place. The trial judge has considerable discretion in determining the reasonable nature of the production in each case. The amendment makes clear that the production of underlying voluminous records must be made in a manner that affords other parties a fair opportunity to meet the summary. *See* Rules 404(b)(3) and 807(b).]

Although Rule 1006 refers to materials too voluminous to be examined "in court" and permits the trial judge to order production of underlying materials "in court", the rule applies to virtual proceedings just as it does to proceedings conducted in person in a courtroom.

The amendment draws a distinction between summaries of admissible, voluminous~~, admissible~~ information offered to prove a fact, and illustrations ~~summaries of evidence~~ offered solely to assist the trier of fact in understanding the evidence. The former are subject to the strictures of Rule 1006. The latter are illustrative aids, which are now regulated by Rule 611(d).

[15] These alterations to the committee note could be made in addition to a textual change to Rule 1006(a) requiring an accurate and non-argumentative summary, or as an alternative to a textual change. The Committee could also reject both changes, leaving Rule 1006(a) and the committee note regarding Rule 403 unchanged from the published version.

TAB 4

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Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Proposed Amendment to Rule 613(b): Extrinsic Evidence of a Witness's Prior Inconsistent Statement
Date: April 1, 2023

A proposed amendment to Rule 613(b) was published for notice and comment in August 2022. The proposed amendment relates to a witness's opportunity to explain or deny a prior inconsistent statement when a party offers extrinsic proof of the statement. Under the current version of Rule 613(b), the witness's opportunity to explain or deny may come at any time – even after extrinsic evidence of the prior inconsistent statement is offered. This means that a witness need not be offered the opportunity to explain or deny during her testimony and may be recalled to explain after extrinsic proof is admitted. Some federal courts recognize the timing flexibility within the existing provision and apply it as written, allowing extrinsic evidence of a prior inconsistent statement to precede a witness's explanation.[1] Because of inefficiencies that occur when a witness must be recalled simply to explain a prior inconsistent statement, however, many federal courts require litigants to lay a prior foundation with the witness during cross-examination notwithstanding the timing flexibility embodied in Rule 613(b).[2]

The proposed amendment would resolve this conflict in the courts and demand a prior foundation for extrinsic evidence of a prior inconsistent statement. The proposed amendment would require that a witness be given an opportunity to explain or deny a prior inconsistent statement *before* extrinsic evidence of the statement may be admitted. The amendment would preserve the discretion of the trial judge to permit a later opportunity to explain or deny or to dispense with the opportunity altogether in appropriate circumstances. Thus, the amendment would simply set a default timing sequence, requiring an opportunity to explain or deny a prior inconsistent statement before extrinsic evidence of the statement may be offered, while

[1] *See, e.g.*, United States v. Jones, 739 F. App'x 376, 379 (9th Cir. 2018) (affirming admission of testifying witness's inconsistent grand jury testimony prior to witness's opportunity to explain); United States v. Farber, 762 F.2d. 1012 (6th Cir. 1985) ("Extrinsic evidence is admissible to establish a prior inconsistent statement of a witness if the impeached party is given an opportunity to explain or deny the statement. Although the party being impeached does not have to be given a *prior* opportunity to explain or deny the statement, some opportunity to explain or deny the statement is still required.").

[2] *See, e.g.,* United States v. Hudson, 970 F.2d 948, 955 (1st Cir. 1992) (explaining that "the Fifth, Ninth, and Tenth Circuits have upheld the refusal to admit proof through extrinsic evidence of prior inconsistent statements unless the witness has first been afforded the opportunity to deny or explain those statements.").

maintaining flexibility to alter that default rule. Importantly, adding a default timing requirement to Rule 613(b) will put litigants on clear notice that they must first confront a witness with a prior inconsistent statement before offering extrinsic evidence of the statement in the usual case.

The proposed rule and Advisory Committee Note published for comment read as follows:

Rule 613. Witness's Prior Statement

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Unless the court orders otherwise, ~~E~~extrinsic evidence of a witness's prior inconsistent statement ~~is admissible only if~~ may not be admitted until after the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it ~~or if justice so requires~~. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Committee Note

Rule 613(b) has been amended to require that a witness receive an opportunity to explain or deny a prior inconsistent statement *prior* to the introduction of extrinsic evidence of the statement. This requirement of a prior foundation is consistent with the common law approach to prior inconsistent statement impeachment. *See, e.g.*, *Wammock v. Celotex Corp.*, 793 F.2d 1518, 1521 (11th Cir. 1986) ("Traditionally, prior inconsistent statements of a witness could not be proved by extrinsic evidence unless and until the witness was first confronted with the impeaching statement."). The original rule imposed no timing preference or sequence, however, and permitted an impeaching party to introduce extrinsic evidence of a witness's prior inconsistent statement before giving the witness the necessary opportunity to explain or deny it. This flexible timing can create problems concerning the witness's availability to be recalled, and lead to disputes about which party bears responsibility for recalling the witness to afford the opportunity to explain or deny. Further, recalling a witness solely to afford the requisite opportunity to explain or deny a prior inconsistent statement may be inefficient. Finally, trial judges may find extrinsic evidence of a prior inconsistent statement unnecessary in some circumstances where a witness freely acknowledges the inconsistency when afforded an opportunity to explain or deny. Affording the witness an opportunity to explain or deny a prior inconsistent statement before introducing extrinsic evidence of the statement avoids these difficulties. The prior foundation requirement prevents unfair surprise; gives the target of the impeaching evidence a timely opportunity to explain or deny the alleged inconsistency; promotes judges' efforts to conduct trials in an orderly manner; and conserves judicial resources.

The amendment preserves the trial court's discretion to delay an opportunity to explain or deny until after the introduction of extrinsic evidence in appropriate cases, or to dispense with the requirement altogether. A trial judge may decide to delay or even forgo a witness's opportunity to explain or deny a prior inconsistent statement in certain

circumstances, such as when the failure to afford the prior opportunity was inadvertent and the witness may be afforded a subsequent opportunity, or when a prior opportunity was impossible because the witness's statement was not discovered until after the witness testified.

A. Public Comment on Rule 613(b)

The public comment period closed on February 16, 2023. Of the 137 total comments received, only four related to the proposed amendment to Rule 613(b). The following commentary was received.

1. Federal Magistrate Judges' Association

The Federal Magistrate Judges' Association endorsed the proposed amendment. It explained: "The FMJA agrees fully with the rule as proposed because it will ensure consistent practice throughout federal courts, and therefore endorses the proposed amendment as written."

2. The National Association of Criminal Defense Lawyers

In important respects, the commentary from the NACDL is supportive of the proposed amendment. It acknowledges that the amendment would "make[] the Rule consistent with the preferred approach of most judges and with the current law in many states, which have not generally followed the prior Federal Rule in this regard." The NACDL also notes that a prior foundation will not impede fair and effective impeachment and that it will improve efficiency:

> A competent cross-examiner will still be able to expose a lying witness who has changed their story by asking carefully framed questions before disclosing knowledge of the prior inconsistent statement, and will be able to introduce evidence of that statement afterwards, where such evidence exists. We agree that the proposal should make for a more orderly and efficient presentation of evidence, with no loss of fairness.

The NACDL expresses two concerns about the proposed amendment, however. First, it suggests that the discretion reserved for the trial judge to excuse a prior foundation is vague and limitless. It opines that some trial judges may simply override the amendment and permit continued timing flexibility, producing divergent and inconsistent outcomes in practice. The NACDL suggests that "[s]tronger language in the Note about a need for special circumstances to properly justify a court in allowing a deviation from the Rule might help obviate this risk." Second, the NACDL argues that the amendment is unclear as to whether a lawyer needs to request permission in advance from the trial judge before offering extrinsic evidence of a prior inconsistent statement in the absence of a prior foundation. The NACDL suggests that the committee note should direct counsel to "request leave of court" to deviate from the default timing rule and not to proceed unilaterally to offer extrinsic evidence in the hopes of drawing no objection. In essence, the NACDL suggests that the committee note should direct lawyers to ask for permission rather

than forgiveness in offering extrinsic evidence of a witness's prior inconsistent statement before offering the requisite opportunity to explain or deny.

With respect to the first concern, it seems unnecessary to limit a trial judge's discretion to dispense with the prior foundation requirement for several reasons. First, existing Rule 613(b) permits a trial judge to dispense with a witness's opportunity to explain or deny a prior inconsistent statement altogether whenever "justice so requires." The Advisory Committee's note to the original provision explains this discretion as follows:

> In order to allow for such eventualities as the witness becoming unavailable by the time the statement is discovered, a measure of discretion is conferred upon the trial judge.[3]

Thus, it appears that the current provision offers broad authority to a trial judge to dispense with the requirement as the judge sees fit and makes no effort to limit or cabin that discretion. Thus, to the extent that the proposed amendment offers similar latitude to the trial judge, it is not an expansion. Indeed, the proposed amendment creates more clarity and limitation than the existing provision by requiring a prior foundation in the usual case. Second, the committee note to the proposed amendment *does* offer examples of circumstances in which a trial judge might consider permitting extrinsic evidence of a prior inconsistent statement in the absence of a prior foundation:

> A trial judge may decide to delay or even forgo a witness's opportunity to explain or deny a prior inconsistent statement in certain circumstances, such as when the failure to afford the prior opportunity was inadvertent and the witness may be afforded a subsequent opportunity, or when a prior opportunity was impossible because the witness's statement was not discovered until after the witness testified.

It is true that the first example offers very little limitation, suggesting that a trial judge may wish to allow extrinsic evidence to be admitted first in a situation in which a party simply forgot to lay the prior foundation where the witness can easily be recalled. But there seems to be no reason to limit the trial judge's discretion to do just that. The prior foundation requirement ensures the orderly and efficient administration of a trial. If the trial judge finds no inefficiency or unfairness in a particular case in permitting extrinsic evidence to be admitted first *for any reason*, Rule 613(b) should not prevent the judge from allowing the evidence as he or she sees fit.

This measure of discretion also appears consistent with Rule 611(b) which sets a default limit on the scope of cross examination while providing that the trial judge "may allow inquiry into additional matters as if on direct examination."[4] Third, it seems unlikely that trial judges will frequently reject the prior foundation requirement in the proposed amendment as the NACDL fears. As noted above and as confirmed by the NACDL, many judges *already* insist upon a prior

[3] *See* Advisory Committee's note to Fed. R. Evid. 613(b).

[4] Fed. R. Evid. 611(b).

foundation even though the current rule dispenses with one.[5] The amendment is designed to align Rule 613(b) with the prevailing practice in many federal courts. It is difficult to imagine that practice shifting in response to a rule change confirming and adopting it.

For all these reasons, there seems to be little benefit to attempting to limit a trial judge's remaining discretion under Rule 613(b) as the NACDL suggests. If the Committee disagrees and wishes to impose more limitation, the first example in the committee note that suggests forgiveness of the prior foundation requirement due to inadvertent failure to comply could be removed and a reference to "good cause" or some similar standard could be added. A version of the final paragraph of the committee note reflecting such changes appears at the end of this section.

The second concern raised by the NACDL likewise does not appear to merit a change to the proposed amendment or to the committee note. The Federal Rules of Evidence generally do not require advance permission to present evidence. Rule 103(a) provides that a party should make a specific and timely objection to prevent an opponent from offering inadmissible evidence.[6] It further notes that a "motion to strike" is the appropriate remedy if inadmissible evidence is proffered before an objection can be made. In the absence of objection, evidence is evaluated only for plain error. It would be at odds with traditional practice to prohibit a party from proffering extrinsic evidence without prior authorization from the court.

Rule 412, the rape shield rule, is the only one that specifies a procedure for determining admissibility and that requires pre-trial permission to present evidence.[7] Special public policy reasons support the need for an advanced determination in the context of evidence of a victim's sexual history that would not support a pre-authorization limit on Rule 613(b).[8] Certain other provisions, such as Rule 404(b), require pre-trial *notice* to an adversary of the intent to offer evidence.[9] Such notice certainly aids in facilitating pre-trial determinations regarding admissibility. Pre-trial notice and *in limine* determinations are particularly unsuited to impeachment evidence, however, the need for which can only be determined after a witness has testified. In addition, there is no precedent for requiring litigants to ask permission before presenting a particular piece of evidence once trial has begun. For example, parties are required to have a "good faith basis" for cross-examination questions concerning a witness's prior bad acts

[5] *See, e.g.*, *United States v. Beverly*, 369 F.3d 516, 542 (6th Cir. 2004) ("Federal Rule of Evidence 613(b) states that extrinsic evidence of a prior inconsistent statement by a witness is not admissible if the witness has not had an opportunity to explain the prior inconsistency.").

[6] Fed. R. Evid. 103(a).

[7] *See* Fed. R. Evid. 412(c) (requiring a pre-trial motion and hearing to determine admissibility of evidence of a victim's past sexual conduct or sexual predisposition).

[8] *See* Advisory Committee's note to 1995 amendment to Fed. R. Evid. 412 (explaining that the pre-trial admissibility procedures are designed to assure "that the privacy of the alleged victim is preserved in all cases in which the court rules that proffered evidence is not admissible, and in which the hearing refers to matters that are not received, or are received in another form.").

[9] *See* Fed. R. Evid. 404(b)(3).

under Rule 608(b).[10] Nothing in the Evidence Rules requires a cross-examiner to vet her "good faith basis" with the court before posing such a question to a witness, however.[11] A decision to ask for permission is a matter of strategy rather than of obligation. Thus, it would be inconsistent with the Rules generally to dictate that a party must seek advance permission to avoid the prior foundation requirement. The method for raising and resolving departures from the prior foundation requirement is best left to the trial judge in a particular case. Again, if the Committee disagrees and has concerns about prior permission, adding such an admonition to the committee note is an option.

Should the Committee wish to adopt the suggestions of the NACDL, there are two possible approaches. First, as the NACDL suggests, the final paragraph of the committee note could be redrafted, as follows:

> The amendment preserves the trial court's discretion to delay an opportunity to explain or deny until after the introduction of extrinsic evidence ~~in appropriate cases~~, or to dispense with the requirement altogether when the proponent of extrinsic evidence demonstrates good cause. For example, ~~A~~ a trial judge may decide to delay or even forgo a witness's opportunity to explain or deny a prior inconsistent statement ~~in certain circumstances, such as when the failure to afford the prior opportunity was inadvertent and the witness may be afforded a subsequent opportunity, or~~ when a prior opportunity was impossible because the witness's statement was not discovered until after the witness testified. A party who wishes to present extrinsic evidence of a witness's prior inconsistent statement without affording the witness a prior opportunity to explain or deny should request leave of court before proffering the extrinsic evidence.

If the Committee is interested in limiting the trial judge's discretion to dispense with the prior foundation through a "good cause" or similar requirement, there is an argument to be made that this change modifies the Rule 613(b) standard such that the limitation should appear in the text of the Rule. This could be accomplished by modifying the opening clause of the proposed Rule to read: "Unless the court orders otherwise for good cause".

3. The New York City Bar Association

The New York City Bar Association ("NYCBA") shares the concern of the NACDL that the discretionary exception in the proposed amendment is "so broad and unbounded that it would

[10] *See* United States v. Oti, 872 F.3d 678, 694 (5th Cir. 2017).

[11] *See United States v. Zidell*, 323 F.3d 412, 426 (6th Cir. 2003)("Although the courts have required that there be a "good faith basis" for cross-examination under Rule 608(b), Defendant's lack of objection at trial deprived the District Court of any opportunity to determine whether such a basis existed, and hence precludes any meaningful consideration of this question by this Court."), *called into question on other grounds by Alleyne v. United States*, 570 U.S. 99 (2013); *United States v. Davis*, 77 F. App'x 902, 905 (7th Cir. 2003)("There is no evidence in the record that the government was lacking a good faith basis for asking the questions, and without an objection or request by the court, the government was under no obligation to reveal the bases for the questions.").

grant courts unreviewable discretion to forego the prior foundation requirement." Unlike the NACDL, the NYCBA is in favor of judicial discretion, however, and does not advocate limiting the trial judge's discretion:

> [C]ourts need flexibility and freedom in managing the timing of testimony and structuring the sequence of evidence. There is no "one rule fits all." In some circumstances, a prior foundation should be required—for instance, where the witness cannot be recalled due to illness, disability, physical location, or other reasons. And in other circumstances, a prior foundation requirement impedes fairness—for instance, if providing the witness with advance notice of the inconsistent statement strips that evidence of its impeachment force. In sum, trials are fluid, and so the Rules of Evidence should be flexible as to sequencing the presentation of evidence.

For these reasons, the NYCBA argues that Rule 613(b) should not be amended at all. It claims that the boundless discretion in the proposed amendment prevents the provision from achieving its desired effect of creating a more efficient impeachment process. It argues that the proposal simply maintains the status quo by permitting discretionary departure from the very prior foundation requirement it establishes.

As discussed above, the proposed amendment would preserve the trial judge's discretion to dispense with a prior foundation requirement in appropriate circumstances. The amendment would thus retain the flexibility that the NYCBA rightly claims is necessary to the trial process. That flexibility notwithstanding, the amendment would accomplish two things. First, it would resolve a conflict in the courts with respect to the need for a prior foundation. Second, it would create a default rule about sequencing that is missing from the existing provision. The current version of Rule 613(b) imposes no timing requirement for the presentation of extrinsic evidence. On its face, it freely permits extrinsic evidence of a witness's prior inconsistent statement to be offered in advance of the witness's opportunity to explain or deny. As explained in prior memoranda, federal courts often impose a prior foundation requirement despite the timing flexibility embedded in Rule 613(b) due to the inefficiencies created by recalling a witness. This disconnect between the text of Rule 613(b) and the practice in the federal courts creates a trap for the unwary lawyer.

Reading Rule 613(b) as it is currently written, the lawyer learns that she need not ask about a prior inconsistent statement when cross-examining a witness and may offer extrinsic evidence of the statement so long as the witness can be recalled to explain at some later point in the trial. By the time the lawyer proffers extrinsic evidence and the trial judge rules that the witness should have had an opportunity to explain or deny during cross, the moment is gone. The proposed amendment would align the language of Rule 613(b) with the preferred practice in many federal courts, ensuring that a lawyer reading the rule is on fair notice of the need to ask the witness about the prior inconsistent statement during cross-examination. Thus, the proposed amendment does not simply maintain the status quo -- it eliminates a conflict in the courts and resolves an important mismatch between the Rule and the practice in many federal courts, while preserving needed flexibility. For these reasons, it does not seem that the comments of the NYCBA justify the abandonment of the amendment. It is also useful to note that only four of 137 commenters

commented on Rule 613(b) and that two of the four wholly support the proposed amendment. Thus, any concerns about the discretionary provision in the amended rule are not widespread.

4. Professor Richard Friedman

Professor Richard Friedman supports the amendment to Rule 613(b):

> This proposal would restore in part traditional doctrine, which, despite the language of the current rule, appears to be the practice to which many courts adhere. On balance, I believe this change is a good one, given that it only sets a default rule; it makes sense that the prescribed order should be the one ordinarily followed, and the proposal properly preserves the discretion of the court, in appropriate circumstances, both to vary the order and to admit the evidence even absent an opportunity to explain or deny.

Notwithstanding his support for the amended rule, Professor Friedman suggests that the reference to "unfair surprise" be removed from the committee note. In listing the advantages of a prior foundation requirement, the draft committee note references unfair surprise:

> Affording the witness an opportunity to explain or deny a prior inconsistent statement before introducing extrinsic evidence of the statement avoids these difficulties. The prior foundation requirement prevents unfair surprise; gives the target of the impeaching evidence a timely opportunity to explain or deny the alleged inconsistency; promotes judges' efforts to conduct trials in an orderly manner; and conserves judicial resources.

Professor Friedman notes that concerns about "unfair surprise" reflect a bygone era in which "it might have appeared to be indecorous to surprise a witness with mention of the witness's prior inconsistent statement." As Professor Friedman correctly explains, those days are long past and Rule 613(a) – which is not being amended – allows a cross-examiner to surprise a witness with questions about a prior inconsistent statement without any requirement that the lawyer disclose the statement or its contents to the witness first. Professor Friedman also notes that it might be *more surprising* to the witness to have extrinsic evidence offered after he is asked about his prior inconsistent statement because the witness may not be aware that extrinsic evidence exists until after he answers questions about the statement. For these reasons, Professor Friedman suggests deleting the reference to "unfair surprise" from the committee note. Professor Friedman's analysis is sound, and the modification is a minor one. The committee note would be improved by deleting the reference to "unfair surprise."

B. Final Draft of the Amendment

None of the public comments set forth above suggests a change to the text of the proposed amendment to Rule 613(b). The Federal Magistrate Judges' Association would leave the text of the amendment unchanged, the NYCBA would reject an amendment altogether, and Professor Friedman and the NACDL would make modifications to the committee note only. As explored above, only Professor Friedman's suggested removal of the reference to "unfair surprise" from the committee note appears warranted. Accepting the suggestion of Professor Friedman and two other

minor modifications – one recommended by the Reporter and the other already agreed upon by the Committee at its Fall 2022 meeting -- the amended Rule and accompanying committee note would read, as follows (with modifications to the committee note published for comment underscored and stricken):[12]

Rule 613. Witness's Prior Statement

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Unless the court orders otherwise, ~~E~~extrinsic evidence of a witness's prior inconsistent statement ~~is admissible only if~~ may not be admitted until after the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it ~~or if justice so requires~~. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Committee Note

Rule 613(b) has been amended to require that a witness receive an opportunity to explain or deny a prior inconsistent statement ~~*prior* to~~ *before* the introduction of extrinsic evidence of the statement.[13] This requirement of a prior foundation is consistent with the common law approach to prior inconsistent statement impeachment. *See, e.g.*, *Wammock v. Celotex Corp.*, 793 F.2d 1518, 1521 (11th Cir. 1986) ("Traditionally, prior inconsistent statements of a witness could not be proved by extrinsic evidence unless and until the witness was first confronted with the impeaching statement."). The ~~original~~ existing[14] rule impose~~d~~s no timing preference or sequence, however, and permit~~ted~~s an impeaching party to introduce extrinsic evidence of a witness's prior inconsistent statement before giving the witness the necessary opportunity to explain or deny it. This flexible timing can create problems concerning the witness's availability to be recalled, and lead to disputes about which party bears responsibility for recalling the witness to afford the opportunity to explain or deny. Further, recalling a witness solely to afford the requisite opportunity to explain or deny a prior inconsistent statement may be inefficient. Finally, trial judges may find extrinsic evidence of a prior inconsistent statement unnecessary in some circumstances where a witness freely acknowledges the inconsistency when afforded an opportunity to explain or deny. Affording the witness an opportunity to explain or deny a prior

[12] Modifications to the committee note reflecting the proposals by the NACDL are not included in this draft. Should the Committee wish to adopt the proposals of the NACDL, the final paragraph could be modified as illustrated above. Alternatively, the Committee could add a "good cause" or other limiting standard to the text of the proposed amendment, adding only the prior permission requirement suggested by the NACDL to the committee note.

[13] This change was agreed upon by the Committee at its Fall 2022 meeting to avoid using the word "prior" twice in this sentence.

[14] Professor Capra noted that the term "original rule" was confusing because it could refer to the common law or to the originally enacted Rule 613(b). He suggested using the term "existing rule" to refer to Rule 613(b) as originally enacted instead with appropriate modifications to tense.

inconsistent statement before introducing extrinsic evidence of the statement avoids these difficulties. The prior foundation requirement ~~prevents unfair surprise;~~ gives the target of the impeaching evidence a timely opportunity to explain or deny the alleged inconsistency; promotes judges' efforts to conduct trials in an orderly manner; and conserves judicial resources.

The amendment preserves the trial court's discretion to delay an opportunity to explain or deny until after the introduction of extrinsic evidence in appropriate cases, or to dispense with the requirement altogether. A trial judge may decide to delay or even forgo a witness's opportunity to explain or deny a prior inconsistent statement in certain circumstances, such as when the failure to afford the prior opportunity was inadvertent and the witness may be afforded a subsequent opportunity, or when a prior opportunity was impossible because the witness's statement was not discovered until after the witness testified.

TAB 5

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Daniel J. Capra
Philip Reed Professor of Law

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to 801(d)(2) for Statements Made by a Predecessor in Interest
Date: April 1, 2023

At the Spring, 2022 meeting, the Committee unanimously approved, for release for public comment, an amendment to Rule 801(d)(2). The amendment would resolve a circuit split on whether a statement made by a declarant can be offered against a party-opponent, if that party's cause of action or liability is derived directly from the declarant. The proposed amendment would bind the successor if the statement would have been admissible against the declarant (or the declarant's principal) as a party-opponent statement. The Standing Committee unanimously approved the amendment for release for public comment.

The Committee received only two public comments. These will be discussed below.

This memo does the following:

- It sets forth the proposed amendment and committee note as issued for public comment;
- It recaps some of the drafting decisions that were made;
- It recaps the rationale for the amendment;
- It discusses a possible change that was raised by a member of the Standing Committee and rejected by the Committee at the last meeting; and
- It discusses a suggestion for a change to the text made in the two public comments.
- It discusses a suggestion for change to cover a situation in which a hearsay statement is admissible against the declarant but not against the principal.

The question for the Committee at this meeting is whether to recommend final approval of the text and committee note, together with any changes approved by the Committee.

Proposed Amendment and Committee Note:

Note: Two changes are suggested to the Committee Note, based on discussion at the last meeting, with footnote explanations.

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

* * *

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

* * *

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

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

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

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

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

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

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

If a party's claim or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.

Committee Note

The rule has been amended to provide that when a party stands in the shoes of a declarant or the declarant's principal, hearsay statements that would be admissible against ~~made by~~ the declarant or the declarant's principal are admissible against the party.[1] For example, if an estate is bringing a claim for damages suffered by the decedent, any hearsay statement that would have been admitted against the decedent as a party-opponent under this rule is equally admissible against the estate. Other relationships that would support this attribution include assignor/assignee and debtor/trustee when the trustee is pursuing the debtor's claims. The rule is justified because if the party is standing in the shoes of the declarant or the principal, the party should not be placed in a better position as to the admissibility of hearsay than the declarant or the principal would have been. A party that directly[2] derives its interest from a declarant or principal is ordinarily subject to all the substantive limitations applicable to them, so it follows that the party should be bound by the same evidence rules as well.

Reference to the declarant's principal is necessary because the statement may have been made by the agent of the person or entity whose rights or obligations have been succeeded to by the party against whom the statement is offered.

The rationale of attribution does not apply, and so the hearsay statement would not be admissible, if the declarant makes the statement after the rights or obligations have been transferred, by contract or operation of law, to the party against whom the statement is offered.

Recap of Drafting Decisions:

1. The amendment is placed at the end of the rule because it has to apply to all the subdivisions. The statement offered against the successor might not have been made by the predecessor himself, but instead may have been adopted by the predecessor, or made by the predecessor's agents. (This is especially so in corporate situations, in which the statement is made by an agent of the corporate principal.) If the predecessor's own statements are admissible against the successor, it would be irrational to have other Rule 801(d)(2) statements *not* admissible against the successor.

2. Reference to the "declarant's principal" mucks up the text a bit, but the reference is necessary because in many of the cases, the statement is made by a declarant and admissible

[1] This was a slight change suggested at the last meeting, making it clearer that the declarant-as-agent situation is covered by the rule, and it better tracks the text. Thanks to Professor Richter for raising this.

[2] This addition to the Note was suggested by Judge Bates at the last meeting and approved by the Committee. Adding "directly" tracks the rule text.

against the predecessor party under Rule 801(2)(C) or (D). So the successor is not standing in the shoes of the *declarant, but rather of the principal*. If the rule only referred to "the declarant" then it would not cover the many cases in which the statement is made by a declarant-agent --- because the successor is standing in the shoes of the principal, not the agent.

Recap on the Rationale for the Amendment:

The major reason for the amendment is to rectify a circuit split on whether statements of a predecessor are admissible against a successor. *Compare Huff v. White Motor Corp*., 609 F.2d 286 (7th Cir. 1979) (holding that statements of a decedent are not admissible against the estate under Rule 801(d)(2), because that rule did not embrace the privity-based rules of attribution in the common law), *with Estate of Shafer v. Comm'r,* 749 F.2d 1216, 1219–20 (6th Cir. 1984) ("a decedent, through his estate, is a party to [an] action" and the decedent's statements "are a classic example of an admission"). The amendment adopts the view that there should be admissibility. Here are the reasons for that decision:

1. When the party's claim or defense is directly derived from the claim or liability of the declarant or the declarant's principal, the declarant or principal is essentially a real party in interest. It is the declarant's or principal's actions that are in dispute, not the successor's. Successors are usually bound by judgments against the predecessor under the doctrines of claim and issue preclusion. So it makes little sense to *bind* the successor to things the predecessor has done, yet prohibit mere admission of his statements.

2. The rationale for admitting party-opponent statements is that it is consistent with the adversary system: you can't complain about statements you made that are now being offered against you. That adversarial interest is also applicable when there has been a substitution of parties. The successor should not be able to complain about statements offered against it that are made by the very person (or the agent of that person) whose claim or defense the successor is relying on at trial.

3. The contrary rule, that a successor is not bound, gives rise to arbitrary and random application. Take two cases involving allegations of police brutality, both happening on the same day, both tried on the same day, and the victim in each case made a statement that his injuries weren't very severe. Victim 1 is alive at the time of trial --- so his statement is easily admitted against him under Rule 801(d)(2)(A). But assume Victim 2 is run over by a car and killed a month before trial. Under the *Huff* rule, Victim 2's statement, identical in all respects to that of Victim 1, is inadmissible hearsay. This makes no sense.

4. Given the breadth and number of successorship interests --- merger, assignment, estates, etc. --- the contrary view can have a substantial negative impact on federal litigation.

For the above reasons, the equities are in favor of admissibility of a hearsay statement against a party whose claim or defense is directly derived from the declarant or the declarant's principal. And the Committee so found, by unanimously approving the proposed amendment.

Possible Adjustment Raised by a Standing Committee Member

The committee note addresses the situation that might occur if the original party-opponent makes a hearsay statement *after* the litigation interest has been transferred to the successor. The position expressed—the statement is inadmissible against the successor --- makes a good deal of sense. The concept of admissibility is attribution --- the attribution in this situation is that the successor has taken an interest from the predecessor and so essentially is accountable for all party-opponent statements that the predecessor made. But that attribution ends after the transfer. And it would be inappropriate to saddle the successor with post-transfer statements made by the predecessor --- perhaps made with the intent to undermine the successor's position.

All this is so, and the Standing Committee member who commented on the proposed amendment completely agreed. The suggestion was that this was a point of such importance that it should be made part of the text of the rule.

Here is the language of the Note that covers the question of timing:

> The rationale of attribution does not apply, and so the hearsay statement would not be admissible, if the declarant makes the statement after the rights or obligations have been transferred, by contract or operation of law, to the party against whom the statement is offered.

At the last meeting, the Committee determined that adding such language to the text of the rule was not warranted. The text is already complicated enough, and the situation covered by the passage in the committee note is unlikely to arise frequently. There seems to be no reason to rethink the Committee's determination that the language in the committee note should remain there, and not be elevated to the text.

Suggestion from the Public Comment

Only two public comments were received on the proposed amendment. One was from the Magistrate Judges' Association, and one was from Richard Friedman, Esq. Both agreed wholeheartedly with the result provided in the amendment, i.e., that if a statement is admissible against a declarant if they were a party to the action, then the statement is admissible if the actual party derives their interest in the litigation from the declarant.

Both comments, however, thought that the language of the amendment was complicated, and that it could be made more clear and direct if the term "successor-in-interest" were used. If this suggestion is followed, the text of the proposed amendment might look like this:

> A statement is admissible under this rule if it is made by a declarant or the declarant's principal, and the party-opponent is a successor-in-interest to the declarant or principal.

There are, however, a number of strong arguments against using "successor-in-interest" terminology in the text of the amendment.[3]

First, it is still a complicated solution. It does not seem all that much easier to understand than the "directly derived" language in the proposal as issued for public comment. In fact it could be thought more complicated because it uses hoary legal terminology as opposed to regular words --- "directly derived." [4]

Second, and most important, the term "predecessor-in-interest" is already used in the Evidence Rules (and successor-in-interest is just the other side of that coin) and the way it has been interpreted would raise trouble for its use in Rule 801(d)(2). Rule 804(b)(1) provides that prior testimony is admissible against a party in a civil case if that party's "predecessor-in-interest" had a motive to develop the testimony that is similar to what the party would have in the instant proceeding if the declarant could be produced. But the problem is that the "predecessor-in-interest" language in Rule 804(b)(1) has been very loosely interpreted. Under the case law, a party to an earlier matter can be a predecessor-in-interest to a later party even though their claims and defenses are completely independent and they have no legal relationship whatsoever. See, e.g., *Lloyd v. American Export Lines, Inc*., 580 F.2d 1179 (3rd Cir. 1978) (testimony given against the Coast Guard at a prior proceeding was admissible against a seaman in a later proceeding under Rule 804(b)(1); the Coast Guard was a predecessor in interest of the seaman, not because they had a legal relationship but because the Coast Guard had a motive to develop the testimony that was similar to what the seaman would have if able to cross-examine the declarant at the later proceeding). Essentially the courts are construing "predecessor-in-interest" right out of Rule 804(b)(1), and finding admissibility when two different parties share a similar motive in developing the declarant's testimony. *See also Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc*., 71 F.3d 119 (4th Cir. 1995) (a legal relationship is not the gravamen of the predecessor-in-interest requirement of Rule 804(b)(1); 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).

There is a good explanation for a broad (indeed dismissive) application of the predecessor-in-interest requirement of Rule 804(b)(1). That hearsay exception is grounded in two factors guaranteeing reliability: 1) the declarant was under oath; and 2) the declarant was subject to cross-examination with a similar motivation to what would exist if the declarant could be cross-examined now. On the cross-examination factor, it shouldn't matter whether the prior party is legally related to the party against whom the evidence was offered. Rather what should matter is that the prior party had a similar motive to develop the testimony as the current party would have if the witness were available. In contrast, a legal relationship is *definitely* required to justify admitting a statement against a party under Rule 801(d)(2). That rule is not about reliability but rather about accountability. The party is accountable for its own statements, and that accountability logically

[3] It should be noted that an alternative term --- "privity" --- was previously and correctly rejected by the Committee because it is a fuzzy and conclusory term.

[4] Notably, some Magistrate Judges were "concerned about using language, such as predecessors or successors, that carries specific legal meaning which may not address all instances to which the Rule amendment is intended to apply."

and fairly extends to the statements of a declarant whose cause of action or potential liability (or that of their principal) is now being held by that party. But accountability requires a legal relationship.

So the problem with using the term "predecessor-in-interest" in Rule 801(d)(2) is that users of the rules could justifiably think that it is intended to track the identical language in Rule 804(b)(1) (and the courts' broad interpretation of that term), when that should not be the result. If "predecessor in interest" is applied in Rule 801(d)(2) in the same way it is under Rule 804(b)(1), it would mean that if two unrelated plaintiffs are hurt in the same car accident, a statement by one of them that the defendant was being careful would be admissible against the other plaintiff, as they are in similar situations in the litigation. If the term is being read out of Rule 804(b)(1), it seems hard to hang a result on the same language in Rule 801(d)(2).

One could argue that a committee note could avoid an overbroad use by declaring that the term "successor-in-interest" is to be construed more narrowly than the courts have construed it in Rule 804(b)(1). But it would certainly be odd for the rules to require two completely different interpretations for what is a pretty specific legal concept. Moreover, that explanation would mean that the Advisory Committee is conceding that the courts have misconstrued the language under Rule 804(b)(1) --- when in actuality the results under Rule 804(b)(1) are quite justified. Accordingly, whatever minor benefit in clarity might be had by the use of "successor-in-interest" would seem outweighed by the confusion of using the same legal term to mean two different things in two separate rules.

One final point: It is certainly true that the language of the amendment is complicated. But it is intended to cover a very specific (complicated) situation. The amendment is not one of general applicability. It seems likely that the parties who are in the specific situation covered by the amendment will know exactly what it means --- especially in light of the explication of the rationale of the amendment in the committee note. (This point was recognized by some of the Magistrate Judges). Given that there seems to be no less complicated way to express the point of the amendment, and that it is of pretty narrow application, it would seem that the benefits of the substantive change to the rule outweigh the concern about a complicated text.

Treating the possibility of a predecessor statement admissible against an agent but not against the principal.

Chris Pryby, the Rules clerk, posited a hypothetical that he suggested would result in a problematic application of the proposed rule. Assume a corporation has made an allegedly defective product. A corporate executive makes an out-of-court statement: "I should have ordered more testing of the product before we unleashed it on an unsuspecting public." Then the corporation is absorbed by a successor. Under the proposed rule, if this statement was made while the agent is employed, it would be admissible against the successor corporation. This is because the successor's "potential liability is directly derived from . . . declarant's principal" and it would be admissible against the principal if the predecessor was still a party.

So far, so good. But what if the executive made the statement a week after being fired? Then that statement would not be admissible against the predecessor under Rule 801(d)(2)(d), and so it would not be admissible against the successor on that ground. But the statement *would* be admissible against the executive herself if she were sued, because then it would be a party-opponent statement under Rule 801(d)(2)(A). Is it admissible against the successor on that ground?

The answer has to be no, because the successor's potential liability is not directly derived from the agent. It is directly derived from the principal, the corporate predecessor, and the statement is not admissible against the principal. But the proposed amendment could theoretically come to a different result. It states that "if a party's claim or potential liability is directly derived from a declarant OR the declarant's principal, a statement that would be admissible against the declarant OR the principal under this rule is also admissible against the party." The double conjunctive in the rule could technically mean that a statement admissible against either the declarant or principal is admissible against the successor of the principal.

The question is whether this is a problem that needs to be addressed. The whole point of the amendment, as emphasized in the committee note, is that when the successor stands in the shoes of the predecessor, the statements admissible against the predecessor are admissible against the successor. In this hypothetical situation, the successor is not standing in the shoes of the agent-declarant. It seems impossible that the court would bind the successor to the statement when it wouldn't have bound the predecessor to it. Moreover, the hypothetical is an exceedingly narrow fact situation--- in an area which itself is one of narrow application. Query whether it is worth it to further complicate an already complicated rule to deal with a situation that will rarely if ever arise.

But if the Committee believes that this hypothetical should be addressed, there are two ways to do it. One is a textual change suggested by Professor Richter:

> **If a party's claim or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible <u>under this rule</u> against the declarant or the principal ~~under this rule~~ <u>from whom the party's claim or potential liability is derived</u> is also admissible against the party.**

This would cover the hypothetical, because the statement made by the fired agent would not be admissible against the predecessor, "from whom the party's claim or potential liability is derived."

Another alternative is to address the problem only in the committee note. That could be done by adding a proviso in the paragraph that discusses the principal-agent problem:

> Reference to the declarant's principal is necessary because the statement may have been made by the agent of the person or entity whose rights or obligations have been succeeded to by the party against whom the statement is offered. <u>The rule does not apply, however, if the statement is admissible against the agent but not against the principal --- for example, if the statement was made by the agent after termination of employment. This is because the successor's potential liability is derived from the principal, not the agent.</u>

This proviso in the Note may be thought to be more than enough to treat the problem. But if the Committee determines that a change must be made to the text, the addition to the committee note should probably be added as well, as it helps to explain the textual language "from whom the party's claim or potential liability is derived."

Clean Copy of Proposed Amendment with Changes Implemented

If the Committee approves the slight changes to the committee note approved at the last meeting, and wishes to add text and Note changes to cover the hypothetical of a statement admissible against an agent but not against the principal, then the Rule and Note would look like this:

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

* * *

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

* * *

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

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

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

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

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

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

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

If a party's claim or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible under this rule against the declarant or the principal from whom the party's claim or potential liability is derived is also admissible against the party.

Committee Note

The rule has been amended to provide that when a party stands in the shoes of a declarant or the declarant's principal, hearsay statements that would be admissible against the declarant or the declarant's principal are admissible against the party. For example, if an estate is bringing a claim for damages suffered by the decedent, any hearsay statement that would have been admitted against the decedent as a party-opponent under this rule is equally admissible against the estate. Other relationships that would support this attribution include assignor/assignee and debtor/trustee when the trustee is pursuing the debtor's claims. The rule is justified because if the party is standing in the shoes of the declarant or the principal, the party should not be placed in a better position as to the admissibility of hearsay than the declarant or the principal would have been. A party that directly derives its interest from a declarant or principal is ordinarily subject to all the substantive limitations applicable to them, so it follows that the party should be bound by the same evidence rules as well.

Reference to the declarant's principal is necessary because the statement may have been made by the agent of the person or entity whose rights or obligations have been succeeded to by the party against whom the statement is offered. The rule does not apply, however, if the statement is admissible against the agent but not against the principal --- for example, if the statement was made by the agent after termination of employment. This is because the successor's potential liability is derived from the principal, not the agent.

The rationale of attribution does not apply, and so the hearsay statement would not be admissible, if the declarant makes the statement after the rights or obligations have been transferred, by contract or operation of law, to the party against whom the statement is offered.

Summary of Public Comment

Jacob Heyward, Esq. (EV-2022-0004-0003) supports the proposed amendment to Rule 801(d)(2), stating that it will help to "clarify federal evidence law."

The Federal Magistrate Judges Association (EV-2022-0004-0015) "agrees the amendment is necessary and useful" but recommends that the text of the rule make reference to "successors in interest."

Richard Friedman, Esq. (EV-2022-0004-0105) approves the result reached by the proposed amendment, but suggests that the text would be improved if it used the term "successor in interest."

TAB 6

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300 Timberdell Rd., Norman OK. 73019

Liesa L. Richter
George Lynn Cross Research Professor
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Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Rule 804(b)(3): Independent, corroborating evidence to show "corroborating circumstances" in criminal cases.
Date: April 1, 2023

A proposed amendment to Rule 804(b)(3), the hearsay exception for "statements against interest," was published for notice and comment in August 2022. The proposed amendment addresses a conflict in the courts regarding the meaning of the "corroborating circumstances" requirement that appears in the existing provision. The hearsay exception requires courts to find "corroborating circumstances that clearly indicate" the "trustworthiness" of the proffered hearsay statement when a statement against penal interest is offered in a criminal case. Most federal courts hold that a trial judge should consider evidence, if any, corroborating the accuracy of the hearsay statement at issue in applying the corroborating circumstances requirement. Some circuits hold, however, that trial judges may consider only the inherent guarantees of trustworthiness surrounding the statement and *may not* consider corroborative evidence in determining admissibility.

The latter holdings are not only in conflict with the holdings of sister circuits, but they are also inconsistent with the 2019 amendment to the residual exception found in Rule 807, that expressly authorizes the use of "evidence, if any, corroborating the statement" in determining admissibility. The amendment would resolve the conflict by directing courts to consider "the totality of circumstances" as well as "evidence, if any, corroborating" the statement in determining whether a statement against penal interest offered in a criminal case is supported by corroborating circumstances that clearly indicate its trustworthiness. The amendment and committee note published for comment read as follows:

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

* * * * *

(b) The Exceptions. * * *

(3) ***Statement Against Interest.*** A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness~~, if offered in a criminal case as one that tends to expose the declarant to criminal liability~~---after considering the totality of circumstances under which it was made and evidence, if any, corroborating it.

Committee Note

Rule 804(b)(3)(B) has been amended to require that in assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider not only the totality of the circumstances under which the statement was made, but also any evidence corroborating or contradicting it. While most courts have considered corroborating evidence, some courts have refused to do so. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is relevant to, but not dispositive of, whether a statement that tends to expose the declarant to criminal liability should be admissible under this exception when offered in a criminal case. A court evaluating the admissibility of a third-party confession to a crime, for example, must consider not only circumstances such as the timing and spontaneity of the statement and the third-party declarant's likely motivations in making it. It must also consider corroborating information, if any, supporting the statement, such

as evidence placing the third party in the vicinity of the crime. Courts must also consider evidence that contradicts the declarant's account.

The amendment is consistent with the 2019 amendment to Rule 807 that requires courts to consider corroborating evidence in the trustworthiness inquiry under that provision. It is also supported by the legislative history of the corroborating circumstances requirement in Rule 804(b)(3). *See* 1974 House Judiciary Committee Report on Rule 804(b)(3) (adding "unless corroborating circumstances clearly indicate the trustworthiness of the statement" language and noting that this standard would change the result in cases like Donnelly v. United States, 228 U.S. 243 (1912), that excluded a third-party confession exculpating the defendant despite the existence of independent evidence demonstrating the accuracy of the statement).

A. Public Comment

The public comment period closed on February 16, 2023. Of the 137 total comments received, five addressed the proposed amendment to Rule 804(b)(3).

1. Confusion Created by References to Both "Corroborating Circumstances" and "Corroborating Evidence"

Four of the comments suggested that the language of the proposed amendment creates confusion because it *requires* "corroborating circumstances," but also *permits* a court to utilize "corroborating evidence" to find those circumstances. These comments argue that the use of the same term "corroborating" in these two distinct, but closely related contexts, renders the statements against interest exception difficult to comprehend and apply in criminal cases.

The Federal Magistrate Judges' Association "suggests considering whether proposed Rule 804(b)(3)(B) is as clear as it could be as to whether "corroborating circumstances" are absolutely required before the court can make a finding of trustworthiness or whether corroborating circumstances are simply something to be considered, along with the totality of the circumstances under which the statement was made and any corroborating evidence." The FMJA proposes revising Rule 804(b)(3)(B) to more closely track the standard in Rule 807, as follows:

> [I]f offered in a criminal case as one that tends to expose the declarant to criminal liability, if, after considering the totality of circumstances under which it was made and evidence, if any, corroborating it, the court finds the statement is trustworthy.

The National Association of Criminal Defense Lawyers expresses support for the amendment "insofar as it moderates to some extent the unfair impact of the Rule by making clear that … "corroborating circumstances" may be found in characteristics of or circumstances surrounding the statement itself, or may take the form of separate corroborating evidence, or both." The NACDL also notes, however, that the distinction between "corroborating

circumstances" and "corroborating evidence" is new and subtle and suggests that the committee note utilize the "clearest possible language" to explain it. Caitlyn Brydges also commented that:

> [T]he plain language of rule 804(b)(3)(B) as amended is confusing. It both requires corroborating circumstances and states that corroborating circumstances may be, but do not have to be, considered. The rule is, at the very least, difficult to follow.

While generally supportive of the amendment to Rule 804(b)(3), the Federal Bar Council also suggested that the text of the amendment could be clarified to eliminate confusion:

> The Council supports this rule revision. The proposed revision appears to be sound to the extent it broadens the factors the courts may consider when deciding the applicability of this hearsay exception. It appears that some courts have been considering circumstances external to the context of the actual statement, while other courts had strictly limited their consideration to the circumstances under which the statement was made. The proposed change provides an approach for all courts to apply uniformly. Nonetheless, we believe that the intent of the rule may be better served by a further clarification of the text of the proposed rule.

The Committee discussed the potential confusion created by multiple uses of the term "corroborating" in the proposed amendment at its Fall 2022 meeting. As reflected in the draft Minutes of the Fall 2022 meeting, a committee member raised this issue:

> One Committee member noted that Rule 804(b)(3)(B) uses the term "corroborating" twice – once in requiring that a statement against penal interest be "supported by corroborating circumstances that clearly indicate its trustworthiness" and again in directing courts to consider "evidence, if any, corroborating" the statement. He queried whether the two uses of the term were redundant.

At that time, the Reporter explained that the two uses of the term "corroborating" in the amendment are not redundant. As he explained, the first use of "corroborating" is a term of art that describes the *finding* the trial court must make to admit a statement against penal interest in a criminal case. The original version of Rule 804(b)(3) enacted in 1975 required "corroborating circumstances clearly indicat[ing] the trustworthiness of the statement" for statements admitted through the exception to exculpate a criminal defendant. The same finding was extended to use of the exception by the prosecution to admit statements inculpating criminal defendants in 2010.

The second and amended reference to "corroborating" evidence describes the *information* that a court should use in making the requisite finding. Some courts have declined to consider evidence independent of the statement itself that corroborates or contradicts it in deciding trustworthiness, focusing only on the circumstances surrounding the making of the statement. The amendment expressly requires a court to consider evidence corroborating the statement, if any, in looking for "corroborating circumstances clearly indicating trustworthiness."

a. Modifying the Text of Amended Rule 804(b)(3)

The Committee could explore modifications to the language of the proposed amendment to reduce any potential confusion. The change proposed by the FMJA seeks to minimize confusion by eliminating the required finding of "corroborating circumstances clearly indicating trustworthiness" and replacing it with a finding that the statement is "trustworthy." The "corroborating circumstances" terminology has been used to describe the finding a court must make to admit statements against interest in criminal cases since the Rule was first enacted. The FMJA proposed change would simply collapse this required finding into one of "trustworthiness." This required finding would resemble the one required for the admissibility of residual hearsay under Rule 807. If this change were adopted, the amended Rule would contain only one reference to "corroborating evidence" describing the information a court may utilize to find trustworthiness.

At its Fall 2022 meeting, the Committee expressed unwillingness to alter the original term of art used to describe the finding a court must make to admit statements against interest in criminal cases. The Chair noted that using the term "corroborating" twice in the amended Rule may be inartful but may be necessary to clarify that courts should look to the existence of corroborating evidence without disturbing the term of art included in the original rule. Therefore, the Committee may not want to modify the language requiring "corroborating circumstances clearly indicating the trustworthiness of the statement" that has been a feature of Rule 804(b)(3) since 1975.

The Committee could explore other modifications to the text of the proposed amendment to reduce potential confusion without tinkering with the term of art contained in the Rule. The Federal Bar Council suggests the following change:

> (B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness, after considering the totality of circumstances under which it was made and ~~evidence, if any, corroborating it~~ after considering any other evidence, beyond evidence of the totality of circumstances under which the statement was made, that also corroborates the statement.

This language avoids using the term "corroborating" two times, though it does reference evidence that "corroborates" the statement. This modification appears unnecessarily verbose, especially given the already complex nature of the provision. A similar, but more concise alternative might read:

> (B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness, after considering the totality of circumstances under which it was made and any other evidence that corroborates or contradicts it ~~evidence, if any, corroborating it~~.

This language raises two concerns. First, it is not apparent that this improves the clarity of the Rule. Although this version contrasts "corroborating circumstances" with "evidence that corroborates," it still references corroboration twice. If this language does not improve clarity, there is no reason to modify the amendment published for notice and comment.

The second concern is that this language differs slightly from the language utilized in Rule 807 to describe the same concept. Rule 807 was amended in 2019 to clarify that courts should consider "evidence, if any, corroborating the statement" in determining whether it is "supported by sufficient guarantees of trustworthiness" for purposes of the residual hearsay exception. This amendment also resolved a conflict in the courts over whether independent corroborating evidence could be used to show the trustworthiness of a hearsay statement. The Committee discussed concerns about utilizing different language to describe the same concept in Rules 807 and 804(b)(3) at its Fall 2022 meeting after a member of the Standing Committee suggested adding the concept of "contradictory" evidence to the text of Rule 804(b)(3). The Committee concluded that courts and litigants might construe the identical concepts embodied in Rules 807 and 804(b)(3) differently if different terminology were to be used in the two provisions. For that reason, the Committee decided not to add contradiction to the text of Rule 804(b)(3) to maintain consistency between the two provisions. Modifying the amendment to Rule 804(b)(3) as suggested above would deploy language slightly distinct from that used in Rule 807.

If the proposal above adds clarity, however, it may be advisable to adopt it notwithstanding its use of language that is slightly different from that utilized in Rule 807. Rules 804(b)(3) and 807 require distinct threshold findings of reliability. Rule 807 requires a finding that a hearsay statement "is supported by sufficient guarantees of trustworthiness" and Rule 804(b)(3) requires a finding in criminal cases of "corroborating circumstances that clearly indicate [the] trustworthiness" of the statement. Thus, it makes sense that an amendment permitting use of corroborating evidence in evaluating trustworthiness might need to be worded slightly differently to fit within the framework of each provision. To avoid any inference that the use of different language indicates different standards, the committee note could explain that the principles are identical but that slightly different language is utilized to accommodate the distinct framework and reliability standard of each provision. For example, the Committee might modify the second paragraph of the draft committee note, as follows:

> Although it utilizes slightly distinct language to fit within the framework of Rule 804(b)(3), ~~T~~the amendment is entirely consistent with the 2019 amendment to Rule 807 that requires courts to consider corroborating evidence in the trustworthiness inquiry under that provision. It is also supported by the legislative history of the corroborating circumstances requirement in Rule 804(b)(3). *See* 1974 House Judiciary Committee Report on Rule 804(b)(3) (adding "unless corroborating circumstances clearly indicate the trustworthiness of the statement" language and noting that this standard would change the result in cases like Donnelly v. United States, 228 U.S. 243 (1912), that excluded a third-party confession exculpating the

> defendant despite the existence of independent evidence demonstrating the accuracy of the statement).

If the Committee decides to adopt textual language that is slightly distinct from Rule 807 to improve clarity, it could include the concept of contradictory evidence in the text of amended Rule 804(b)(3). A member of the Standing Committee suggested this change and the Chair of the Advisory Committee opined that it would be desirable if it were not necessary to keep the language of Rules 807 and 804(b)(3) the same.

b. Addressing Confusion Through the Committee Note

Whether or not the Committee decides to alter the text of the amendment to improve clarity, it may be advisable to include additional explanation of the distinction between "corroborating circumstances" and "corroborating evidence" in the Advisory Committee Note. An additional paragraph could be inserted between the first and second paragraphs of the existing draft Note to clarify, as follows:

> Rule 804(b)(3) has long required courts to find statements against penal interest offered in criminal cases supported by "corroborating circumstances that clearly indicate" the "trustworthiness" of those statements. The amendment does not alter this required finding. The amendment addresses the information that a court should utilize in making this finding. It clarifies that a court should look to independent evidence corroborating or contradicting the statement, if any exists, as well as to the totality of the circumstances surrounding the making of the statement, to decide whether a statement against penal interest is supported by corroborating circumstances that clearly indicate its trustworthiness.

The final version of Rule 804(b)(3) at the conclusion of this memorandum includes these potential changes in brackets for the Committee's consideration.

2. Comments of Professor Richard Friedman

Professor Friedman notes his broad dissatisfaction with Rule 804(b)(3), primarily stemming from changes made to the draft of the hearsay exception in 1971 that permitted a statement inculpating a criminal defendant to be admitted through the exception.[1] He also notes that the concern regarding manufactured statements against interest that appears to have influenced the original "corroborating circumstances" requirement is a concern about the credibility of the witness reporting the statement rather than a hearsay concern. He expresses his view that the amendment turns the exception "into a totality-of-the-circumstances rule that basically asks the court to decide whether it believes the underlying statement to be true." He further opines that *Williamson v. United States*, 512 U.S. (1994), the Supreme Court's decision regarding the proper

[1] *See* Friedman & Deahl, *Federal Rules of Evidence: Text and History*, p. 423 (West Academic 2015) (reprinting the Evidence Advisory Committee's March 1971 Revised Draft of Rule 804(b)(3) that provided: "This exception does not include a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused.").

interpretation of Rule 804(b)(3), was wrongly decided and that the Committee should consider "how to undo the rule of *Williamson*."[2]

Professor Friedman's comments raise fundamental concerns regarding the operation and interpretation of Rule 804(b)(3) and the "corroborating circumstances" requirement that go well beyond the scope of the proposed amendment. In essence, these comments propose a wholesale reconsideration of the statements against interest exception. If the Committee is inclined to pursue a re-examination of Rule 804(b)(3) and the "corroborating circumstances" requirement that has applied in criminal cases since the original enactment of the Rule, the current proposed amendment should be tabled to allow preparation of an agenda memorandum exploring the advisability of more comprehensive modification to Rule 804(b)(3). Fundamental changes to the amendment along the lines suggested by Professor Friedman would require re-publication of a new amendment.[3]

3. Concerns Regarding the Application and Scope of a "Corroborating Circumstances" Requirement in Criminal Cases

The National Association of Criminal Defense Lawyers comments that it has "long opposed" the corroborating circumstances requirement in Rule 804(b)(3) because that requirement disfavors use of statements against interest in criminal cases. The NACDL recognizes, however, that the proposed amendment does not "reconsider the entire premise of this Rule now." That said, the NACDL proposes that the amendment modify the "corroborating circumstances *that clearly indicate trustworthiness*" standard in favor of a "corroborating circumstances *that suggest trustworthiness*" standard. The NACDL opines that the "clearly indicates" language is overly restrictive and should be softened.

Like Professor Freidman's comments, the comments of the NACDL go beyond the scope of the amendment published for notice and comment. As discussed above at length, the "corroborating circumstances clearly indicating trustworthiness" standard has been included in Rule 804(b)(3) since 1975. The intent of the current amendment is to address the information that courts may use in making this finding. The amendment is not intended to modify the "corroborating circumstances" requirement itself in any way. Any effort to modify this time-honored standard would require additional research and consideration, as well as republication of the proposed amendment to Rule 804(b)(3).

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[2] In *Williamson*, the Supreme Court interpreted Rule 804(b)(3) to require all statements admitted through the exception to be contrary to the declarant's interests and rejected the admissibility of collateral statements, that are not themselves against interest, made in conjunction with disserving statements.

[3] *See* Procedures for Committees on Rules of Practice and Procedure § 440.20.50, Procedures After the Comment Period ("If the advisory committee makes substantial changes, the proposed rule should be republished for an additional period of public comment unless the advisory committee determines that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees.").

B. Proposed Rule 804(b)(3)

The final version of the amendment to Rule 804(b)(3) could be drafted as follows. Potential changes to the published amendment to address concerns raised by public comment appear in brackets.

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

* * * * *

(b) The Exceptions. * * *

(3) ***Statement Against Interest.*** A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness~~, if offered in a criminal case as one that tends to expose the declarant to criminal liability~~---after considering the totality of circumstances under which it was made and evidence, if any, corroborating it [OR after considering the totality of circumstances under which it was made and any other evidence that corroborates or contradicts it].

Committee Note

Rule 804(b)(3)(B) has been amended to require that in assessing whether a statement is supported by "corroborating circumstances that clearly indicate its

trustworthiness,"[4] the court must consider not only the totality of the circumstances under which the statement was made, but also any evidence corroborating or contradicting it. While most courts have considered corroborating evidence, some courts have refused to do so. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is relevant to, but not dispositive of, whether a statement that tends to expose the declarant to criminal liability should be admissible under this exception when offered in a criminal case. A court evaluating the admissibility of a third-party confession to a crime, for example, must consider not only circumstances such as the timing and spontaneity of the statement and the third-party declarant's likely motivations in making it. It must also consider corroborating information, if any, supporting the statement, such as evidence placing the third party in the vicinity of the crime. Courts must also consider evidence that contradicts the declarant's account.

[Rule 804(b)(3) has long required courts to find statements against penal interest offered in criminal cases supported by "corroborating circumstances that clearly indicate" the "trustworthiness" of those statements. The amendment does not alter this required finding. The amendment addresses the information that a court should utilize in making this finding. It clarifies that a court should look to independent evidence corroborating or contradicting the statement, if any exists, as well as to the totality of the circumstances surrounding the making of the statement to decide whether a statement against penal interest is supported by corroborating circumstances that clearly indicate its trustworthiness.]

[Although it utilizes slightly distinct language to fit within the framework of Rule 804(b)(3),] ~~T~~the amendment is [entirely] consistent with the 2019 amendment to Rule 807 that requires courts to consider corroborating evidence in the trustworthiness inquiry under that provision. It is also supported by the legislative history of the corroborating circumstances requirement in Rule 804(b)(3). *See* 1974 House Judiciary Committee Report on Rule 804(b)(3) (adding "~~unless~~[5] corroborating circumstances clearly indicate the trustworthiness of the statement" language and noting that this standard would change the result in cases like Donnelly v. United States, 228 U.S. 243 (1912), that excluded a third-party confession exculpating the defendant despite the existence of independent evidence demonstrating the accuracy of the statement).[6]

[4] Professors Richter and Capra suggest adding quotation marks around the "corroborating circumstances" language as an indication that the term is one of art.

[5] Professor Friedman correctly notes that the word "unless" was in the Revised Definitive Draft of Rule 804(b)(3) drafted by the Advisory Committee and that the House Committee added only the "corroborating circumstances clearly indicate the trustworthiness of the statement" language. "Unless" has been deleted to avoid suggesting that the House Committee added that word.

[6] Professor Friedman also mentioned this reference to the legislative history in his public comment. He expressed his uncertainty that the House of Representatives would have approved of corroborating evidence given that the House

did not consider the defendant's own testimony sufficiently corroborative. But the House's reference to the *Donnelly* case makes clear its intention that other independent corroborating evidence could suffice. The House stated that "It was contemplated that the result in such cases as *Donnelly v. United States*, 228 U.S. 243 (1913), where the circumstances plainly indicated reliability, would be changed." Importantly, the Court mentioned *no* inherent guarantees of trustworthiness surrounding the against-interest confession that was excluded in *Donnelly*. The *only* factors that the House thought so "plainly indicated reliability" were independent corroborating evidence. The confessing declarant was known to live in the vicinity of the riverbed where the murder occurred. Imprints left in the ground near the murder indicated that a person had paused to sit on the ground – a likely practice of the declarant who suffered from consumption. Footprints leading away from the murder traveled in the direction of the declarant's destination and away from the home of the defendant. Where the only corroborating circumstances in *Donnelly* consisted of independent evidence, and where the House stated that the against interest statement in that case would be admissible under the "corroborating circumstances" standard, it is clear that the House considered independent corroborative evidence sufficient.

TAB 7

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Memorandum To: Advisory Committee on Evidence Rules, and Panelists on Juror Questions to Witnesses
From: Daniel J. Capra, Reporter
Re: Possible amendment to Rule 611 to add safeguards when jurors are allowed to ask questions of witnesses
Date: April 1, 2023

At its last meeting, the Committee continued to review an amendment to Rule 611 that would add a subdivision providing procedural safeguards in cases where the trial judge has decided to allow jurors to pose questions to witnesses.[1] The Committee convened a panel in Phoenix, Arizona, to discuss the proposal at its last meeting. The panelists discussed the merits of allowing jurors to pose questions; all panelists present (including lawyers on both sides of the v. in civil and

[1] Rule 611 currently provides as follows:

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
(1) make those procedures effective for determining the truth;
(2) avoid wasting time; and
(3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:
(1) on cross-examination; and
(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

criminal cases) had extensive experience with the practice --- and all who participated were in favor of the practice.

The amendment that has been drafted by the Committee takes no position on whether jurors should be allowed to pose questions to witnesses. Nonetheless, it is apparent that some members of the Standing Committee were opposed to the proposal because they believe that adopting the amendment will be seen as an endorsement of the practice --- or will at least end up encouraging judges to try it because they would have a ready-made set of safeguards in place. The core beliefs of the opposition appear to be two: 1) allowing jurors to pose questions can shift control of the trial from lawyers to jurors; and 2) allowing jurors to pose questions favors the party with the burden of proof --- because a juror may raise a question that points to a failure to prove an element, that the party can then try to remedy.

This memorandum continues the discussion on the proposed amendment. *It does not, however, raise an action item*. The Chair and the Reporter believe that further Committee discussion is necessary, to make the best case to the Standing Committee, assuming that the Committee does decide to propose the amendment.

This memorandum is in five parts. Part One discusses the federal case law on juror questions of witnesses. Part Two discusses the arguments in favor of and opposed to the practice of allowing jurors to question witnesses. Part Three presents data from various studies of the practice. Part Four addresses two questions that were raised as concerns in the last Committee meeting --- both addressed to whether codification of safeguards is necessary or useful: 1) Have federal courts found error in the implementation of the safeguards that are necessary when allowing jurors to pose questions to witnesses?; and 2) How often do federal courts allow jurors to pose questions to witnesses? Part Five adds some suggested changes to the working draft of the text and committee note for an amendment that would add safeguards when a court allows jurors to ask questions of witnesses.

I. Federal Case Law on Juror Questioning of Witnesses[2]

Every circuit court has issued a ruling on juror questioning of witnesses. Essentially these rulings articulate the risks of prejudice to the parties, and the benefits of increased juror attention and better juror understanding. The courts differ on how they weigh these risks and benefits. Some courts are fairly hostile to juror questioning, others are quite permissive, as discussed below. No federal court has held that juror questioning of witnesses is per se prohibited.[3]

[2] This section is taken, with some modifications, from previous memos submitted to the Committee.

[3] A few states have barred juror questioning. One is Minnesota. *See State v. Costello,* 646 N.W.2d 204, 215 (2002) ("In sum, our concern about allowing jurors to question witnesses is two-fold. First, the opportunity to pose questions may prevent jurors from keeping an open mind until all the evidence has been presented. Second, the opportunity to pose questions may upset the burden of production and persuasion in a criminal trial.").

A typical case of skepticism about jurors questioning witnesses is the Second Circuit's opinion in *United States v. Bush,* 47 F.3d 511, 515 (2d Cir. 1995), where the court raised the following concerns about the practice:

- Questioning by jurors "risks turning jurors into advocates."

- It "creates the risk that jurors will ask prejudicial or other improper questions."

- "Remedial measures taken by the court to control jurors' improper questions may embarrass or even antagonize the jurors if they sense that their pursuit of the truth has been thwarted by rules they do not understand."

- Juror questioning "will often impale attorneys on the horns of a dilemma" because an attorney, by objecting to a question from a juror, risks alienating the jury.

The *Bush* court concluded that the balance of the prejudicial effect arising from juror questioning, against the benefits of issue-clarification, will "almost always lead trial courts to disallow juror questioning, in the absence of extraordinary or compelling circumstances."[4]

But other courts are more positive about the practice of questioning by jurors. For example, in *SEC v Koenig*, 557 F.3d 736, 742 (7th Cir. 2009), the court noted that its prior decisions had expressed skepticism about juror questioning. But it observed that "[n]ow that several studies have concluded that the benefits exceed the costs, there is no reason to disfavor the practice."[5] Judge Easterbrook, writing in *Koenig,* referred to the following supportive data for allowing jurors to ask questions:

> Principle 13(C) of the ABA's American Jury Project recommends that judges permit jurors to ask questions of witnesses. The Final Report of the Seventh Circuit's American Jury Project 15–24 (Sept. 2008) concurs, with the proviso that jurors should submit their questions to the judge, who will edit them and pose appropriate, non-argumentative queries. District judges throughout the Seventh Circuit participated in that project. The judges, the lawyers for the winning side, and, tellingly, the lawyers for the losing side, all concluded (by substantial margins) that when jurors were allowed to ask questions, their attention improved, with benefits for the overall quality of adjudication.

[4] For other cases expressing skepticism about juror questioning of witnesses, see, e.g., *United States v. Sutton*, 97 F.2d 1001, 1005 (1st Cir. 1992) ("[a]llowing jurors to pose questions during a criminal trial is a procedure fraught with perils"; but allowing the practice, subject to procedural safeguards, because "trial judges should be given wide latitude to manage trials."); *United States v. Cassiere*, 4 F.3d 1006, 1018 (1st Cir. 1993) ("the practice should be reserved for exceptional situations"); *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512 (4th Cir. 1985) (expressing concern particularly about a juror's reaction if their question is not asked); *United States v. George*, 986 F.2d 1176, 1178 (8th Cir. 1993) (warning against the risks of juror questioning and "the importance of maintaining the jury's role as neutral factfinder" but stating that "the practice of allowing juror questions is a matter committed to the sound discretion of the district court and is not prejudicial per se").

[5] See also Third Circuit Pattern Jury Instruction for Civil Cases 1.8, Option 2 (recognizing that certain judges routinely allow juror questions).

> Keeping the jurors' minds on their work is an especially vital objective during a long trial about a technical subject, such as accounting.[6]

The Eleventh Circuit, in *United States v. Richardson,* 233 F.3d 1285, 1290 (11th Cir. 2000), was also positive about the use of juror questioning, especially in complex cases:

> The underlying rationale for the practice of permitting jurors to ask questions is that it helps jurors clarify and understand factual issues, especially in complex or lengthy trials that involve expert witness testimony or financial or technical evidence. If there is confusion in a juror's mind about factual testimony, it makes good common sense to allow a question to be asked about it. Juror-inspired questions may serve to advance the search for truth by alleviating uncertainties in the jurors' minds, clearing up confusion, or alerting the attorneys to points that bear further elaboration. Indeed, there may be cases in which the facts are so complicated that jurors should be allowed to ask questions in order to perform their duties as fact-finders. Moreover, juror questioning leads to more attentive jurors and thereby leads to a more informed verdict. *See* Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking,* 12 Law & Hum. Behav. 231, 233-34 (1988) (addressing benefits of juror questioning). [Internal citations and quotations omitted.]

So it is fair to say that the courts of appeals are not uniform in their attitude toward juror questioning of witnesses. But they *are* essentially uniform in holding that *if* juror questioning is permitted, it must be done subject to significant procedural safeguards. For example, the court in *Richardson,* after extolling the practice of juror questioning of witnesses, described necessary safeguards:

> • In determining whether to permit juror questioning, the trial court should weigh the potential benefit to the jurors against the potential harm to the parties, especially when one of those parties is a criminal defendant. District courts must in each case balance the positive value of allowing a troubled juror to ask a question against the possible abuses that might occur if juror questioning became extensive.
>
> • Questions should be permitted to clarify factual issues when necessary, especially in complex cases. However, the questioning procedure should not be used to test legal theories, to fill in perceived gaps in the case, or occur so repeatedly that they usurp the function of lawyer or judge, or go beyond the jurors' role as fact finders.
>
> • Jurors should not be permitted to directly question a witness but rather should be required to submit their questions in writing to the trial judge, who should pose the questions to the

[6] Judge Easterbrook also cited scholarly works asserting the benefits of allowing jurors to ask questions of witnesses. *See, e.g.,* Shari Seidman Diamond, Mary R. Rose, Beth Murphy & Sven Smith, *Juror Questions During Trial: A Window into Juror Thinking,* 59 Vand. L.Rev.1927 (2006); Nicole L. Mott, *The Current Debate on Juror Questions,* 78 Chi.-Kent L.Rev. 1099 (2003).

witness in a neutral manner. Written submission of questions eliminates the possibility that a witness will answer an improper question and prevents jurors from hearing prejudicial comments that may be imbedded in improper questions. This procedure also allows the attorneys to make and argue objections without fear of alienating the jury.

• The jury should be instructed throughout the trial regarding the limited purpose of the questions, the proper use of the procedure and should be constantly cautioned about the danger of reaching conclusions or taking a position before all of the evidence has been received or speculating about answers to unasked questions.

• Finally, the district court should make clear to the jury that questions are to be reserved for important points, that the rules of evidence may frequently require the judge to eschew certain questions, and that no implication should be drawn if a juror-inspired question withers on the vine.[7]

Similarly, the court in *United States v. Collins*, 226 F.3d 457, 463–464 (6th Cir. 2000), set forth the following procedural safeguards that must be undertaken before jurors' questions are permitted:

> When a court decides to allow juror questions, counsel should be promptly informed. At the beginning of the trial, jurors should be instructed that they will be allowed to submit questions, limited to important points, and informed of the manner by which they may do so. The court should explain that, if the jurors do submit questions, some proposed questions may not be asked because they are prohibited by the rules of evidence, or may be rephrased to comply with the rules. The jurors should be informed that a questioning juror should not draw any conclusions from the rephrasing of or failure to ask a proposed question. Jurors should submit their question in writing without disclosing the content to other jurors. The court and the attorneys should then review the questions away from the jurors' hearing, at which time the attorney should be allowed an opportunity to present any objections. The court may modify a question if necessary. When the court determines that a juror question should be asked, it is the judge who should pose the question to the witness.

The following procedural safeguards can be distilled from *Richardson*, *Bush, Collins,* and the other cases that have been discussed above:

[7] For other cases on the need for safeguards, see, e.g., *See, e.g., United States v. Sykes,* 614 F.3d 303 (7th Cir. 2010) (error to permit jurors to question witnesses directly, without reducing the questions to writing or submitting them first to the judge); *United States v. Hernandez,* 176 F.3d 719 (3d Cir. 1999) (allowing jury questions is within the trial court's discretion, but the judge should ask any juror-generated questions and should only do so after allowing attorneys to raise any objection out of the hearing of the jury). See also *United States v. Ricketts,* 317 F.3d 540 (6th Cir. 2003) (error for the trial court to permit jurors to submit questions to witnesses without counsel first being allowed to review those questions).

● The judge must consider the possible value of allowing questions against the risk of possible abuse.
● The court must notify the parties of the court's intent to allow juror questioning at the earliest possible time, and give the parties an opportunity to be heard in opposition to the practice.
● Questions must be submitted in writing.
● Questions should be limited to important points.
● Jurors must be instructed not to disclose to other jurors the content of any question submitted to the court.
● Questions should be factual and not argumentative or opinionated.
● The court must review each question with counsel --- outside the hearing of the jury --- to determine whether it is appropriate under the Evidence Rules.
● The court must allow a party's objection to a juror's question to be made outside the hearing of the jury.
● The court must notify the jury that it may rephrase questions to comply with the Evidence Rules.
● The court must instruct the jury that if a juror's question is not asked, or is rephrased, the juror should not draw any negative inferences against any party.
● The jurors should be reminded that they are not advocates but rather are impartial factfinders. Thus, questions should not be argumentative.
● The court must instruct the jury that answers to questions asked by jurors should not be given any greater weight than would be given to any other testimony.[8]

[8] A good example of a jury instruction regarding questioning of witnesses is found in California (with thanks to Judge Carolyn Kuhl for sending it to me):

> If, during the trial, you have a question that you believe should be asked of a witness, you may write out the question and send it to me through my courtroom staff. I will share your question with the attorneys and decide whether it may be asked.
>
> Do not feel disappointed if your question is not asked. Your question may not be asked for a variety of reasons. For example, the question may call for an answer that is not allowed for legal reasons. Also, you should not try to guess the reason why a question is not asked or speculate about what the answer might have been. Because the decision whether to allow the question is mine alone, do not hold it against any of the attorneys or their clients if your question is not asked.
>
> Remember that you are not an advocate for one side or the other. Each of you is an impartial judge of the facts. Your questions should be posed in as neutral a fashion as possible. Do not discuss any question asked by any juror with any other juror until after deliberations begin.

See also Third Circuit Pattern Instruction for Civil Cases 1.8, Option 2 (written by Capra and Struve):

> You will have the opportunity to ask questions of the witnesses in writing. When a witness has been examined and cross-examined by counsel, and after I ask any clarifying questions of the witness, I will ask whether any juror has any further clarifying question for the witness.
>
> If so, you will write your question on a piece of paper, and hand it to my Deputy Clerk. Do not discuss your question with any other juror. I will review your question with counsel at sidebar and determine whether the question is appropriate under the rules of evidence. If so, I will ask your question, though I might

● When the court determines that a juror's question may be asked, the question is to be posed by the court or by a party, not the juror.
● Counsel should be allowed to re-examine witnesses after a juror's question is answered by the witness.

II. Arguments in Favor of and Opposed to Juror Questions of Witnesses.

Asserted Benefits:

The asserted benefits of allowing jurors to pose questions to witnesses have been articulated as follows:

1. Improving juror comprehension. Studies indicate that people learn better actively than passively. The argument is that allowing jurors to pose questions will assist them in figuring out some of the issues that are outside their ordinary experience.[9] It is asserted that juror questions are particularly useful in complex cases.

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put it in my own words. If the question is not permitted by the rules of evidence, it will not be asked, and you should not draw any conclusions about the fact that your question was not asked. Following your questions, if any, the attorneys may ask additional questions. If I do ask your question you should not give the answer to it any greater weight than you would give to any other testimony.

The Arizona Civil Preliminary Instruction 11 provides this model for juror questions of witnesses:

If you have a question about the case for a witness or for me, write it down, but do not sign it. Hand the question to the Courtroom Assistant. If your question is for a witness who is about to leave the witness stand, please let the Courtroom Assistant or me know you have a question before the witness leaves the stand.

The lawyers and I will discuss the question. The rules of evidence or other rules of law may prevent some questions from being asked. If the rules permit the question I will ask the witness the question or provide you with the answer at the earliest opportunity. When we do not ask a question, it is no reflection on the juror submitting it. You should attach no significance to my decision not to ask a question you submitted. I will apply the same legal standards to your questions as I do to the questions asked by the lawyers.

If a particular question is not asked, please do not guess why the question was not asked or what the witness's answer might have been.

[9] See, e.g., Alena Jehle and Monica Miller, *Controversy in the Courtroom: Implications of Allowing Jurors to Question Witnesses,* 32 Wm. Mitchell L. Rev. 27 (2005) (discussing the "Story Model" of learning and concluding that "jurors should be allowed to ask questions in order to facilitate their natural decision-making tendencies").

2. Improving the jurors' attention and improving the jurors' state of mind. If jurors have the opportunity to ask questions, the theory is that they will pay more attention and be more involved. Jurors also report that the experience of being a juror is improved if they are able to ask questions. See, e.g., Chomos, et. al., *Increasing Juror Satisfaction: A Call to Action for Judges and Researchers,* 59 Drake L.Rev. 707 (2011) (finding nearly twenty percent of jurors experience moderate stress related to the inability to ask questions).

3. Improves juror deliberations and decisionmaking. To the extent juror questions can help to alleviate misunderstandings or confusion, deliberations will be more efficient, and jurors are more likely to come to the proper result. It is also possible that jurors will be less likely to deadlock when clarifying information is provided by juror questions.

4. Assists the parties and the court. If a juror is laboring under a misimpression, or fails to understand critical aspects of the case, it would be good for the court and parties to know that during the trial. Parties in particular can address matters of concern to a juror that they had previously overlooked or ignored. They can go back and present evidence or argument on something that might not have been understood the first time. Essentially, proponents argue it is always a good thing to know what jurors are thinking.

5. It may uncover juror bias. If a question indicates that a juror is biased, the court and the parties can engage in remedies during and after the trial.

6. It lessens the likelihood that jurors will seek information from outside the courtroom. At the Arizona conference, Judge Hopkins mentioned that in post-verdict discussions with jurors, several had stated that their ability to ask questions of witnesses provided an alternative to seeking answers off the internet.

7. Questions are usually just for clarification. The experience of many judges is that questions from jurors are almost always for the limited and proper purpose of clarification (such as the meaning of an acronym or abbreviation used by a lawyer or a witness, or the timing of an event). It appears that jurors rarely pose questions that are argumentative or skeptical.

8. Jurors usually don't ask many questions. Proponents argue that the cost of juror questioning is not high, because in most cases, jurors ask few questions. Judges at the Arizona conference stated that it is typical that fewer than ten questions are posed in a trial. *See, e.g.,* Diamond, Rose & Murphy, *Jurors' Unanswered Questions, Court Review*, Spring 2004 at 20–29 (study involving videotaping of 50 civil trials where jurors were allowed to ask questions, found that jurors asked ten or fewer questions in half of the trials, on average about three questions for every four hours of trial; that about 76% of the questions were legally appropriate; and that when the judge could not supply jurors with an answer, they rarely expressed disappointment, surprise, or resentment, but instead accepted the decision easily and moved on).

Asserted Costs:

The asserted costs associated with juror questioning have been articulated as follows:

1. Jurors are changed from factfinders to advocates. The theory here is that to be impartial, one cannot be actively involved in the factfinding. The concern is that jurors will, through questioning, take the role of advocate rather than factfinder. Some have argued that in the very process of forming a question, the juror may be coming to a conclusion before all the evidence has been presented. This concern is often expressed by detractors, but rarely found by judges who allow jurors to question witnesses.

2. Control is shifted from the parties (lawyers) to the jury. Opponents argue that the parties' autonomy in structuring their cases can be disrupted by wayward questions of jurors. For example, a juror's question may be about something the party deliberately left out of their presentation. Or, the question may require the party to address an issue at a time different from what the party had planned.

3. A juror's question may give an advantage to the prosecutor and the plaintiff. The concern often expressed at Committee meetings is that the party with the burden of proof may receive an unfair advantage if jurors are allowed to ask questions. The most concerning example is that a juror might ask a question that alerts the prosecution to the fact that it has not offered sufficient proof on an element of the crime. The question could allow the prosecutor to correct that mistake --- and without the question the mistake would go uncorrected, and the defendant would be acquitted.[10] While no judge at the Arizona conference had ever seen that happens, Judge Bolton at the conference could not discount the possibility. Another possibility is that the prosecutor has simply overestimated the strength of her case, or underestimated a defense; a question from a juror may alert the prosecutor to put more into the case or to more aggressively attack the defense. Of course, the same signaling from the jury could help the defendant --- but the theory is that juror signals would be more beneficial to the party with the burden of proof.

4. Early deliberations through questioning: Juror questioning allows jurors to know what other jurors are thinking. That could mean that juror questioning operates as a form of jury deliberation --- before the actual deliberation.

5. The risk of inappropriate questions. Jurors may ask questions that call for inadmissible information. And even if an answer is not provided, the failure to answer the juror's question may lead the juror to draw an improper inference about what the answer would be.

[10] Specific examples have not been posed, but the one that I am using in my head is this: a child pornography case involving requiring proof of transportation in interstate or foreign commerce. See 18 U.S.C 2252. A juror asks a question: "how do we know that it was shipped or transported in interstate or foreign commerce?" This question alerts the prosecutor to the fact that he forgot to actually prove what he thought to be an obvious point. So then he offers the proof.

6. The problem of objection. The argument is that lawyers will find it risky to object for fear of offending the questioning juror. While there are ways to arrange for sidebar objection,[11] the questioning juror will probably still figure out that an objection was made by a particular party.

7. Excessive weight. Jurors might give excessive weight to answers in response to jurors' questions. (Especially so as to the juror that asked the question).

8. Undue delay. The argument is that allowing juror questions disrupts the flow of the trial and result in excessive time spent reviewing and ruling on the questions. Obviously this objection is more salient if the jury is asking dozens of questions.

9. Some jurors might exploit the practice: While most jurors ask only clarifying questions if they ask any questions at all, there are some reported examples where particular jurors exploited the practice. For example, in a trial before Judge Zipps (a member of the Standing Committee) two jurors asked a total of 278 questions, requiring extensive time in sidebar discussions. Many of the questions were in the nature of social commentary, indicating the juror's biases, and others were comments on the ineffectiveness of trial counsel. Other questions indicated that the juror was viewing himself or herself as an investigator with skills superior to that of counsel. Yet, even though the questioning amounted to abuse of the process and ended up being very time-consuming, there was a silver lining: the parties were able to address many of the questions in closing argument, and the questions from the biased juror were part of the reason that the juror was in fact dismissed for bias.

It should be noted that the strength of the arguments against jurors posing questions to witnesses are dependent on the procedures that the courts employ. If one posits a trial where jurors are simply allowed willy-nilly to stand up and ask dozens of questions that must be immediately answered, then the argument that the jurors have taken over is pretty strong. The arguments are significantly less compelling if the safeguards set forth in proposed Rule 611(e) are employed.

III. Studies on Juror Questioning of Witnesses

A number of studies have been conducted on the practice of juror questioning of witnesses. Some of them have been surveys of judges, lawyers and jurors. Others have been reviews of cases in which the practice has been employed. And others involved mock trials. Here are a few takeaways from all the data:

1. One example from a two-week trial indicated that jurors asked a total of 35 questions, six of which were objected to, and the total amount of time taken by juror questions was a little

[11] Judge Robert Jones hooked up his courtroom so that if a lawyer had an objection to a juror's question, the lawyer could press a button that would alert the judge.

less than two hours in a trial that took 152 hours. Jurors were surveyed and concluded that questioning helped their comprehension and made them more comfortable with the verdict rendered.[12]

2. In the 1980's a number of studies were conducted, and they are summarized by Jeffrey Berkowitz in *Breaking the Silence: Should Jurors Allowed to Question Witnesses During Trial?,* 44 Vand. L. Rev. 117, 141 (1991):

> During the past ten years at least three major studies have addressed juror questioning: a study conducted in the Second Circuit and two studies by Professor Stephen Penrod and Mr. Larry Heuer. The studies are based on real trials during which jurors were allowed to pose questions to witnesses under an indirect questioning method in which the judge screened written questions. Because the judges and lawyers in each Heuer and Penrod study agreed to participate in the study at the outset, the results could be skewed in favor of allowing jurors to ask questions. Significantly, in each of the studies, the jurors who could question witnesses were more satisfied with their jury service than those who were not allowed to ask questions. This satisfaction stemmed from the additional involvement of asking questions. Jurors claimed that they were less worried about an incorrect verdict because asking questions eliminated their concerns about insufficient information. * * * The other important finding in the studies focused on the number of questions asked and the parties' satisfaction with the procedure. The Second Circuit study revealed no correlation between the number of questions asked and the judge's perception of the utility of the procedure. One of the Heuer and Penrod studies, however, found that judges became more concerned with the utility of the procedure as the number of questions increased. The Heuer and Penrod studies also showed that the belief that jury questions uncover pertinent and helpful information has been exaggerated. Benefits in this area were modest at best. . . . The studies further revealed that juror questions provided little instruction about the jurors' understanding of the evidence and law in the case. . . . Notably, the Second Circuit study found a divergence between the views of attorneys for the prosecution or the plaintiff and those representing the defense. Prosecutors and plaintiff counsel were overwhelmingly in favor of allowing jurors to ask questions. On the other hand, defense counsel were split on the subject, with several attorneys strongly opposed to allowing jurors to ask questions.

3. Judge Marmolejo summarizes the findings of the Arizona Jury Project, and the Seventh Circuit study, in the following excerpt from *Jack of All Trades, Master of None: Giving Jurors the Tools They Need to Reach a Verdict,* 28 George Mason L.Rev. 149, 160 (2020).

> Scholars widely agree that the two most renowned studies in this area are the Arizona Jury Project and the Seventh Circuit Bar Association American Jury Project ("the Seventh Circuit Project"). The Arizona Supreme Court created the Arizona Jury Project in 1993 with the principal goal of improving juror comprehension and increasing juror

[12] Hon. Maria Marmalejo, *Jack of All Trades, Master of None: Giving Jurors the Tools They Need to Reach a Verdict,* 28 George Mason L.Rev. 149, 160 (2020).

participation in their process of factfinding. . . . [The Project] included a detailed analysis of 829 questions submitted by jurors in fifty civil trials, for which comprehensive results found: That juror questions generally do not add significant time to trials and tend to focus on the primary legal issues in the cases. Jurors not only use questions to clarify the testimony of witnesses and to fill in gaps, but also to assist in evaluating the credibility of witnesses and the plausibility of accounts offered during trial through a process of cross-checking. Talk about answers to juror questions does not dominate deliberations. Rather, the answers to juror questions appear to supplement and deepen juror understanding of the evidence. In particular, the questions jurors submit for experts reveal efforts to grapple with the content, not merely the trappings, of challenging evidence. Moreover, jurors rarely appear to express an advocacy position through their questions.

The Seventh Circuit Project is the federal equivalent to the Arizona Jury Project. It, too, examined the practice of allowing juror questions for witnesses during trials. Twenty-two federal district judges participated in the fifty jury trials that formed the basis for the Project. In total, four hundred and thirty-four jurors, eighty-six lawyers, and twenty-two federal district judges completed questionnaires. The results showed that the vast majority of judges believed that juror questions increased the fairness of the trial. And while the perspective of judges is important, most important was the fact that the vast majority of jurors themselves confirmed that their ability to ask questions increased or helped them better understand the evidence.

Former US District Judge James F. Holderman, a participant in the Seventh Circuit Jury Project . . . expanded upon his experience. His findings validate the following significant concepts seen throughout the studies:

> • Most of the jurors' questions sought information to clarify evidence that had been presented during the lawyers' questioning of the witness.
>
> • Rarely did the jurors' questions seek testimony on a subject that was inadmissible, and when such questions were submitted, [the judge] explained to the jury why the question could not be asked and brought the jurors' focus back to the pertinent evidence.
>
> • The jurors' questions provided a window into the jurors' thinking and areas of interest, which allowed the lawyers beneficial insights during the trials that the lawyers would not have otherwise had.
>
> • The jurors appreciated the opportunity to inquire. They were more engaged and attentive to the evidence presented by the lawyers. Any confusion they had about the evidence was dispelled by the answers provided to the jurors' questions.

• After the jurors reached a verdict, they appeared to be more confident of the correctness of their decision because they were confident that they had understood the evidence.

4. A Colorado field experiment involving 239 criminal trials found that jurors who were permitted to submit questions were more likely to agree that they had sufficient information to reach a correct decision. The jurors reported greater attentiveness and confidence in the ultimate decision rendered.[13]

5. A survey conducted in the Eighth Circuit and in Iowa state court, of lawyers and judges, essentially indicated that the negative views about juror questioning of witnesses were voiced only by those who had not tried out the practice. Those who had used the practice were big fans.[14]

6. A poll conducted by the American College of Trial Lawyers found general support among attorneys for allowing jurors to question witnesses.[15] Seventy-nine percent of the attorneys polled believe that allowing jurors to ask questions improves juror comprehension of the evidence. Additionally, ninety-three percent of the attorneys believe that the practice increases juror satisfaction with the trial. About one-half of respondents also view the practice as enhancing the quality of justice.

7. Professor Nicole Mott performed a content analysis on 2271 questions asked by jurors in real trials. She found that jurors' questions were almost exclusively used to clarify testimony and were not an attempt to uncover new evidence or cross-examine witnesses.[16]

In sum, the data collected so far supports the practice of allowing jurors to pose questions to witnesses, subject to safeguards.

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[13] Shari Seidman Diamond, Mary R. Rose, Beth Murphy & Sven Smith, *Juror Questions During Trial: A Window into Juror Thinking*, 59 Vand. L. Rev. 1927, 1929 (2006).

[14] Hon. Thomas Waterman and Hon. Mark Bennett, *A Fresh Look at Jurors Questioning Witnesses: A Review of Eighth Circuit and Iowa Appellate Precedents and an Empirical Analysis of Federal and State Trial Judges and Trial Lawyers,* 64 Drake L. Rev. 485, 511 (2016): "Both lawyers and judges who have experienced the practice of jurors submitting question for witnesses, while in the minority of those surveyed, had a much more positive and encouraging view of the practice than those who had not experienced it. Moreover, this remained true for every single attribute and metric of the practice we analyzed, including how the practice affects the fairness and efficiency of the trial, the juror understanding of the case, the accuracy of the verdict, and whether jurors ask too many questions or questions that are too argumentative."

[15] J. Donald Cowan, Jr., Thomas M. Crisham, Michael B. Keating, Gael Mahony, Debra E. Pole, Michael A. Pope, William W. Schwarzer & John R. Wester, *What Attorneys Think of Jury Trial Innovations*, 86 Judicature 192, 194 (2003).

[16] Nicole L. Mott, *The Current Debate on Juror Questions: "To Ask or Not to Ask, That Is the Question*," 78 Chi.-Kent L. Rev. 1099, 1099 (2003)

IV. Research in Response to Questions from the Last Meeting

Two questions that are pertinent to the adoption of the proposed amendment were raised at the last meeting:

1) How prevalent is jury questioning? The point being that if the procedure is rarely used, a rule setting forth protections may not be necessary, and may only lead to more general use of a possibly problematic procedure.

2) How often have courts been found to be in error when allowing jurors to question witnesses? The point being that if courts are employing the practice with sufficient safeguards already, there may be no need to propose a rule that imposes safeguards.

A. How Prevalent Is Juror Questioning?

There does not appear to be recent empirical data on how frequently federal courts use juror questioning. But here are some data points:

• A survey conducted by Professor Gregory Mize, *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report,* 32 tb. 24 (2007) found that written juror questions for witnesses were permitted in 11.4% of federal criminal trials and 10.9% of federal civil trials, and in 15.1% of state criminal trials and 16.1% of state civil trials.

• A survey by the National Association of State Courts found in 2018 that, in federal courts, jurors were allowed to ask questions in 14.5 percent of all trials, and 15.6 percent of civil trials.

• A survey of the Iowa federal courts in 2016 found that 23% of district judges allow the practice in civil cases while 7% allow the practice in criminal trials. Waterman and Bennett, *A Fresh Look at Jurors Questioning Witnesses: A Review of Eighth Circuit and Iowa Appellate Precedents and An Empirical Analysis of Federal and State Trial Judges and Trial Lawyers*, 64 Drake L. Rev. 485 (2016).

• A 2014 survey in Florida state courts reported that juror questioning is used in about 1/3 of the trials, both civil and criminal.

B. Court Practices Disapproved by Appellate Courts

What follows is a digest of appellate court cases disapproving a procedure employed when jurors were permitted to pose questions to witnesses.

Failure to allow lawyers to make objections to juror questions outside the presence of the jury: ***United States v. Kieffer,*** 991 F.3d 630 (5th Cir. 2021): The trial court allowed juror questions, but did not give counsel the opportunity to object outside the jurors' hearing. The court indicated that this should be error, but the problem was that there was prior precedent that found no error in denying sidebar objections. *United States v. Callahan,* 588 F.2d 1078). So while the court did not reverse, it strongly suggested that courts allowing jurors to question witnesses should also give counsel an opportunity to object outside the presence of the jury. Judge Oldham, concurring, questioned whether an appellate court even had the power to establish procedural best practices for juror questioning of witnesses. He stated that best practices principles are *"a long list of shoulds and ifs and thens [which] look more like something that would come from an advisory (or model rules) committee."* ***See also United States v. Ricketts****,* 317 F.3d 540 (6th Cir. 2003) (error for the trial court to permit jurors to submit questions to witnesses without counsel first being allowed to review those questions).

Actively soliciting juror questions: ***United States v. Douglas***, 81 F.3d 324, 326 (2d Cir.1996): The court found error, though harmless, when the trial judge actively encouraged jurors to ask questions, both at the start of the trial and at the end of each witness's testimony. ***See also United States v. Ajmal****,* 57 F.3d 12 (2nd Cir. 1995) (error for the trial court to actively encourage juror questioning); ***United States v. Thompson***, 76 F.3d 442 (2d Cir. 1996) (error to encourage juror questioning); ***DeBenedetto v. Goodyear Tire & Rubber Co***., 754 F.2d 512 (4th Cir. 1985) (disapproving of the district court's inviting juror questioning).

Allowing jurors to interrupt testimony to ask questions directly to witnesses: ***United States v. Sykes***, 614 F.3d 303 (7th Cir.2010): while reiterating its approval of allowing jurors to ask questions, the court found that it was error (though harmless) for the trial judge to allow jurors to interrupt the witnesses and ask questions at will without submitting the questions in writing. ***See also United States v. Bush,*** 47 F.3d 511 (2d Cir.1995) (disapproving the practice of allowing jurors to directly interact with witnesses).

Questions not submitted in writing: ***United States v. Feinberg*****,** 89 F.3d 333 (7th Cir. 1996): The trial court allowed jurors to submit questions either orally or in writing. The court found no plain error, but disapproved of the practice allowing jurors to submit questions orally. The court stated that "[b]y reducing the questions to writing, a court eliminates the possibility that a witness will answer a question prematurely" and that "[w]ritten questions also guard against juror commentary that suggests or precipitates premature deliberation." ***See also United States v. Land,*** 877 F.2d 17 (8th Cir. 1989) (disapproving the trial court's procedure allowing the jurors to state questions orally); ***United States v. Hernandez,*** 176 F.3d 719, 726 (3rd Cir. 1999) ("we conclude that the dangers of allowing jurors to ask questions orally far outweighs any perceived benefit of allowing juror questioning of witnesses.").

Instruction that invited improper questions: ***United States v. Tavares***, 844 F.3d 46 (1st Cir. 2016): The trial court instructed the jurors that they would be allowed to pose questions of witnesses and that their questions "should be guided by whether the lawyer gets out what interests you from the witness." Jurors submitted 281 questions, and the court permitted 180 of them. The court of appeals reversed on other grounds, but disapproved the instruction and the volume of questions. It stated that the instruction was an "invitation to go beyond seeking clarification" and led to questions that were not just clarifications but "gap-filling evidence."

Jurors posing questions in the presence of other jurors: ***United States v. Polowichak***, 783 F.2d 410 (4th Cir.1986), the court disapproved the practice of having jurors pose questions in front of other jurors. The court stated that the trial judge should require questions to be submitted without disclosure to other jurors, "whereupon the court may pose the question in its original or restated form upon ruling the question or the substance of the question proper."

As can be seen from the above cases, trial courts have from time to time deviated from some of the safeguards that are set forth in proposed Rule 611(e). It is notable, though, that some of the procedures questioned above are not addressed in the proposed rule. For example, the proposed rule does not provide that the court should not encourage or invite juror questions. Nor does it suggest that there should be a limitation on the content or number of questions. If the Committee does wish to go forward with a proposal, it should consider whether to add as safeguards that the court should not encourage questions, that there should be some soft limit on the number of questions, and that the questions should be limited to clarification, as opposed to argument.

V. Draft Rule 611(e)

What follows is the draft rule, blacklined to incorporate changes agreed upon at the Fall, 2022 meeting, as well as changes suggested by Judge Schroeder, who kindly reviewed the draft. These changes are generally designed to clarify that the rule is not intended to encourage the use of juror questions.

Again, if the Committee decides to go forward with the proposal, it may think of adding a proviso against encouraging questioning, as well as limits on the number and content of questions. As to content, it may wish to reconsider the deletion of subdivision (1)(F) --- an instruction that a

juror should be a factfinder, not an advocate, is one way of trying to limit argumentative questions. Or, that instruction could be redrafted to provide some specific content-limitation, as seen below.

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

* * * * *

(e) Safeguards Required If Court Allows Jurors to Pose ~~Juror~~ Questions for Witnesses.

(1)Instructions to Jurors If Questions Are Allowed. If the court allows jurors to submit questions for
Witnesses during trial, then the court must instruct the jury that:

(A) any question must be submitted to the court in writing;

(B) a juror must not disclose a question's content to any other juror;

(C) the court may rephrase or decline to ask a question submitted by a juror;

(D) a juror must draw no inference from the fact that a juror's question is asked, rephrased, or not asked; and

(E) an answer to a juror's question should not be given any greater weight than an answer to any other question~~; and~~

~~**(F)** the jurors are neutral factfinders, not advocates~~. **[Or: juror questions should be for purposes of clarifying matters, and are not to be argumentative;]**

[(G) while the court is permitting juror questions, it is not encouraging them;

[(H) as the trial progresses, the court may decide to prohibit jury questions if they become excessive in number.]

(2) ***Procedure ~~When~~ If a Question Is Submitted.*** ~~When~~ If a question is submitted by a juror, the court must, outside the jury's hearing:

(A) review the question with counsel to determine whether it should be asked, rephrased, or not asked; and

(B) allow a party to object to it.

(3) ***Posing the Question to a Witness***. If the court allows a juror's question to be asked, the court must pose it to the witness or permit one of the parties to do so.

(4) ***Record.*** All questions submitted by the jurors must be entered into the record.

Draft Committee Note --- with changes from the prior proposal approved by the Committee.

New subdivision (e) sets forth procedural safeguards that are necessary ~~when~~ if a court decides to allow jurors to submit questions for witnesses at trial. Courts have taken different positions on whether to allow jurors to ask questions of witnesses. Some courts permit jurors to ask questions in the belief that it improves the jurors' experience and provides helpful information to the lawyers and to the court. Other courts believe that allowing the practice cedes control of the trial to the jury and provides an unfair advantage to the party with the burden of proof. But all courts agree that before the practice ~~is~~ can be undertaken, trial judges ~~should~~ must weigh the benefits of allowing juror questions in a particular case against the potential harm that it might cause. And they agree that safeguards must be imposed.

Rule 611(e) does not endorse the practice of juror questioning. ~~takes no position on whether and under what circumstances a trial judge should allow jurors to pose questions to witnesses.~~ The intent of the amendment is to codify the minimum procedural safeguards that are necessary ~~when~~ if the court decides to allow juror questions. These safeguards are necessary to ensure that the parties are not prejudiced, and that jurors remain impartial factfinders. And codification is useful because courts employing the practice have, on occasion, failed to employ the necessary safeguards.

~~The safeguards set forth are taken from and are well-established in case law. But the cases set out these safeguards in varying language, and often not in a single case in each circuit. The intent of the amendment is to assist courts and counsel by setting forth all the critical safeguards in uniform language and in one place.~~

The safeguards and instructions set forth in the rule are mandatory, but they are not intended to be exclusive. Courts are free to impose additional safeguards, or to provide additional instructions, when necessary to protect the parties from prejudice, or to assure that the jurors maintain their neutral role.

A court may refuse to allow a juror's question to be posed, or may modify it, for a number of reasons. For example, the question may call for inadmissible information; it may

assume facts that are not in evidence; the witness to whom the question is posed may not have the personal knowledge required to answer; the question may be argumentative; or the question might be better posed at a different point in the trial. In some situations, one of the parties may wish to pose the question, and the court may in its discretion allow the party to ask a juror's question—so long, of course, as it is permissible under the rules of evidence. ~~In any case, the court should not disclose—to the parties or to the jury—which juror submitted the question.~~

After a juror's question is asked, a party may wish to ask follow-up questions or to reopen questioning. The court has discretion under Rule 611(a) to allow or prohibit such questions.

There is a possibility that a witness answering a juror's question will go beyond the question to a broader narrative. At that point, a party may be concerned about the prejudice that could arise in objecting in front of the jury, and it should be for the court to intervene.

TAB 8

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Federal Case Law Development After *Crawford v. Washington*
Date: April 1, 2023

The Committee has directed the Reporter to keep it apprised of case law developments after *Crawford v. Washington*. This memo is intended to fulfill that function. The memo describes the Supreme Court and federal circuit case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. The outline begins with a short discussion of the Court's three latest cases on confrontation, *Ohio v. Clark, Williams v. Illinois,* and *Hemphill v. New York,* and then summarizes all the post-*Crawford* circuit court cases by subject matter heading.

I. Supreme Court Confrontation Cases

A. Ohio v. Clark

The Court's most in *Ohio v. Clark,* 576 U.S. 237 (2015), shed light on how to determine whether hearsay is or is not "testimonial." As shown in the outline below, the Court has found a statement to be testimonial when the "primary motivation" for making the statement is to have it used in a criminal prosecution. *Clark* raised three questions about the application of the primary motivation test:

1. Can a statement be primarily motivated for use in a prosecution when it is not made with the involvement of law enforcement? (Or put the other way, is law enforcement involvement a prerequisite for a finding of testimoniality?).

2. If a person is required to report information to law enforcement, does that requirement render them law enforcement personnel for the purpose of the primary motivation test?

3. How does the primary motivation test apply to statements made by children, who are too young to know about use of statements for law enforcement purposes?

In *Clark*, teachers at a preschool saw indications that a 3 year-old boy had been abused, and asked the boy about it. The boy implicated the defendant. The boy's statement was admitted at trial under the Ohio version of the residual exception. The boy was not called to testify --- nor could he have been, because under Ohio law, a child of his age is incompetent to testify at trial. The defendant argued that the boy's statement was testimonial, relying in part on the fact that under Ohio law, teachers are required to report evidence of child abuse to law enforcement. The defendant argued that the reporting requirement rendered the teachers agents of law enforcement.

The Supreme Court in C*lark*, in an opinion by Justice Alito for six members of the Court, found that the boy's hearsay statement was not testimonial.[1] It made no categorical rulings as to the issues presented, but did make the following points about the primary motive test of testimoniality:

> 1. Statements of young children are *extremely unlikely* to be testimonial because a young child is not cognizant of the criminal justice system, and so will not be making a statement with the primary motive that it be used in a criminal prosecution.
>
> 2. A statement made without law enforcement involvement is *extremely unlikely* to be found testimonial because if law enforcement is not involved, there is probably some other motive for making the statement other than use in a criminal prosecution. Moreover, the formality of a statement is a critical component in determining primary motive, and if the statement is not made with law enforcement involved, it is much less likely to be formal in nature.
>
> 3. The fact that the teachers were subject to a reporting requirement was essentially irrelevant, because the teachers would have sought information from the child whether or not there was a reporting requirement --- their primary motivation was to protect the child, and the reporting requirement did nothing to change that motivation. (So there may be room left for a finding of testimoniality if the government sets up mandatory reporting in a situation in which the individual would not otherwise think of, or be interested in, obtaining information).

[1]All nine Justices found that the boy's statement was not testimonial. Justices Scalia and Ginsburg concurred in the judgment, but challenged some of the language in the majority opinion on the ground that it appeared to be backsliding from the *Crawford* decision. Justice Thomas concurred in the judgment, finding that the statement was not testimonial because it lacked the solemnity required to meet his definition of testimoniality.

B. Williams v. Illinois

In *Williams v. Illinois*, 567 U.S. 50 (2012), the Court brought substantial uncertainty to how courts are supposed to regulate hearsay offered against an accused under the Confrontation Clause. The case involved an expert who used testimonial hearsay as part of the basis for her opinion. The expert relied in part on a Cellmark DNA report to conclude that the DNA found at the crime scene belonged to Williams. The splintered opinions in *Williams* create confusion not only for how and whether experts may use testimonial hearsay, but more broadly about how some of the hearsay exceptions square with the Confrontation Clause bar on testimonial hearsay.

The question in *Williams* was whether an expert's testimony violates the Confrontation Clause when the expert relies on hearsay. A plurality of four Justices, in an opinion written by Justice Alito, found no confrontation violation for two independent reasons:

> 1) First, the hearsay (the report of a DNA analyst) was never admitted for its truth, but was only used as a basis of the expert's own conclusion that Williams's DNA was found at the crime scene. Justice Alito emphasized that the expert witness conducted her own analysis of the data and did not simply parrot the conclusions of the out-of-court analyst.
>
> 2) Second, the DNA test results were not testimonial in any event, because at the time the test was conducted the suspect was at large, and so the DNA was not prepared with the intent that it be used against a *targeted individual.*

Justice Kagan, in a dissenting opinion for four Justices, rejected both of the grounds on which Justice Alito relied to affirm Williams's conviction. She stated that it was a "subterfuge" to say that it was only the expert's opinion (and not the underlying report) that was admitted against Williams. She reasoned that where the expert relies on a report, the expert's opinion is useful only if the report itself is true. Therefore, according to Justice Kagan, the argument that the Cellmark report was not admitted for its truth rests on an artificial distinction that cannot satisfy the right to confrontation. As to Justice Alito's "targeting the individual" test of testimoniality, Justice Kagan declared that it was not supported by the Court's prior cases defining testimoniality in terms of primary motive. Her test of "primary motive" is whether the statement was prepared primarily for the purpose of *any* criminal prosecution, which the Cellmark report clearly was.[2]

[2] Justice Breyer wrote a concurring opinion. He argued that rejecting the premise that an expert can rely on testimonial hearsay --- as permitted by Fed.R.Evid. 703 --- would end up requiring the government to call every person who had anything to do with a forensic test. That was a result he found untenable. He also set forth several possible approaches to

Justice Thomas was the tiebreaker. He essentially agreed completely with Justice Kagan's critique of Justice Alito's two grounds for affirming the conviction. But Justice Thomas concurred in the judgment nonetheless, because he had his own reason for affirming the conviction. In his view, the use of the Cellmark report for its truth did not offend the Confrontation Clause because that report was not sufficiently "formalized." He declared that the Cellmark report

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

Fallout from Williams:

The irony of *Williams* is that *eight* members of the Court rejected Justice Thomas's view that testimoniality is defined by whether a statement is sufficiently formal as to constitute an affidavit or certification. Yet if a court is counting Justices, it appears that it might be necessary for the government to comply with the rather amorphous standards for "informality" established by Justice Thomas. Thus, if the government offers hearsay that would be testimonial under the Kagan view of "primary motive" but not under the Alito view, then the government may have to satisfy the Thomas requirement that the hearsay is not tantamount to a formal affidavit. Similarly, if the government proffers an expert who relies on testimonial hearsay, but the declarant does not testify, then it can be argued that the government must establish that the hearsay is not tantamount to a formal affidavit --- because five members of the Court rejected the argument that the Confrontation Clause is satisfied so long as the testimonial hearsay is used only as the basis of the expert's opinion.

There is a strong argument, though, that counting Justices after *Williams* is a fool's errand for now --- because of the death of Justices Scalia and Ginsburg and the retirement of Justice Kennedy, and the uncertainty over the views of the new Justices. (Though, in a dissent from denial of certiorari, Justice Gorsuch appeared to side with Justice Kagan's views in *Williams*).

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permitting/limiting experts' reliance on lab reports, some of which he found "more compatible with *Crawford* than others" and some of which "seem more easily considered by a rules committee" than the Court.

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

It should be noted that much of the post-*Crawford* landscape is unaltered by *Williams*. For example, take a case in which a victim has just been shot. He makes a statement to a neighbor "I've just been shot by Bill. Call an ambulance." Surely admission of that statement --- admissible against the accused as an excited utterance --- satisfies the Confrontation Clause on the same grounds after *Williams* as it did before. Such a statement is not testimonial because even under the Kagan view, it was not made with the primary motive that it would be used in a criminal prosecution. And *a fortiori* it satisfies the less restrictive Alito view. And Justice Thomas's "formality" test is not controlling, but even if it were, such a statement is not tantamount to an affidavit and so Justice Thomas would find no constitutional problem with its admission. See *Michigan v. Bryant,* 562 U.S. 344 (2011) (Thomas, J., concurring) (excited utterance of shooting victim "bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.").

Similarly, there is extensive case law both before and after *Williams* allowing admission of testimonial statements on the ground that they are not offered for their truth. For example, if a statement is legitimately offered to show the background of a police investigation, or offered to show that the statement is in fact false, then it is not hearsay and it also does not violate the right to confrontation. This is because if the statement is not offered for its truth, there is no reason to cross-examine the declarant, and cross-examination is the procedure right that the Confrontation Clause guarantees. As will be discussed further below, while both Justice Thomas and Justice Kagan in *Williams* reject the not-for-truth analysis in the context of expert reliance on hearsay, they both distinguish that use from admitting a statement for a *legitimate* not-for-truth purpose. Moreover, both approve of the language in *Crawford* that the Confrontation Clause "does not bar the use of testimonial statements offered for purposes other than establishing the truth of the matter asserted." And they both approve of the result in *Tennessee v. Street,* 471 U.S. 409 (1985), in which the Court held that the Confrontation Clause was not violated when an accomplice confession was admitted only to show that it was different from the defendant's own confession. For the Kagan-Thomas camp, the question will be whether the testimonial statement is offered for a purpose as to which its probative value is not dependent on the statement being true --- and that is the test that is essentially applied by the lower courts in determining whether statements ostensibly offered for a not-for-truth purpose are consistent with the Confrontation Clause.

C. *Hemphill v. New York,* 142 S.Ct. 681 (2022): Hemphill was charged with murder with a 9-millimeter caliber gun. He claimed Morris did the shooting. Evidence indicated that Morris had both 9-caliber ammunition and 357 caliber ammunition in his bedroom. The state had first charged Morris with the murder but then dismissed those charges, and Morris pleaded guilty to charges related to his .357 handgun. In his plea allocution, Morris admitted to the charges related to the .357 gun, but denied involvement with a 9-millimeter gun. Morris was unavailable at Hemphill's trial. Hemphill offered evidence about the presence of the 9-millimeter ammunition in Morris's bedroom. He did not offer any evidence regarding the other ammunition. To rebut Hemphill's evidence, the prosecution offered Morris's plea allocution --- which all agreed was testimonial hearsay under *Crawford.* The trial court held that Hemphill opened the door to Morris's

hearsay by proving that only the 9-caliber ammunition was present in the bedroom. The court found that by doing so Hemphill forfeited his right to confrontation.

The Supreme Court, in an opinion by Justice Sotomayor, rejected the state courts' forfeiture arguments and found that admitting the plea allocution violated Hemphill's right to confrontation. The Court declared that under *Crawford, "*the role of the trial judge is not, for Confrontation Clause purposes, to weigh the reliability or credibility of testimonial hearsay evidence; it is to ensure that the Constitution's procedures for testing the reliability of that evidence are followed." The Court declared that the trial court "violated this principle by admitting unconfronted, testimonial hearsay against Hemphill simply because the judge deemed his presentation to have created a misleading impression that the testimonial hearsay was reasonably necessary to correct." But "it was not for the judge to determine whether Hemphill's theory that Morris was the shooter was unreliable, incredible, or otherwise misleading in light of the State's proffered, unconfronted plea evidence. Nor, under the Clause, was it the judge's role to decide that this evidence was reasonably necessary to correct that misleading impression. Such inquiries are antithetical to the Confrontation Clause."

II. Post-*Crawford* Cases Discussing the Relationship Between the Confrontation Clause and the Hearsay Rule and its Exceptions, Arranged by Subject Matter

"Admissions" --- Hearsay Statements by the Defendant

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

> **Note: The *Lopez* court had an easier way to dispose of the case. Both before and after *Crawford*, an accused has no right to confront *himself*. If the solution to confrontation is cross-examination, as the Court in *Crawford* states, then it is silly to argue that a defendant has the right to have his own statements excluded because he**

had no opportunity to cross-examine himself. *See United States v. Orm Hieng,* 679 F.3d 1131 (9th Cir. 2012): "The Sixth Amendment simply has no application [to the defendant's own hearsay statements] because a defendant cannot complain that he was denied the opportunity to confront himself."

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

Text messages were properly admitted as coming from the defendant: *United States v. Brinson,* 772 F.3d 1314 (10th Cir. 2014). In a prosecution for sex trafficking, text messages sent to a prostitute were admitted against the defendant. The defendant argued that admitting the texts violated his right to confrontation, but the court disagreed. The court stated that the texts were properly admitted as statements of a party-opponent, because the government had established by a preponderance of the evidence that the texts were sent by the defendant. They were therefore "not hearsay" under Rule 801(d)(2)(A), and "[b]ecause the messages did not constitute hearsay their introduction did not violate the Confrontation Clause."

Note: The court in *Brinson* was right but for the wrong reasons. It is true that if a statement is "not hearsay" its admission does not violate the Confrontation Clause. (See the many cases collected under the "not hearsay" headnote, infra). But party-opponent statements are only technically "not hearsay." They are in fact hearsay because they are offered for their truth --- they are hearsay subject to an exemption. The Evidence Rules' technical categorization in Rule 801(d)(2) cannot determine the scope of the Confrontation Clause. If that were so, then coconspirator statements would automatically satisfy the Confrontation Clause because they, too, are classified as "not hearsay" under the Federal Rules. That would have made the Supreme Court's decision in *Bourjaily v. United States* unnecessary; and the Court in *Crawford* would not have had to discuss the fact that coconspirator statements are ordinarily not testimonial. The real reason that party-opponent statements are not hearsay is that when the defendant makes a hearsay statement, he has no right to confront himself.

Bruton --- Statements of Co-Defendants

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

Bruton* does not apply unless the testimonial hearsay directly implicates the nonconfessing codefendant:** ***United States v. Lung Fong Chen, 393 F.3d 139, 150 (2d Cir. 2004)**:** The court held that a confession of a co-defendant, when offered only against the co-defendant, is regulated by *Bruton,* not *Crawford*: so that the question of a Confrontation violation is dependent on whether the confession is powerfully incriminating against the non-confessing defendant. If the confession does not directly implicate the defendant, then there will be no violation if the judge gives an effective limiting instruction to the jury. *Crawford* does not apply because if the instruction is effective, the co-defendant is not a witness "against" the defendant within the meaning of the Confrontation Clause. ***See also Chrysler v. Guiney,*** 806 F.3d 104 (2nd Cir. 2015) (noting that if an accomplice confession is properly redacted to satisfy *Bruton,* then *Crawford* is not violated because the accomplice is not a witness "against" the defendant within the meaning of the Confrontation Clause).

Bruton* protection limited to testimonial statements:** ***United States v. Berrios, 676 F.3d 118 (3rd Cir. 2012): "[B]ecause *Bruton* is no more than a byproduct of the Confrontation Clause, the Court's holdings in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements. Any protection provided by *Bruton* is therefore only afforded to the same extent as the Confrontation Clause, which requires that the challenged statement qualify as testimonial. To the extent we have held otherwise, we no longer follow those holdings." ***See also United States v. Shavers,*** 693 F.3d 363 (3rd Cir. 2012) (admission of non-testifying co-defendant's inculpatory statement did not violate *Bruton* because it was made casually to an acquaintance and so was non-testimonial; the statement bore "no resemblance to the abusive governmental investigation tactics that the Sixth Amendment seeks to prevent").

***Bruton* protection does not apply unless the codefendant's statements are testimonial: *United States v. Dargan*,** 738 F.3d 643 (4th Cir. 2013): The court held that a statement made to a cellmate in an informal setting was not testimonial --- therefore admitting the statement against the nonconfessing codefendant did not violate *Bruton,* because the premise of *Bruton* is that the nonconfessing defendant's confrontation rights are violated when the confessing defendant's statement is admitted at trial. But after *Crawford* there can be no confrontation violation unless the hearsay statement is testimonial.

***Bruton* does not apply unless the testimonial hearsay clearly and directly implicates the non-confessing co-defendant: *United States v. Benson*,** 957 F.3d 218 (4th Cir. 2020). In a case involving a robbery and murder, one of the joined defendants made a confession to a police officer. This statement was clearly testimonial, but the court found no *Bruton* violation because the confession was "not facially incriminating" at to the non-confessing codefendant. The statement was that the confessing defendant took the non-confessing defendant's truck to the robbery. "Left unsaid was whether Brown was physically present in the truck or at the house, or that Brown approved or even knew of Wallace's use of his truck." The court also rejected a *Bruton* claim as to confessions made by one defendant to a friend, because that statement was not testimonial.

***Bruton* violation where unredacted guilty pleas from an earlier, related prosecution were introduced against the defendant: *United States v. Perry*,** 35 F.4th 293 (5th Cir. 2022): The court found a *Bruton* violation when unredacted guilty pleas from a prior, related prosecution against others were admitted against the defendant. The court observed as follows:

> When the Government re-charges offense conduct in a successive prosecution yet multiple defendants in that successive case already have pled guilty to the recharged offense conduct, the peril of a *Bruton* violation, even inadvertent, is high. District judges, unsurprisingly, will need to be attentive to redactions, limiting instructions, and possibly severance.

Limiting instruction satisfies *Bruton* as to testimonial hearsay, because it was not a direct accusation against the defendant: *United States v. Ramos-Cardenas*, 524 F.3d 600 (5th Cir. 2008): In a multiple-defendant case, the trial court admitted a post-arrest statement by one of the defendants, which indirectly implicated the others. The court found that the confession could not be admitted against the other defendants, because the confession was testimonial under *Crawford.* But the court found that *Crawford* did not change the analysis with respect to the admissibility of a confession against the confessing defendant (because he has no right to confront himself); nor did it displace the case law under *Bruton* allowing limiting instructions to protect the non-confessing defendants under certain circumstances. The court found that the reference to the other defendants in the confession was vague, and therefore a limiting instruction was sufficient to assure that the confession would not be used against them. Thus, the *Bruton* problem was resolved by a limiting instruction.

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

Bruton* inapplicable to statement made by co-defendant to another prisoner, because that statement was not testimonial: *United States v. Vasquez, 766 F.3d 373 (5th Cir. 2014): The defendant's co-defendant made a statement to a jailhouse snitch that implicated the defendant in the crime. The defendant argued that admitting the codefendant's statement at his trial violated *Bruton*, but the court disagreed. It stated that *Bruton "*is no longer applicable to a non-testimonial prison yard conversation because *Bruton* is no more than a by-product of the Confrontation Clause." The court further stated that "statements from one prisoner to another are clearly non-testimonial."

Bruton* protection does not apply unless codefendant's statements are testimonial: *United States v. Johnson, 581 F.3d 320 (6th Cir. 2009): The court held that after *Crawford, Bruton* is applicable only when the codefendant's statement is testimonial.

Bruton* protection does not apply unless codefendant's statements are testimonial: *United States v. Dale, 614 F.3d 942 (8th Cir. 2010): The court held that after *Crawford, Bruton* is applicable only when the codefendant's statement is testimonial.

Bruton* protection does not apply unless codefendant's statements are testimonial: *Lucero v. Holland, 902 F.3d 979 (9th Cir. 2018): The defendant was charged with others for attempting to murder a fellow prisoner. At trial, the government offered a handwritten gang memo that was found on another defendant the day after the murder attempt. It detailed the assault on the victim and identified the perpetrators. The memo was admitted only against the defendant who wrote it, as a party-opponent statement. The defendant argued that admission of the memo was a violation of *Bruton.* But the court found that the memo among gang members was clearly not testimonial, as it was not prepared with the primary motive of use in a criminal prosecution. (Far from it.). The court found that "the specialized rules of *Bruton* fit comfortably within the *Crawford* umbrella" --- meaning that *Bruton* is premised on a violation of the non-confessing defendant's

right to confrontation and, after *Crawford,* the right to confrontation applies only to the admission of testimonial hearsay. The court concluded that "only testimonial codefendant statements are subject to the federal Confrontation Clause limits established in *Bruton."*

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

Statement that is non-testimonial cannot raise a *Bruton* problem: *United States v. Patterson,* 713 F.3d 1237 (10th Cir. 2013): The defendant challenged a statement by a non-testifying codefendant on *Bruton* grounds. The court found no error, because the statement was made in furtherance of the conspiracy. Accordingly, it was non-testimonial. That meant there was no *Bruton* problem because *Bruton* does not apply to non-testimonial hearsay. *Bruton* is a confrontation case and the Supreme Court has held that the Confrontation Clause extends only to testimonial hearsay. ***See also United States v. Clark,*** 717 F.3d 790 (10th Cir. 2013) (No *Bruton* violation because the codefendant hearsay was a coconspirator statement made in furtherance of the conspiracy and so was not testimonial); ***United States v. Morgan***, 748 F.3d 1024 (10th Cir. 2014) (statement admissible as a coconspirator statement cannot violate *Bruton* because "*Bruton* applies only to testimonial statements" and the statements were made between coconspirators dividing up the proceeds of the crime and so "were not made to be used for investigation or prosecution of crime.").

Admission of codefendant's incriminating statement, made in an informal conversation with a friend, did not violate *Bruton*: *United States v. Hano,* 922 F.3d 1272 (11th Cir. 1999): The court stated that "the same principles that govern whether the admission of testimony violated the Confrontation Clause control whether the admission of the statements of a nontestifying codefendant against a defendant at a joint trial violate *Bruton."* In this case there was no *Bruton* violation because the codefendant's incriminating statement was made as part of a "friendly and informal" exchange with a friend.

Child-Declarants

Statements of young children are extremely unlikely to be testimonial: *Ohio v. Clark,* 576 U.S. 237 (2015): This case is fully discussed in Part I. The case involved a statement from a three-year-old boy to his teachers. It accused the defendant of injuring him. The Court held that a statement from a young child is extremely unlikely to be testimonial because the child is not aware of the possibility of use of statements in criminal prosecutions, and so cannot be speaking with the primary motive that the statement will be so used. The Court refused to adopt a bright-line rule, but it is hard to think of a case in which the statement of a young child will be found testimonial under the primary motivation test.

Following *Clark,* the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker,* 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark.* The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Coconspirator Statements

Coconspirator statement not testimonial: ***United States v. Felton,*** 417 F.3d 97 (1st Cir. 2005): The court held that a statement by the defendant's coconspirator, made during the course and in furtherance of the conspiracy, was not testimonial under *Crawford.* **Accord** ***United States v. Sanchez-Berrios,*** 424 F.3d 65 (1st Cir. 2005) (noting that *Crawford* "explicitly recognized that statements made in furtherance of a conspiracy by their nature are not testimonial."). ***See also United States v. Turner,*** 501 F.3d 59 (1st Cir. 2007) (conspirator's statement made during a private conversation were not testimonial); ***United States v. Ciresi*****,** 697 F.3d 19 (1st Cir. 2012) (statements admissible as coconspirator hearsay under Rule 801(d)(2)(E) are "by their nature" not testimonial because they are "made for a purpose other than use in a prosecution.") ***United States v. Mayfield****,* 909 F.3d 956 (8th Cir. 2018): Affirming convictions for conspiracy to distribute methamphetamine, the court found that the trial court did not err in admitting statements by one coconspirator about a completed act of distribution, and by another who informed the defendant what the police had found when he was arrested. The defendant argued that both sets of statements were testimonial, but the court found that statements made in furtherance of a conspiracy are not testimonial because, by definition, they are not made for the primary purpose of being used as evidence in a prosecution.

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Statements made pursuant to a conspiracy to commit kidnapping are not testimonial: ***United States v. Stimler,*** 864 F.3d 253 (3rd Cir. 2017): The defendants were prosecuted for conspiracy to kidnap and related crimes arising out of Orthodox Jewish divorce proceedings. Statements were made at a *beth din* which was convened when the alleged victim of one of the kidnappings had challenged the validity of the *get* he signed. The court found that those statements were made pursuant to the kidnapping conspiracy, and reasoned that "none of the individuals at the *beth din* --- all of whom were charged in the conspiracy --- would have reasonably believed that they were making statements for the purpose of assisting a criminal prosecution."

Surreptitiously recorded statements of coconspirators are not testimonial: ***United States v. Hendricks,*** 395 F.3d 173 (3rd Cir. 2005): The court found that surreptitiously recorded statements of an ongoing criminal conspiracy were not testimonial within the meaning of *Crawford* because they were informal statements among coconspirators. ***See also United States v. Bobb,*** 471 F.3d 491 (3rd Cir. 2006) (noting that the holding in *Hendricks* was not limited to cases in which the declarant was a confidential informant).

Statement admissible as coconspirator hearsay is not testimonial: ***United States v. Robinson***, 367 F.3d 278 (5th Cir. 2004): The court affirmed a drug trafficker's murder convictions and death sentence. It held that coconspirator statements are not testimonial under *Crawford* as they are made under informal circumstances and not for the purpose of creating evidence. ***Accord***

United States v. Delgado, 401 F.3d 290 (5th Cir. 2005); ***United States v. Olguin,*** 643 F.3d 384 (5th Cir. 2011); ***United States v. Alaniz,*** 726 F.3d 586 (5th Cir. 2013); ***United States v. Ayelotan,*** 917 F.3d 394 (5th Cir. 2019). ***See also United States v. King,*** 541 F.3d 1143 (5th Cir. 2008) ("Because the statements at issue here were made by co-conspirators in the furtherance of a conspiracy, they do not fall within the ambit of *Crawford's* protection"). Note that the court in *King* rejected the defendant's argument that the co-conspirator statements were testimonial because they were "presented by the government for their testimonial value." Accepting that definition would mean that all hearsay is testimonial simply by being offered at trial. The court observed that *"Crawford's* emphasis clearly is on whether the statement was testimonial at the time it was made."

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

Coconspirator statements made to an undercover informant are not testimonial: *United States v. Hargrove,* 508 F.3d 445 (7th Cir. 2007): The defendant, a police officer, was charged with taking part in a conspiracy to rob drug dealers. One of his coconspirators had a discussion with a potential member of the conspiracy (in fact an undercover informant) about future robberies. The defendant argued that the coconspirator's statements were testimonial, but the court disagreed. It held that *"Crawford* did not affect the admissibility of coconspirator statements." The court specifically rejected the defendant's argument that *Crawford* somehow undermined *Bourjaily*, noting that in *Crawford*, "the Supreme Court specifically cited *Bourjaily* --- which as here involved a coconspirator's statement made to a government informant --- to illustrate a category of nontestimonial statements that falls outside the requirements of the Confrontation Clause."

Statements by a coconspirator during the course and in furtherance of the conspiracy are not testimonial: ***United States v. Lee,*** 374 F.3d 637 (8th Cir. 2004): The court held that statements admissible under the coconspirator exemption from the hearsay rule are by definition not testimonial. As those statements to be admissible must be made during the course and in furtherance of the conspiracy, they cannot be the kind of formalized, litigation-oriented statements that the Court found testimonial in *Crawford.* The court reached the same result on co-conspirator hearsay in ***United States v. Reyes*****,** 362 F.3d 536 (8th Cir. 2004); ***United States v. Singh,*** 494 F.3d 653 (8th Cir. 2007); and ***United States v. Hyles,*** 521 F.3d 946 (8th Cir. 2008) (noting that the statements were not elicited in response to a government investigation and were casual remarks to co-conspirators); ***United States v. Furman,*** 867 F.3d 981 (8th Cir. 2017) (statements by a coconspirator over a prison telephone were not testimonial even though the declarant knew the statements were recorded by law enforcement: "[A]lthough Gerald was aware that law enforcement might listen to his telephone conversations and use them as evidence, the primary purpose of the calls was to further the drug conspiracy, not to create a record for a criminal prosecution.").

Statements in furtherance of a conspiracy are not testimonial: ***United States v. Allen,*** 425 F.3d 1231 (9th Cir. 2005): The court held that "co-conspirator statements are not testimonial and therefore beyond the compass of *Crawford's* holding." ***See also United States v. Larson,*** 460 F.3d 1200 (9th Cir. 2006) (statement from one conspirator to another identifying the defendants as the source of some drugs was made in furtherance of the conspiracy; conspiratorial statements were not testimonial as there was no expectation that the statements would later be used at trial); ***United States v. Grasso,*** 724 F.3d 1077 (9th Cir. 2013) ("co-conspirator statements in furtherance of a conspiracy are not testimonial"); ***United States v. Cazares,*** 788 F.3d 956 (9th Cir. 2015) ("a conversation between two gang members about the journey of their burned gun is not testimonial").

Statements admissible under the co-conspirator exemption are not testimonial: ***United States v. Townley,*** 472 F.3d 1267 (10th Cir. 2007): The court rejected the defendant's argument that hearsay is testimonial under *Crawford* whenever "confrontation would have been required at common law as it existed in 1791." It specifically noted that *Crawford* did not alter the rule from *Bourjaily* that a hearsay statement admitted under Federal Rule 801(d)(2)(E) does not violate the Confrontation Clause. ***Accord United States v. Ramirez,*** 479 F.3d 1229 (10th Cir. 2007) (statements admissible under Rule 801(d)(2)(E) are not testimonial under *Crawford*); ***United States v. Patterson,*** 713 F.3d 1237 (10th Cir. 2013) (same); ***United States v. Morgan***, 748 F.3d 1024 (10th Cir. 2014) (statements made between coconspirators dividing up the proceeds of the crime were not testimonial because they "were not made to be used for investigation or prosecution of crime."); ***United States v. Yurek*****,** 925 F.3d 423 (10th Cir. 2019) (coconspirator hearsay is not testimonial).

Statements made during the course and in furtherance of the conspiracy are not testimonial: ***United States v. Underwood,*** 446 F.3d 1340 (11th Cir. 2006): In a narcotics prosecution, the defendant argued that the admission of an intercepted conversation between his brother Darryl and an undercover informant violated *Crawford*. But the court found no error and affirmed. The court noted that the statements "clearly were not made under circumstances which would have led [Daryl] reasonably to believe that his statement would be available for use at a later trial. Had Darryl known that Hopps was a confidential informant, it is clear that he never would have spoken to her in the first place." The court concluded as follows:

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

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

Cross-Examination

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

Attorney's cross-examination at a prior trial was adequate and therefore admitting the testimony at a later trial did not violate the right to confrontation: *United States v. Richardson,* 781 F. 3d 287 (5th Cir. 2015): The defendant was convicted on drug and gun charges, but the conviction was reversed on appeal. By the time of retrial on mostly the same charges, a prosecution witness had become unavailable, and the trial court admitted the transcript of the witness's testimony from the prior trial. The court found no violation of the right to confrontation. The court found that *Crawford* did not change the long-standing rule as to the opportunity that must be afforded for cross-examination to satisfy the Confrontation Clause. What is required is an "adequate opportunity to cross-examine" the witness: enough to provide the jury with "sufficient information to appraise the bias and the motives of the witness." The court noted that while the lawyer's cross-examination of the witness at the first trial could have been better, it was adequate, as the lawyer explored the witness's motive to cooperate, his arrests and convictions, his relationship with the defendant, and "the contours of his trial testimony."

Confrontation Clause violated when prior testimony was admitted and critical cross-examination was deleted: *Miller v. Genovese,* 994 F.3d 734 (6th Cir. 2021): Prior testimony from the defendant's previous trial, but the trial court excised from the transcript the witness's statement on cross-examination that she "remembered her testimony because she didn't want to go to jail." The court found that the cross-examination required for admission of prior testimony under

Crawford and prior Supreme Court cases was not met, because the excised testimony provided important evidence that would impeach the witness for bias and bad memory.

Cross-examination at a deposition was adequate to satisfy the right to confrontation: *United States v. Mallory,* 902 F.3d. 584 (6th Cir. 2018): The defendant was charged with a scheme to pilfer money from an old person, by forging a will. One of his accomplices, with whom he had fallen out, testified against him at a deposition, and was unavailable to testify at trial, due to dementia. The trial court admitted the deposition transcript, and the defendant argued that this violated his right to confrontation. The court held that the defendant had a meaningful opportunity to cross-examine the witness at the deposition. The defendant argued that he had insufficient time to prepare for the deposition given voluminous discovery; but the court found that the defendant had failed to specify what his counsel could have reviewed but did not, and concluded that "counsel's preparation, even if hurried, was not so rushed as to significantly limit his ability to cross-examine." The defendant next argued that he received discovery after the deposition, but the court found that none of this information was pertinent to cross-examining the witness. The defendant next argued that he did not know that the witness had been diagnosed with dementia at the time of the deposition, and would have liked to cross-examine the witness on that. But the court responded that the defendant had information that the witness was confused, and actually asked him if he had been diagnosed with Alzheimer's; and moreover, the defendant was allowed to impeach the deposition at trial with information about the witness's mental condition.

Cross-examination at a preliminary hearing was sufficient to satisfy the defendant's right to confrontation: *United States v. Ralston,* 973 F.3d 896 (8th Cir. 2020): In a trial alleging sexual abuse of a minor on a United States military installation, the government offered testimony from the victim at a preliminary hearing in state court. The preliminary hearing was on state felony charges for sexually abusing the victim. The court held that the defendant's cross-examination at the preliminary hearing was sufficient to satisfy his confrontation rights. It noted that at the hearing defense counsel "cross-examined J.W. regarding the substance of her testimony including the basic facts, inconsistencies, and her delay in reporting the incident. The court noted that "a preliminary hearing is more circumscribed than an actual trial but that an any other differences are not dispositive here."

Defendant's opportunity on redirect to question his witness about testimonial hearsay raised on cross-examination satisfied the defendant's right to confrontation: *United States v. Rusnak,* 981 F.3d 687 (9th Cir. 2020): A defense witness was cross-examined about a matter outside the scope or direct. The cross-examination introduced (through the prosecutor's question) a testimonial hearsay statement. The court of appeals found no confrontation violation, however, because the trial judge permitted redirect on the matter and statement raised on cross-examination. The court concluded that "the redirect permitted by the district court satisfied Rusnak's Confrontation Clause right."

State court was not unreasonable in finding that cross-examination by defense counsel at the preliminary hearing was sufficient to satisfy the defendant's right to confrontation: ***Williams v. Bauman,*** 759 F.3d 630 (9th Cir. 2014): The defendant argued that his right to confrontation was violated when the transcript of the preliminary hearing testimony of an eyewitness was admitted against him at his state trial. The witness was unavailable for trial and the defense counsel cross-examined him at the preliminary hearing. The court found that the state court was not unreasonable in concluding that the cross-examination was adequate, thus satisfying the right to confrontation. The court noted that "there is some question whether a preliminary hearing necessarily offers an adequate opportunity to cross-examine for Confrontation Clause purposes" but concluded that there was "reasonable room for debate" on the question, and therefore the state court's decision to align itself on one side of the argument was beyond the federal court's power to remedy on habeas review.

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

Accomplice's jailhouse statement was admissible as a declaration against interest and accordingly was not testimonial: ***United States v. Pelletier,*** 666 F.3d 1 (1st Cir. 2011): The defendant's accomplice made hearsay statements to a jailhouse buddy, indicating among other things that he had smuggled marijuana for the defendant. The court found that the statements were properly admitted as declarations against interest. The court noted specifically that the fact that the accomplice made the statements "to fellow inmate Hafford, rather than in an attempt to curry favor with police, cuts in favor of admissibility." For similar reasons, the hearsay was not testimonial under *Crawford.* The court stated that the statements were made "not under formal circumstances, but rather to a fellow inmate with a shared history, under circumstances that did not portend their use at trial against Pelletier." ***See also United States v. Veloz,*** 948 F.3d 418 (1st Cir. 2020) (statement to a fellow inmate, admissible as a declaration against penal interest, was not testimonial).

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: ***United States v. Saget,*** 377 F.3d 223 (2nd Cir. 2004) (Sotomayor, J.): The defendant's accomplice spoke to an undercover officer, trying to enlist him in the defendant's criminal scheme. The accomplice's statements were admitted at trial as declarations against penal interest under Rule 804(b)(3), as they tended to implicate the accomplice in a conspiracy. After *Williamson v. United States,* hearsay statements made by an accomplice to a law enforcement officer while in custody are not admissible under Rule 804(b)(3) when they implicate the defendant, because the accomplice may be currying favor with law enforcement. But in the instant case, the accomplice's statement was not barred by *Williamson,* because it was made to an undercover officer---the accomplice didn't know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant. For similar reasons, the statement was not testimonial under *Crawford* --- it was not the kind of formalized statement to law enforcement, prepared for trial, such as a "witness" would provide. ***See also United States v. Williams***, 506 F.3d 151 (2d Cir. 2007): Statement of accomplice implicating himself and defendant in a murder was admissible under Rule 804(b)(3) where it was made to a friend in informal circumstances; for the same reason the statement was not testimonial. The defendant's argument about insufficient indicia of reliability was misplaced because the Confrontation Clause no longer imposes a reliability requirement. ***Accord United States v. Wexler,*** 522 F.3d 194 (2nd Cir. 2008) (inculpatory statement made to friends found admissible under Rule 804(b)(3) and not testimonial).

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

the statements were non-testimonial, because neither of the declarants "held the objective of incriminating any of the defendants at trial when their prison yard conversation was recorded; there is no indication that they were aware of being overheard; and there is no indication that their conversation consisted of anything but casual remarks to an acquaintance." A defendant also lodged a hearsay objection, but the court found that the statements were admissible as declarations against interest. The declarants unequivocally incriminated themselves in acts of carjacking and murder, as well as shooting a security guard, and they mentioned the defendant "only to complain that he crashed the getaway car." ***See also Mitchell v. Superintendent,*** 902 F.3d 156 (3rd Cir. 2016) (jailhouse conversations among inmates, admissible as declarations against interest, were not testimonial).

Accomplice's statement made to a friend, admitting complicity in a crime, was admissible as a declaration against interest and was not testimonial: ***United States v. Jordan,*** 509 F.3d 191 (4th Cir. 2007): The defendant was convicted of murder while engaged in a drug-trafficking offense. He contended that the admission of a statement of an accomplice was error under the Confrontation Clause and the hearsay rule. The accomplice confessed her part in the crime in a statement to her roommate. The court found no error in the admission of the accomplice's statement. It was not testimonial because it was made to a friend, not to law enforcement. The court stated: "To our knowledge, no court has extended *Crawford* to statements made by a declarant to friends or associates." The court also found the accomplice's statement properly admitted as a declaration against interest. The court elaborated as follows:

> Here, although Brown's statements to Adams inculpated Jordan, they also subject *her* to criminal liability for a drug conspiracy and, by extension, for Tabon's murder. Brown made the statements to a friend in an effort to relieve herself of guilt, not to law enforcement in an effort to minimize culpability or criminal exposure.

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

know he was talking to anyone affiliated with law enforcement, and the *husband's* primary motivation was not to prepare a statement for any criminal trial. The court observed that the "intent of the police officers or investigators is relevant to the determination of whether a statement is testimonial only if it is first the case that a person in the position of the declarant reasonably would have expected that his statements would be used prosecutorially."

> **Note: This case was decided before *Michigan v. Bryant, infra,* but it consistent with the holding in *Bryant* that the primary motive test considers the motivation of all the parties to a communication --- and that all of them must be primarily motivated to have the statement used in a criminal prosecution for the statement to be testimonial.**

Accomplice's confessions to law enforcement agents were testimonial: *United States v. Harper,* 514 F.3d 456 (5th Cir. 2008): The court held that confessions made by the codefendant to law enforcement were testimonial, even though the codefendant did not mention the defendant as being involved in the crime. The statements were introduced to show that the codefendant owned some of the firearms and narcotics at issue in the case, and these facts implicated the defendant as well. The court did not consider whether the confessions were admissible under a hearsay exception --- but they would not have been admissible as a declaration against interest, because *Williamson* bars confessions of cohorts made to law enforcement.

Accomplice's statements to a friend, implicating both the accomplice and the defendant in the crime, were not testimonial: *Ramirez v. Dretke,* 398 F.3d 691 (5th Cir. 2005): The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The accomplice made statements both before and after the murder that directly implicated both himself and the defendant. These statements were made to the accomplice's roommate. The court found that these statements were not testimonial under *Crawford*: "There is nothing in *Crawford* to suggest that testimonial evidence includes spontaneous out-of-court statements made outside any arguably judicial or investigatorial context."

Declaration against penal interest, made to a friend, is not testimonial: *United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005): The defendant was charged with bank robbery. One of the defendant's accomplices (Clarke), was speaking to a friend (Wright) sometime after the robbery. Wright told Clarke that he looked "stressed out." Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The court found no error in admitting Clarke's hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark's interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the court found that Clarke's statement was not testimonial under *Crawford:*

> Clarke made the statements to his friend by happenstance; Wright was not a police officer or a government informant seeking to elicit statements to further a prosecution against Clarke or Franklin. To the contrary, Wright was privy to Clarke's statements only as his friend and confidant.

The court distinguished other cases in which an informant's statement to police officers was found testimonial, on the ground that those other cases involved accomplice statements knowingly made to police officers, so that "the informant's statements were akin to statements elicited during police interrogation, i.e., the informant could reasonably anticipate that the statements would be used to prosecute the defendant."

See also United States v. Gibson, 409 F.3d 325 (6th Cir. 2005) (describing statements as nontestimonial where "the statements were not made to the police or in the course of an official investigation, nor in an attempt to curry favor or shift the blame"); ***United States v. Johnson,*** 440 F.3d 832 (6th Cir. 2006) (statements by accomplice to an undercover informant he thought to be a cohort were properly admitted against the defendant; the statements were not testimonial because the declarant didn't know he was speaking to law enforcement, and so a person in his position "would not have anticipated that his statements would be used in a criminal investigation or prosecution of Johnson.").

Statement admissible as a declaration against penal interest is not testimonial: *United States v. Johnson*, 581 F.3d 320 (6th Cir. 2009): The court held that the tape-recorded confession of a coconspirator describing the details of an armed robbery, including his and the defendant's roles, was properly admitted as a declaration against penal interest. The court found that the statements tended to disserve the declarant's interest because "they admitted his participation in an unsolved murder and bank robbery." And the statements were trustworthy because they were made to a person the declarant thought to be his friend, at a time when the declarant did not know he was being recorded "and therefore could not have made his statement in order to obtain a benefit from law enforcement." Moreover, the hearsay was not testimonial, because the declarant did not know he was being recorded or that the statement would be used in a criminal proceeding against the defendant.

Accomplice confession to law enforcement is testimonial, even if redacted: *United States v. Jones,* 371 F.3d 363 (7th Cir. 2004): An accomplice's statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, could be admissible as a declaration against interest (a question it did not decide), its admission would violate the Confrontation Clause after *Crawford*. The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And because the defendant never had a chance to cross-examine the accomplice, "under *Crawford*, no part of Rock's confession should have been allowed into evidence."

Declaration against interest made to an accomplice who was secretly recording the conversation for law enforcement was not testimonial: *United States v. Watson,* 525 F.3d 583 (7th Cir. 2008): After a bank robbery, one of the perpetrators was arrested and agreed to cooperate with the FBI. She surreptitiously recorded a conversation with Anthony, in which Anthony implicated himself and Watson in the robbery. The court found that Anthony's statement was against his own interest, and rejected Watson's contention that it was testimonial. The court noted that Anthony could not have anticipated that the statement would be used at a trial, because he did not know that the FBI was secretly recording the conversation. It concluded: "A statement unwittingly made to a confidential informant and recorded by the government is not testimonial for Confrontation Clause purposes." ***Accord United States v. Volpendesto*** *,* 746 F.3d 273 (7th Cir. 2014): Statements of an accomplice made to a confidential informant were properly admitted as declarations against interest and for the same reasons were not testimonial. The defendant argued that the court should reconsider its ruling in *Watson* because the Supreme Court, in *Michigan v. Bryant,* had in the interim stated that in determining primary motive, the court must look at the motivation of both the declarant and the other party to the conversation, and in this case as in *Watson* the other party was a confidential informant trying to obtain statements to use in a criminal prosecution. But the court noted that in *Bryant* the Court stated that the relevant inquiry "is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had." Applying this objective approach, the court concluded that the conversation "looks like a casual, confidential discussion between co-conspirators."

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

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

Accomplice's confession to law enforcement was testimonial, even if redacted: *United States v. Shaw,* 758 F.3d 1187 (10th Cir. 2014): At the defendant's trial, the court permitted a police officer to testify about a confession made by the defendant's alleged accomplice. The accomplice was not a co-defendant, but the court, relying on the *Bruton* line of cases, ruled that

the confession could be admitted so long as all references to the defendant were replaced with a neutral pronoun. The court of appeals found that this was error, because the confession to law enforcement was, under *Crawford,* clearly testimonial. It stated that "[r]edaction does not override the Confrontation Clause. It is just a tool to remove, in appropriate cases, the prejudice to the defendant from allowing the jury to hear evidence admissible against the codefendant but not admissible against the defendant." The trial court's reliance on the *Bruton* cases was flawed because in those cases the accomplice is joined as a codefendant and the confession is admissible against the accomplice. In this case, where the defendant was tried alone and the confession was offered against him only, it was inadmissible for any purpose, whether or not redacted.

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

Declaration against interest is not testimonial: *United States v. U.S. Infrastructure, Inc.,* 576 F.3d 1195 (11th Cir. 2009): The declarant, McNair, made a hearsay statement that he was accepting bribes from one of the defendants. The statement was made in private to a friend. The court found that the statement was properly admitted as a declaration against McNair's penal interest, as it showed that he accepted bribes from an identified person. The court also held that the hearsay was not testimonial, because it was "part of a private conversation" and no law enforcement personnel were involved. ***See also, United States v. Hano,*** 922 F.3d 1272 (11th Cir. 2019) (Incriminating statement was made as part of a "friendly and informal" exchange with a friend; the statement was nontestimonial, and was properly admitted as a declaration against interest).

Dying Declarations

Testimonial dying declarations do not clearly offend the Confrontation Clause: *Woods v. Cook,* 960 F.3d 295 (6th Cir. 2020): Reviewing a denial of a habeas petition, the court found that the state court had not acted unreasonably in determining that the admission of a testimonial dying declaration did not violate the petitioner's right to confrontation. The court stated that under *Crawford,* "the state may admit an unconfronted out-of-court statement if it fits a historically recognized common law exception." It noted, however, that the *Crawford* Court refused to decide whether the Sixth Amendment incorporates the dying declaration exception, and so the exception is in "High Court limbo." Nonetheless, the fact that the *Crawford* Court found it unnecessary to decide the issue meant that the state court by definition had not unreasonably applied clearly established Supreme Court precedent in determining that the dying declarations exception was consistent with the Sixth Amendment. The court explained as follows:

> Since *Crawford*, the U.S. Supreme Court has acknowledged the potential permissibility of this common law exception to the Confrontation Clause. See *Giles*, 554 U.S. at 358, 128 S.Ct. 2678. Under these circumstances, we cannot fault state courts for continuing to do what the U.S. Supreme Court has acknowledged they may be able to do after *Crawford* and what the Court itself did before *Crawford*. *See, e.g., Mattox v. United States,* 156 U.S. 237, 243–44, 15 S.Ct. 337, 39 L.Ed. 409 (1895) (noting that courts have treated dying declarations as "competent testimony" since "time immemorial"). * * * Our sister circuits have taken a similar view in unpublished opinions. See, e.g., *Martin v. Fanies,* 365 F. App'x 736, 738–39 (8th Cir. 2010); *Brown v. Att'y Gen. of Cal.,* 650 F. App'x 434, 436 (9th Cir. 2016). We are not aware of a contrary decision, and Woods has not identified one.

Excited Utterances, 911 Calls, Etc.

911 calls and statements to responding officers may be testimonial, but only if the primary purpose is to establish or prove past events in a criminal prosecution: *Davis v. Washington* and *Hammon v. Indiana,* 547 U.S. 813 (2006): In companion cases, the Court decided whether reports of crime by victims of domestic abuse were testimonial under *Crawford*. In *Davis,* the victim's statements were made to a 911 operator while and shortly after the victim was being assaulted by the defendant. In *Hammon,* the statements were made to police, who were conducting an interview of the victim after being called to the scene. The Court held that the statements in *Davis* were not testimonial, but came to the opposite result with respect to one of the statements in *Hammon*. The Court set the dividing line for such statements as follows:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Court defined testimoniality by whether the *primary motivation* in making the statements was for use in a criminal prosecution.

Pragmatic application of the emergency and primary purpose standards: *Michigan v. Bryant,* 562 U.S. 344 (2011): The Court held that the statement of a shooting victim to police, identifying the defendant as the shooter --- and admitted as an excited utterance under a state rule of evidence --- was not testimonial under *Davis* and *Crawford.* The Court applied the test for testimoniality established by *Davis* --- whether the primary motive for making the statement was to have it used in a criminal prosecution --- and found that in this case such primary motive did not exist. The Court noted that *Davis* focused on whether statements were made to respond to an emergency, as distinct from an investigation into past events. But it stated that the lower court had construed that distinction too narrowly to bar, as testimonial, essentially all statements of past events. The Court made the following observations about how to determine testimoniality when statements are made to responding police officers:

> 1. The primary purpose inquiry is objective. The relevant inquiry into the parties' statements and actions is not the subjective or actual purpose of the particular parties, but the purpose that reasonable participants would have had, as ascertained from the parties' statements and actions and the circumstances in which the encounter occurred.
>
> 2. As *Davis* notes, the existence of an "ongoing emergency" at the time of the encounter is among the most important circumstances informing the interrogation's

primary purpose. An emergency focuses the participants not on proving past events potentially relevant to later criminal prosecution, but on ending a threatening situation. But there is no categorical distinction between present and past fact. Rather, the question of whether an emergency exists and is ongoing is a highly context-dependent inquiry. An assessment of whether an emergency threatening the police and public is ongoing cannot narrowly focus on whether the threat to the first victim has been neutralized, because the threat to the first responders and public may continue.

3. An emergency's duration and scope may depend in part on the type of weapon involved; in *Davis* and *Hammon* the assailants used their fists, which limited the scope of the emergency --- unlike in this case where the perpetrator used a gun, and so questioning could permissibly be broader.

4. A victim's medical condition is important to the primary purpose inquiry to the extent that it sheds light on the victim's ability to have any purpose at all in responding to police questions and on the likelihood that any such purpose would be a testimonial one. It also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.

5. Whether an ongoing emergency exists is simply one factor informing the ultimate inquiry regarding an interrogation's "primary purpose." Another is the encounter's informality. Formality suggests the absence of an emergency, but informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.

6. The statements and actions of *both* the declarant and interrogators provide objective evidence of the interrogation's primary purpose. Looking to the contents of both the questions and the answers ameliorates problems that could arise from looking solely to one participant, because both interrogators and declarants may have mixed motives.

Applying all these considerations to the facts, the Court found that the circumstances of the encounter as well as the statements and actions of the shooting victim and the police objectively indicated that the interrogation's "primary purpose" was "to enable police assistance to meet an ongoing emergency." The circumstances of the interrogation involved an armed shooter, whose motive for and location after the shooting were unknown and who had mortally wounded the victim within a few blocks and a few minutes of the location where the police found him. Unlike the emergencies in *Davis* and *Hammon*, the circumstances presented in *Bryant* indicated a potential threat to the police and the *public*, even if not the victim. And because this case involved a gun, the physical separation that was sufficient to end the emergency in *Hammon* was not necessarily sufficient to end the threat.

The Court concluded that the statements and actions of the police and victim objectively indicated that the primary purpose of their discussion was not to generate statements for trial. When the victim responded to police questions about the crime, he was lying in a gas station parking lot bleeding from a mortal gunshot wound, and his answers were punctuated with

questions about when emergency medical services would arrive. Thus, the Court could not say that a person in his situation would have had a primary purpose "to establish or prove past events potentially relevant to later criminal prosecution." For their part, the police responded to a call that a man had been shot. They did not know why, where, or when the shooting had occurred; the shooter's location; or anything else about the crime. They asked exactly the type of questions necessary to enable them "to meet an ongoing emergency" --- essentially, who shot the victim and where did the act occur. Nothing in the victim's responses indicated to the police that there was no emergency or that the emergency had ended. The informality suggested that their primary purpose was to address what they considered to be an ongoing emergency --- apprehending a suspect with a gun --- and the circumstances lacked the formality that would have alerted the victim to or focused him on the possible future prosecutorial use of his statements.

Justice Sotomayor wrote the majority opinion for five Justices. Justice Thomas concurred in the judgment, adhering to his longstanding view that testimoniality is determined by whether the statement is the kind of formalized accusation that was objectionable under common law --- he found no such formalization in this case. Justices Scalia and Ginsburg wrote dissenting opinions. Justice Kagan did not participate.

911 call reporting drunk person with an unloaded gun was not testimonial: *United States v. Cadieux,* 500 F.3d 37 (1st Cir. 2007): In a felon-firearm prosecution, the trial court admitted a tape of a 911 call, made by the daughter of the defendant's girlfriend, reporting that the defendant was drunk and walking around with an unloaded shotgun. The court held that the 911 call was not testimonial. It relied on the following factors: 1) the daughter spoke about events "in real time, as she witnessed them transpire"; 2) she specifically requested police assistance; 3) the dispatcher's questions were tailored to identify "the location of the emergency, its nature, and the perpetrator"; and 4) the daughter was "hysterical as she speaks to the dispatcher, in an environment that is neither tranquil nor, as far as the dispatcher could reasonably tell, safe." The defendant argued that the call was testimonial because the daughter was aware that her statements to the police could be used in a prosecution. But the court found that after *Davis*, awareness of possible use in a prosecution is not enough for a statement to be testimonial. A statement is testimonial only if the "primary motivation" for making it is for use in a criminal prosecution.

911 call reporting a gun being brandished is nontestimonial: *United States v. Estes,* 985 F.3d 99, 103-06 (1st Cir. 2021): The court held that a 911 call, about a gun being brandished, was nontestimonial. The declarant was describing the current event in real time, was using present tense when describing her feelings, and a reasonable listener would conclude that the declarant was in close proximity to the defendant, a felon who was in possession of a loaded gun that she believed he had stolen. Moreover, the defendant had already pointed the gun at the declarant and was otherwise acting in an odd and unstable manner.

911 call was not testimonial under the circumstances: ***United States v. Brito,*** 427 F.3d 53 (1st Cir. 2005): The court affirmed a conviction of illegal firearm possession. It held that statements made in a 911 call, indicating that the defendant was carrying and had fired a gun, were properly admitted as excited utterances, and that the admission of the 911 statements did not violate the defendant's right to confrontation. The court declared that the relevant question is whether the statement was made with an eye toward "legal ramifications." The court noted that under this test, statements to police made while the declarant or others are still in personal danger are ordinarily not testimonial, because the declarant in these circumstances "usually speaks out of urgency and a desire to obtain a prompt response." In this case the 911 call was properly admitted because the caller stated that she had "just" heard gunshots and seen a man with a gun, that the man had pointed the gun at her, and that the man was still in her line of sight. Thus the declarant was in "imminent personal peril" when the call was made and therefore her report was not testimonial. The court also found that the 911 operator's questioning of the caller did not make the answers testimonial, because "it would blink reality to place under the rubric of interrogation the single off-handed question asked by the dispatcher --- a question that only momentarily interrupted an otherwise continuous stream of consciousness."

911 call --- including statements about the defendant's felony status --- was not testimonial: ***United States v. Proctor,*** 505 F.3d 366 (5th Cir. 2007): In a firearms prosecution, the court admitted a 911 call from the defendant's brother (Yogi), in which the brother stated that the defendant had stolen a gun and shot it into the ground twice. Included in the call were statements about the defendant's felony status and that he was probably on cocaine. The court held that the entire call was nontestimonial. It applied the "primary purpose" test and evaluated the call in the following passage:

> Yogi's call to 911 was made immediately after Proctor grabbed the gun and fired it twice. During the course of the call, he recounts what just happened, gives a description of his brother, indicates his brother's previous criminal history, and the fact that his brother may be under the influence of drugs. All of these statements enabled the police to deal appropriately with the situation that was unfolding. The statements about Proctor's possession of a gun indicated Yogi's understanding that Proctor was armed and possibly dangerous. The information about Proctor's criminal history and possible drug use necessary for the police to respond appropriately to the emergency, as it allowed the police to determine whether they would be encountering a violent felon. Proctor argues that the emergency had already passed, because he had run away with the weapon at the time of the 911 call and, therefore, the 911 conversation was testimonial. It is hard to reconcile this argument with the facts. During the 911 call, Yogi reported that he witnessed his brother, a felon possibly high on cocaine, run off with a loaded weapon into a nightclub. This was an ongoing emergency --- not one that had passed. Proctor's retreat into the nightclub

> provided no assurances that he would not momentarily return to confront Yogi * * *. Further, Yogi could have reasonably feared that the people inside the nightclub were in danger. Overall, a reasonable viewing of the 911 call is that Yogi and the 911 operator were dealing with an ongoing emergency involving a dangerous felon, and that the 911 operator's questions were related to the resolution of that emergency.

See also United States v. Mouzone, 687 F.3d 207 (5th Cir. 2012) (911 calls found non-testimonial as "each caller simply reported his observation of events as they unfolded"; the 911 operators were not attempting to "establish or prove past events"; and "the transcripts simply reflect an effort to meet the needs of the ongoing emergency"); ***United States v. McDowell,*** 973 F.3d 362 (5th Cir. 2020) ("The call to 911 identifying McDowell as the assailant was placed minutes after the assault. The victim sounded out of breath and stressed out and reported that he had fled the scene in fear that McDonald would return and shoot him. Those statements are not akin to live testimony.").

911 call, and statements made by the victim after police arrived, are excited utterances and not testimonial: ***United States v. Arnold,*** 486 F.3d 177 (6th Cir. 2007) (en banc): In a felon-firearm prosecution, the court admitted three sets of hearsay statements made by the daughter of the defendant's girlfriend, after an argument between the daughter (Tamica) and the defendant. The first set were statements made in a 911 call, in which Tamica stated that Arnold pulled a pistol on her and is "fixing to shoot me." The call was made after Tamica got in her car and went around the corner from her house. The second set of statements occurred when the police arrived within minutes; Tamica was hysterical, and without prompting said that Arnold had pulled a gun and was trying to kill her. The police asked what the gun looked like and she said "a black handgun." At the time of this second set of statements, Arnold had left the scene. The third set of statements was made when Arnold returned to the scene in a car a few minutes later. Tamica identified Arnold by name and stated "that's the guy that pulled the gun on me." A search of the vehicle turned up a black handgun underneath Arnold's seat.

The court first found that all three sets of statements were properly admitted as excited utterances. For each set of statements, Tamica was clearly upset, she was concerned about her safety, and the statements were made shortly after or right at the time of the two startling events (the gun threat for the first two sets of statements and Arnold's return for the third set of statements).

The court then concluded that none of Tamica's statements fell within the definition of "testimonial" as developed by the Court in *Davis*. Essentially the court found that the statements were not testimonial for the very reason that they were excited utterances --- Tamica was upset, she was responding to an emergency and concerned about her safety, and her statements were largely spontaneous and not the product of an extensive interrogation.

911 call is not testimonial*:* ***United States v. Thomas,*** 453 F.3d 838 (7th Cir. 2006): The court held that statements made in a 911 call were non-testimonial under the analysis provided by

the Supreme Court in *Davis/Hammon*. The anonymous caller reported a shooting, and the perpetrator was still at large. The court analyzed the statements as follows:

> [T]he caller here described an emergency as it happened. First, she directed the operator's attention to Brown's condition, stating "[t]here's a dude that just got shot . . .", and ". . . the guy who shot him is still out there." Later in the call, she reiterated her concern that ". . . [t]here is somebody shot outside, somebody needs to be sent over here, and there's somebody runnin' around with a gun, somewhere." Any reasonable listener would know from this exchange that the operator and caller were dealing with an ongoing emergency, the resolution of which was paramount in the operator's interrogation. This fact is evidenced by the operator's repeatedly questioning the caller to determine who had the gun and where Brown lay injured. Further, the caller ended the conversation immediately upon the arrival of the police, indicating a level of interrogation that was significantly less formal than the testimonial statement in *Crawford*. Because the tape-recording of the call is nontestimonial, it does not implicate Thomas's right to confrontation.

See also United States v. Dodds, 569 F.3d 336 (7th Cir. 2009) (unidentified person's identification of a person with a gun was not testimonial: "In this case, the police were responding to a 911 call reporting shots fired and had an urgent need to identify the person with the gun and to stop the shooting. The witness's description of the man with a gun was given in that context, and we believe it falls within the scope of *Davis*."); ***United States v. Graham,*** 47 F.4th 561 (7th Cir. 2022) (accusation by a woman that the defendant had been trafficking her and others, made to police officers breaking up a fight between the woman and the defendant, were not testimonial: "Moore's statements to the police were made spontaneously and under circumstances objectively indicating that the officers' primary purpose was to resolve the ongoing emergency of a fight in progress and sex trafficking occurring at the motel. Moore identified a dangerous individual and described his crime as it was actually happening.").

Statement made by a child immediately after an assault on his mother was admissible as excited utterance and was not testimonial: *United States v. Clifford,* 791 F.3d 884 (8th Cir. 2015): In an assault trial, the court admitted a hearsay statement from the victim's three-year-old son, made to a trusted adult, that the defendant "hurt mama." The statement was made immediately after the event and the child was shaking and crying; the statement was in response to the adult asking "what happened?" The court of appeals held that the statement was admissible as an excited utterance and was not testimonial. There was no law enforcement involvement and the court noted that the defendant "identifies no case in which questions from a private individual acting without any direction from state officials were determined to be equivalent to police interrogation." The court also noted that the interchange between the child and the adult was informal, and was in response to an emergency. Finally, the court relied on the Supreme Court's most recent decision in *Ohio v. Clark:*

> As in *Clark,* the record here shows an informal, spontaneous conversation between a very young child and a private individual to determine how the victim had just been injured.

[The child's] age is significant since "statements by very young children will rarely, if ever, implicate the Confrontation Clause."

911 call was not testimonial even though the caller referenced a prior crime: *United States v. Robertson,* 948 F.3d 912 (8th Cir. 2020): In a prosecution for a gun-related assault, the court admitted a 911 call after a shooting, identifying Robertson as the shooter and "the same one that shot his gun over here last month." The court found that the 911 call was not testimonial. The declarant was clearly under the influence of the shooting that prompted the call; the statement about the prior shooting was not intended for trial but rather to "help police identify and apprehend an armed, threatening individual."

911 calls and statements made to officers responding to the calls were not testimonial: *United States v. Brun,* 416 F.3d 703 (8th Cir. 2005): The defendant was charged with assault with a deadly weapon. The police received two 911 calls from the defendant's home. One was from the defendant's 12-year-old nephew, indicating that the defendant and his girlfriend were arguing, and requesting assistance. The other call came 20 minutes later, from the defendant's girlfriend, indicating that the defendant was drunk and had a rifle, which he had fired in the house and then left. When officers responded to the calls, they found the girlfriend in the kitchen crying; she told the responding officers that the defendant had been drunk, and shot his rifle in the bathroom while she was in it. The court had little problem in finding that all three statements were properly admitted as excited utterances, and addressed whether the admission of the statements violated the defendant's right to confrontation after *Crawford.* The court first found that the nephew's 911 call was not testimonial because it was not the kind of statement that was equivalent to courtroom testimony. The court had "no doubt that the statements of an adolescent boy who has called 911 while witnessing an argument between his aunt and her partner escalate to an assault would be emotional and spontaneous rather than deliberate and calculated." The court used similar reasoning to find that the girlfriend's 911 call was not testimonial. The court also found that the girlfriend's statement to the police was not testimonial. It reasoned that the girlfriend's conversation with the officers "was unstructured, and not the product of police interrogation."

Statements made by mother to police, after her son was taken hostage, were not testimonial: *United States v. Lira-Morales,* 759 F.3d 1105 (9th Cir. 2014): The defendant was charged with hostage-taking and related crimes. At trial, the court admitted statements from the hostage's mother, describing a telephone call with her son's captors. The call was arranged as part of a sting operation to rescue the son. The court found that the mother's statements to the officers about what the captors had said were not testimonial, because the primary motive for making the call --- and thus the report about it to the police officers --- was to rescue the son. The court noted that throughout the event the mother was "very nervous, shaking, and crying in response to continuous ransom demands and threats to her son's life." Thus the agents faced an "emergency situation" and "the primary purpose of the telephone call was to respond to these threats and to ensure [the son's] safety." The defendant argued that the statements were testimonial because an agent attempted, unsuccessfully, to record the call that they had set up. But the court rejected this argument, noting that the agent "primarily sought to record the call to obtain information about

Aguilar's location and to facilitate the plan to rescue Aguilar. Far from an attempt to build a case for prosecution, Agent Goyco's actions were good police work directed at resolving a life-threatening hostage situation. * * * That Agent Goyco may have also recorded the call in part to build a criminal case does not alter our conclusion that the *primary* purpose of the call was to diffuse the emergency hostage situation."

Excited utterance not testimonial under the circumstances, even though made to law enforcement: *Leavitt v. Arave*, 371 F.3d 663 (9th Cir. 2004): In a murder case, the government introduced the fact that the victim had called the police the night before her murder and stated that she had seen a prowler who she thought was the defendant. The court found that the victim's statement was admissible as an excited utterance, as the victim was clearly upset and made the statement just after an attempted break-in. The court held that the statement was not testimonial under *Crawford*. The court explained as follows:

> Although the question is close, we do not believe that Elg's statements are of the kind with which *Crawford* was concerned, namely, testimonial statements. * * * Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which the Confrontation Clause was directed: the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.
>
> **Note: The court's decision in *Leavitt* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. The Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they are directed toward dealing with an emergency rather than prosecuting a crime. It is especially consistent with the pragmatic approach to applying the primary motive test established in *Michigan v. Bryant.***

Call to 911 about a violent attack that was occurring was not testimonial: *United States v. Draine,* 26 F.4th 1178 (10th Cir. 2022): The court found that a 911 call connecting the defendant to a violent incident when driving was not testimonial. The court explained as follows:

> First, the caller was speaking about events as they were actually happening . . Second, any reasonable listener would recognize that the declarant was facing an ongoing emergency because her call was plainly a call for help against a bona fide physical threat. She said, "I don't know," "He's going to kill me," "Oh my God," and "I'm so frazzled." Third, viewed objectively, the elicited statements were necessary to be able to resolve the present emergency. The operator and caller discussed the truck's changing location. And their discussion of the shooting related to the car chase and ongoing emergency. Fourth,

the call was not "formal." Answers were provided over the phone, during a car chase late at night, and the declarant was not responding calmly. The admission of the 911 recording did not violate the Confrontation Clause and the district court did not err.

911 call that a man had put a gun to another person's head was not testimonial: *United States v. Hughes,* 840 F.3d 1368 (11th Cir. 2016): In a felon-firearm prosecution, the trial court admitted a 911 call in which a bystander reported that the defendant had cocked a gun and put it to the head of a couple of people. The defendant argued that the 911 call was testimonial, but the court of appeals found no error. It concluded that "Hughes fails to distinguish the 911 caller's statements from those in *Davis* in any way whatsoever."

Expert Witnesses and Other Witnesses Relying on Testimonial Hearsay for Their Conclusion

Confusion over expert witnesses testifying on the basis of testimonial hearsay: *Williams v. Illinois,* 567 U.S. 50 (2012): This case is fully set forth in Part One. To summarize, the confusion is over whether an expert can, consistently with the Confrontation Clause, rely on testimonial hearsay so long as the hearsay is not explicitly introduced for its truth and the expert makes an independent judgment, i.e., is not just a conduit for the hearsay. That practice is permitted by Rule 703. Five members of the Court rejected the use of testimonial hearsay in this way, on the ground that it was based on an artificial distinction. But the plurality decision by Justice Alito embraces this Rule 703 analysis. As seen elsewhere in this outline, some courts have found *Williams* to have no precedential effect other than over cases that present the same facts as *Williams.* And many courts have held that the use of testimonial hearsay by an expert is permitted without regard to its formality, so long as the expert makes an independent conclusion and the hearsay itself is not admitted into evidence.

Expert's reliance on testimonial hearsay does not violate the Confrontation Clause: *United States v. Law,* 528 F.3d 888 (D.C. Cir. 2008)**:** The court found that an expert's testimony about the typical practices of narcotics dealers did not violate *Crawford*. While the testimony was based on interviews with informants, "Thomas testified based on his experience as a narcotics investigator; he did not relate statements by out-of-court declarants to the jury."

> **Note: This opinion precedes *Williams* and is questionable if you count the votes in *Williams.* But the case is quite consistent with the Alito opinion in *Williams* and many lower court cases after *Williams* --- allowing the expert to use testimonial hearsay as long as the hearsay is not introduced at trial and the expert is not simply parroting the hearsay. Lower federal courts are in substance treating the Alito opinion as controlling on an expert's reliance on testimonial hearsay.**

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

> Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth

Amendment infraction is minimal. Where an expert acts merely as a well-credentialed conduit for testimonial hearsay, however, the cases hold that her testimony violates a criminal defendant's right to confrontation. See, e.g., *United States v. Ayala*, 601 F.3d 256, 275 (4th Cir.2010) ("[Where] the expert is, in essence, ... merely acting as a transmitter for testimonial hearsay," there is likely a *Crawford* violation); *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir.2009) (same); *United States v. Lombardozzi*, 491 F.3d 61, 72 (2d Cir.2007) (" [T]he admission of [the expert's] testimony was error ... if he communicated out-of-court testimonial statements ... directly to the jury in the guise of an expert opinion."). In this case, we need not wade too deeply into the thicket, because the testimony at issue here does not reside in the middle ground.

The government is hard-pressed to paint Morales's testimony as anything other than a recitation of Borrero's report. On direct examination, the prosecutor asked Morales to "say what are the results of the test," and he did exactly that, responding "[b]oth bricks were positive for cocaine." This colloquy leaves little room for interpretation. Morales was never asked, and consequently he did not provide, his independent expert opinion as to the nature of the substance in question. Instead, he simply parroted the conclusion of Borrero's report. Morales's testimony amounted to no more than the prohibited transmission of testimonial hearsay. While the interplay between the use of expert testimony and the Confrontation Clause will undoubtedly require further explication, the government cannot meet its Sixth Amendment obligations by relying on Rule 703 in the manner that it was employed here.

Note: Whatever *Williams* may mean, the court's analysis in *Ramos-Gonzalez* surely remains valid. Even Justice Alito cautions that an expert may not testify if he does nothing more than parrot the testimonial hearsay.

Confrontation Clause not violated where testifying expert conducts his own testing that confirms the results of a testimonial report: *United States v. Soto,* 720 F.3d 51 (1st Cir. 2013): In a prosecution for identity theft and related offenses, a technician did a review of the defendant's laptop and came to conclusions that inculpated the defendant. At trial, a different expert testified that he did the same test and it came out exactly the same as the test done by the absent technician. The defendant argued that this was surrogate testimony that violated *Bullcoming v. New Mexico,* in which the Court held that production of a surrogate who simply reported testimonial hearsay did not satisfy the Confrontation Clause. But the court disagreed:

Agent Pickett did not testify as a surrogate witness for Agent Murphy. * * * Unlike in *Bullcoming*, Agent Murphy's forensic report was not introduced into evidence through Agent Pickett. Agent Pickett testified about a conclusion he drew from his own independent examination of the hard drive. The government did not need to get Agent Murphy's report into evidence through Agent Pickett. We do not interpret *Bullcoming* to

> mean that the agent who testifies against the defendant cannot know about another agent's prior examination or that agent's results when he conducts his examination. The government may ask an agent to replicate a forensic examination if the agent who did the initial examination is unable to testify at trial, so long as the agent who testifies conducts an independent examination and testifies to his own results.

The *Soto* court did express concern, however, that the testifying expert did more than simply replicate the results of the prior test: he also testified that the tests came to identical results:

> Soto's argument that Agent Murphy's report bolstered Agent Pickett's testimony hits closer to the mark. At trial, Agent Pickett testified that the incriminating documents in Exhibit 20 were found on a laptop that was seized from Soto's car. Although Agent Pickett had independent knowledge of that fact, he testified that "everything that was in John Murphy's report was exactly the way he said it was," and that Exhibit 20 "was contained in the same folder that John Murphy had said that he had found it in." * * * These two out-of-court statements attributed to Agent Murphy were arguably testimonial and offered for their truth. Agent Pickett testified about the substance of Agent Murphy's report which Agent Murphy prepared for use in Soto's trial. * * * Agent Pickett's testimony about Agent Murphy's prior examination of the hard drive bolstered Agent Pickett's independent conclusion that the Exhibit 20 documents were found on Soto's hard drive.

But the court found no plain error, in large part because the bolstering was cumulative.

See also Barbosa v. Mitchell, 812 F.3d 62 (1st Cir. 2016): On habeas review, the court found it not clearly established that expert reliance on a testimonial lab report violates the Confrontation Clause. The defendant was convicted in the time between *Melendez-Diaz* and *Williams.* The Court held that, "[t]o the contrary, four Justices [in *Williams*] later read *Melendez-Diaz* as not establishing at all, much less beyond doubt" the principle that such testimony violates the Confrontation Clause.

Testimony by *lay* witnesses that they had seen lab reports does not violate the Confrontation Clause: *United States v. Ocean,* 904 F.3d 25 (1st Cir. 2018): In a drug prosecution, police officers testifying as lay witnesses identified the substance found on the defendant as drugs. The government did not introduce lab reports and the witnesses did not refer to them on direct examination. On cross, the officers testified that they had seen lab reports. The court found no confrontation violation because the government never sought to offer the reports into evidence and the witnesses did not rely on the reports.

Expert reliance on a manufacturing label to conclude on point of origin did not violate the Confrontation Clause, because the label was not testimonial: *United States v. Torres-Colon,* 790 F.3d 26 (1st Cir. 2015): In a trial on a charge of unlawful possession of a firearm, the government's expert testified that the firearm was made in Austria. He relied on a manufacturing inscription on the firearm that stated "made in Austria." The court found no confrontation violation in the expert's testimony. The statement on the firearm was clearly not made by the manufacturer with the primary purpose of use in a criminal prosecution. The Confrontation Clause does not regulate expert testimony unless the expert is relying on *testimonial* hearsay.

No relief under AEDPA where expert relied on informal notations regarding testing of buccal swab: *Washington v. Griffin,* 876 F.3d 395 (2nd Cir. 2017) (Livingston, J.): In this habeas petition, the constitutional challenge in state court presented facts close to those of *Williams:* a buccal swab of the defendant was subjected to DNA testing, and an expert relied on notations by lab personnel indicating the process of extraction, amplification, and chain of custody. The expert who testified was not involved in conducting or supervising that process, but the expert did conduct her own review and made an independent conclusion that the DNA from the buccal swab matched the DNA from the crime scene. The court held that the petitioner had not established a clear violation of the Confrontation Clause --- as required under AEDPA --- when the state court allowed the expert to testify and did not require production of the lab analysts. The court found that *Melendez-Diaz* and *Bullcoming* were distinguishable because "Washington does not rely on a lab analyst's affidavit, as in *Melendez-Diaz*, or on the formal certificate of an analyst attesting to his results, as in *Bullcoming,* to make out his constitutional claim. He instead points to a medley of unsworn, uncertified notations by often unspecified lab personnel * * * . Such notations, standing alone, are potentially as suggestive of a purpose to record tasks, in order to accomplish the lab's work, as of any purpose to make an out-of-court statement for admission at trial." The court also noted that the lab reports on the buccal swab were never entered into evidence. The court found that the disarray in *Williams* only highlighted the fact that the state court had not violated clearly established law in allowing the expert to testify and not requiring the lab analysts to do so.

Judge Katzmann, concurring, suggested that the prosecution could avoid any litigation risk by simply having an expert supervise a new test when the case is going to trial. He noted, and the court agreed, that the supervising analyst "need not conduct every step of the process herself. Instead, by supervising the process, she could personally attest to the extraction and correct labeling of the sample, that a proper chain of custody was maintained, and that the DNA profile match was in fact a comparison of the defendant's DNA to that of the DNA found on the crime scene evidence."

Expert's reliance on out-of-court accusations does not violate *Crawford*, unless the accusations are directly presented to the jury*: United States v. Lombardozzi,* 491 F.3d 61 (2nd Cir. 2007): The court stated that *Crawford* is inapplicable if testimonial statements are not used for their truth, and that "it is permissible for an expert witness to form an opinion by applying her expertise because, in that limited instance, the evidence is not being presented for the truth of the

matter asserted." The court concluded that the expert's testimony would violate the Confrontation Clause "only if he communicated out-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion." ***See also United States v. Mejia,*** 545 F.3d 179 (2nd Cir. 2008) (violation of Confrontation Clause where expert directly relates statements made by drug dealers during an interrogation).

Expert report on which the witness worked in conjunction with an analyst did not violate the Confrontation Clause: ***United States v. Walker,*** 990 F.3d 316 (3rd Cir. 2021): An expert testified about phone records and cellphone location data. The defendant alleged a confrontation violation because the testimony was based on a report that the expert did not create. The court found no plain error, stating first that "it is at least arguable that he was speaking about his own work." Moreover, to the extent the witness had worked in conjunction with an analyst, he personally reviewed the data and thus had an independent basis upon which to testify.

Statements made to psychiatric expert were testimonial and were used by the jury for their truth at trial: ***Lambert v. Warden,*** 861 F.3d 459 (3rd Cir. 2017): Tillman shot two people and Lambert drove him to and from the crime. Tillman's mental capacity was in dispute and the government called a psychiatric expert to whom Tillman made statements. Tillman did not testify at trial. The court found that the jury may have used these statements, related inferentially in the expert's testimony, against Lambert for their truth --- in which case there would have been a confrontation violation. The government argued that the statements were not offered to prove anything, only for judging the expert's opinion, but the court found that in the context of the case this was not a "legitimate" not for truth purpose --- the prosecutor raised the statements as inferential proof of Lambert's involvement and the trial court gave no limiting instruction. The court remanded for an assessment of whether the defense counsel's failure to object constituted ineffective assistance of counsel.

Expert reliance on printout from machine does not violate *Crawford*: *United States v. Summers,* 666 F.3d 192 (4th Cir. 2011): The defendant objected to the admission of DNA testing performed on a jacket that linked him to drug trafficking. The court first considered whether the Confrontation Clause was violated by the government's failure to call the FBI lab employees who signed the internal log documenting custody of the jacket. The court found no error in admitting the log, because chain-of-custody evidence had been introduced by the defense and therefore the defendant had opened the door to rebuttal. The court next considered whether the Confrontation Clause was violated by testimony of an expert who relied on DNA testing results by lab analysts who were not produced at trial. The court again found no error. It emphasized that the expert did his own testing, and his reliance on the report was limited to a "pure instrument read-out." The court stated that "[t]he numerical identifiers of the DNA allele here, insofar as they are nothing more than raw data produced by a machine" should be treated the same as gas chromatograph data, which the courts have held to be non-testimonial. ***See also United States v. Shanton,*** 2013 WL 781939 (4th Cir.) (Unpublished) (finding that the result concerning the admissibility of the expert testimony in *Summers* was unaffected by *Williams*).

Expert reliance on confidential informants in interpreting coded conversation does not violate *Crawford: United States v. Johnson*, 587 F.3d 625 (4th Cir. 2009): The court found no error in admitting expert testimony that decoded terms used by the defendants and coconspirators during recorded telephone conversations. The defendant argued that the experts relied on hearsay statements by cooperators to help them reach a conclusion about the meaning of particular conversations. The defendant asserted that the experts were therefore relying on testimonial hearsay. The court recognized that it is "appropriate to recognize the risk that a particular expert might become nothing more than a transmitter of testimonial hearsay." But in this case, the experts never made reference to their interviews, and the jury heard no testimonial hearsay. "Instead, each expert presented his independent judgment and specialized understanding to the jury." Because the experts "did not become mere conduits" for the testimonial hearsay, their consideration of that hearsay "poses no *Crawford* problem." ***Accord United States v. Ayala,*** 601 F.3d 256 (4th Cir. 2010) (no violation of the Confrontation Clause where the experts "did not act as mere transmitters and in fact did not repeat statements of particular declarants to the jury."). ***Accord United States v Palacios*,** 677 F.3d 234 (4th Cir. 2012): Expert testimony on operation of a criminal enterprise, based in part on interviews with members, did not violate the Confrontation Clause because the expert "did not specifically reference" any of the testimonial interviews during his testimony, and simply relied on them as well as other information to give his own opinion.

> **Note: These cases are in doubt if you count the votes in *Williams,* but most courts have come to the same result after *Williams:* Finding no confrontation problem where an expert relies on testimonial hearsay, so long as the hearsay is not admitted into evidence and the expert draws his own conclusion from the data (rather than just parroting it).**

Expert testimony translating coded conversations violated the right to confrontation where the government failed to make a sufficient showing that the expert was relying on her own evaluations rather than those of informants: *United States v. Garcia,* 752 F.3d 382 (4th Cir. 2014): The court reversed drug convictions in part because the law enforcement expert who translated purportedly coded conversations had relied, in coming to her conclusion, on input from coconspirators whom she had debriefed. The court distinguished *Johnson, supra*, on the ground that in this case the government had not done enough to show that the expert had conducted her own independent analysis in reaching her conclusions as to the meaning of certain conversations. The court noted that "the question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay." In this case, "we cannot say that Agent Dayton was giving such independent judgments. While it is true she never made direct reference to the content of her interviews, this could just has well have been the result of the Government's failure to elicit a proper foundation for Agent Dayton's interpretations." The government argued that the information from the coconspirators only served to confirm the Agent's interpretations after the fact, but the court concluded that "[t]he record is devoid of evidence that this was, in fact, the sequence of Dayton's analysis, to Garcia's prejudice." ***Compare United States v. Smith,*** 919 F.3d 825 (4th Cir. 2019) (expert translating coded conversation was

not acting as a conduit; he was "not simply replaying the conspirators' interpretations" but rather relying on his own expertise, and "exercised his judgment independent of any later debriefings").

Officer testifying as a lay witness as to drug activity, in part based on statements from arrestees, did not violate the Confrontation Clause: *United States v. Smith,* 962 F.3d 755 (4th Cir. 2020): In a drug trial, a law enforcement officer was allowed to testify as a lay witness on drug practices like the use of baggies, on the basis of his extensive experience. (For the record, it was probably expert testimony, but the court disagreed). The defendant argued that the officer's conclusions were based in part on statements he heard during police investigations --- which were testimonial hearsay. But the court found no confrontation violation in the testimony, because none of the testimonial hearsay was disclosed at trial, and the officer "was not merely 'parroting' outside statements or repeating what he had overheard in come interrogation room, as opposed to offering insight gleaned from decades of police work."

Expert testimony on gangs, based in part on testimonial hearsay, did not violate the Confrontation Clause when the hearsay was not transmitted to the jury: *United States v. Rios,* 830 F.3d 403 (5th Cir. 2016): In a prosecution of Latin Kings gang members for racketeering and drug offenses, the court found it was not error to allow a law enforcement officer to testify as an expert about the organization of the gang. The testimony was based in large part on listening to jail conversations and interviewing former members. The court found no violation of the Confrontation Clause to the extent the underlying statements were not transmitted to the jury. The one instance in which a statement was related to the jury was found to be harmless error.

Expert opinion based in part on information learned during custodial interrogation did not violate *Crawford* where expert was more than a conduit: *United States v. Lockhart,* 844 F.3d 501 (5th Cir. 2016): In a sex trafficking prosecution, an officer testified as an expert that the defendants were gang members. The defendant argued that the testimony violated his right to confrontation because the officer, in reaching his conclusion, relied on statements made during custodial interrogations, as well as statements of other officers describing their experiences during interrogations. But the court found no error. The court explained that *Crawford* "in no way prevents expert witnesses from offering their independent judgments merely because those judgments were in some part informed by their exposure to otherwise inadmissible evidence." It further stated that "when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise." The court concluded that in this case the expert "did not serve as a conduit for inadmissible testimonial hearsay."

Law enforcement expert's testimony about a motorcycle group, based in part on statements from members in interviews, did not violate the Confrontation Clause: *United States v. Portillo,* 969 F.3d 144 (5th Cir. 2020): In a prosecution of members of a motorcycle gang, a law enforcement agent testified as an expert about the organization and activity of the gang, based on his extensive investigation as well as on interviews with gang members. The court found that the expert's reliance on testimonial hearsay did not violate the defendants' right to confrontation, because the expert "used his expertise to synthesize various source materials rather than simply regurgitating information he learned from those sources." The court concluded that "[a]s long as an expert forms his opinion by *amalgamating* potential testimonial statements, his testimony does not violate the Confrontation Clause." (emphasis in original).

Expert testimony by technical reviewer, rather than the case analyst, does not clearly violate the Confrontation Clause: *Jenkins v. Hall,* 910 F.3d 828 (5th Cir. 2018): In a drug prosecution, the case analyst weighed the drug and the supervisor testified to the weight on the basis of reviewing the case analyst's technical data. The court found no confrontation violation under the AEDPA standard of review. The court found *Bullcoming* to be distinguishable because in that case the supervisor who testified did not review the technical data and come to his own conclusion. **Accord *Grim v. Fisher,*** 816 F.3d 296 (5th Cir. 2016) (no clear confrontation violation where the supervisor "examined the analyst's report and all of the data, including everything the analyst did to the item of evidence; ensured that the analyst did the proper tests and that the analyst's interpretation of the test results was correct; agreed . . . with the examinations and results of the report; and signed the report.")

Police officer's reliance on statements from people he had arrested for drug crimes did not violate *Crawford: United States v. Collins,* 799 F.3d 554 (6th Cir. 2015): In a trial involving manufacture of methamphetamine, a law enforcement officer testified as an expert on the conversion ratio between pseudoephedrine and methamphetamine. He relied in part on statements from people he had interviewed after he had arrested them for manufacturing methamphetamine. The court found no plain error because there was "no evidence that the suspected methamphetamine manufacturers Agent O'Neil questioned throughout his career 'intended to bear testimony' against Collins or his co-defendants." Thus the expert was not relying on testimonial hearsay.

> **Note: The court appears to be applying --- maybe without realizing it --- Justice Alito's definition of testimoniality in *Williams.* The court is saying that the arrestees did not *target* their testimony toward the defendant. But under the view of five Justices in *Williams,* the statements of the arrestees would probably be testimonial, as they were under arrest --- just like Mrs. Crawford --- and the statements could be thought to be motivated toward *some* criminal prosecution.**

Expert reliance on printout from machine and another expert's lab notes does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone." Moreover, the expert's reliance on another expert's lab notes did not violate *Crawford* because the court concluded that an expert is permitted to rely on hearsay (including testimonial hearsay) in reaching his conclusion. The court noted that the defendant could "insist that the data underlying an expert's testimony be admitted, see Fed.R.Evid. 705, but by offering the evidence themselves defendants would waive any objection under the Confrontation Clause." The court observed that the notes of the chemist, evaluating the data from the machine, were testimonial and should not have been independently admitted, but it found no plain error in the admission of these notes.

Expert reliance on drug test conducted by another does not violate the Confrontation Clause --- though on remand from *Williams* the court states that part of the expert's testimony might have violated the Confrontation Clause, but finds harmless error*: United States v. Turner,* 591 F.3d 928 (7th Cir. 2010), on remand from Supreme Court, 709 F.3d 1187 (7th Cir. 2013) : At the defendant's drug trial, the government called a chemist to testify about the tests conducted on the substance seized from the defendant --- the tests indicating that it was cocaine. The defendant objected that the witness did not conduct the tests and was relying on testimonial statements from other chemists, in violation of *Crawford.* The court found no error, emphasizing that no statements of the official who actually tested the substance were admitted at trial, and that the witness unequivocally established that his opinions about the test reports were his own.

Note: The Supreme Court vacated the decision in *Turner* and remanded for reconsideration in light of *Williams.* On remand, the court declared that while a rule from *Williams* was difficult to divine, it at a minimum "casts doubt on using expert testimony in place of testimony from an analyst who actually examined and tested evidence bearing on a defendant's guilt, insofar as the expert is asked about matters which lie solely within the testing analyst's knowledge." But the court noted that even after *Williams*, much of what the expert testified to was permissible because it was based on personal knowledge:

> We note that the bulk of Block's testimony was permissible. Block testified as both a fact and an expert witness. In his capacity as a supervisor at the state crime laboratory, he described the procedures and safeguards that employees of the laboratory observe in handling substances submitted for analysis. He also noted that he reviewed Hanson's work in this case pursuant to the laboratory's standard peer review procedure. As an expert forensic chemist, he went on to explain for the jury how suspect substances are tested using gas chromatography, mass spectrometry, and infrared spectroscopy to yield data from which the nature of the substance may be determined. He then opined, based on his experience and expertise, that the data Hanson had produced in testing the substances that Turner distributed to the

undercover officer-introduced at trial as Government Exhibits 1, 2, and 3-indicated that the substances contained cocaine base. * * *

As we explained in our prior decision, an expert who gives testimony about the nature of a suspected controlled substance may rely on information gathered and produced by an analyst who does not himself testify. Pursuant to Federal Rule of Evidence 703, the information on which the expert bases his opinion need not itself be admissible into evidence in order for the expert to testify. Thus, the government could establish through Block's expert testimony what the data produced by Hanson's testing revealed concerning the nature of the substances that Turner distributed, without having to introduce either Hanson's documentation of her analysis or testimony from Hanson herself. And because the government did not introduce Hanson's report, notes, or test results into evidence, Turner was not deprived of his rights under the Sixth Amendment's Confrontation Clause simply because Block relied on the data contained in those documents in forming his opinion. Nothing in the Supreme Court's *Williams* decision undermines this aspect of our decision. On the contrary, Justice Alito's plurality opinion in *Williams* expressly endorses the notion that an appropriately credentialed individual may give expert testimony as to the significance of data produced by another analyst. Nothing in either Justice Thomas's concurrence or in Justice Kagan's dissent takes issue with this aspect of the plurality's reasoning. Moreover, as we have indicated, Block in part testified in his capacity as Hanson's supervisor, describing both the procedures and safeguards that employees of the state laboratory are expected to follow and the steps that he took to peer review Hanson's work in this case. Block's testimony on these points, which were within his personal knowledge, posed no Confrontation Clause problem.

The *Turner* court on remand saw two Confrontation problems in the expert's testimony: 1) his statement that Hanson followed standard procedures in testing the substances that Turner distributed to the undercover officer, and 2) his testimony that he reached the same conclusion about the nature of the substances that the analyst did. The court held that on those two points, "Block necessarily was relying on out-of-court statements contained in Hanson's notes and report. These portions of Block's testimony strengthened the government's case; and, conversely, their exclusion would have diminished the quantity and quality of evidence showing that the substances Turner distributed comprised cocaine base in the form of crack cocaine." And while the case was much like *Williams,* the court found two distinguishing factors: 1) it was tried to a jury, thus raising a question of whether Justice Alito's not-for-truth analysis was fully applicable; and 2) the test was conducted with a suspect in mind, as Turner had been arrested with the substances to be tested in his possession. The defendant also argued that the report was "certified" and so was formal under the Thomas view. But the court noted that the analysts did not formally certify the results --- the certification was made by the Attorney General to the effect that the report was a correct copy of the *report.* Yet the court implied that it was sufficiently formal in any case, because it was "both official and signed, it constituted a formal record of the result of

the laboratory tests that Hanson had performed, and it was clearly designed to memorialize that result for purposes of the pending legal proceeding against Turner, who was named in the report."

Ultimately the court found it unnecessary to decide whether the defendant's Confrontation rights were violated because the error, if any, in the use of the analyst's report was harmless.

No confrontation violation where expert did not testify that he relied on a testimonial report: ***United States v. Maxwell,*** 724 F.3d 724 (7th Cir. 2013): In a narcotics prosecution, the analyst from the Wisconsin State Crime Laboratory who originally tested the substance seized from Maxwell retired before trial, so the government offered the testimony of his co-worker instead. The coworker did not personally analyze the substance herself, but concluded that it contained crack cocaine after reviewing the data generated by the original analyst. The court found no plain error in permitting this testimony, explaining that there could be no Confrontation problem, even after *Bullcoming* and *Williams*, where there is no testimony that the expert relied on the report:

> What makes this case different (and relatively more straightforward) from those we have dealt with in the past is that Gee did not read from Nied's report while testifying * * * , she did not vouch for whether Nied followed standard testing procedures or state that she reached the same conclusion as Nied about the nature of the substance (as in *Turner*), and the government did not introduce Nied's report itself or any readings taken from the instruments he used (as in *Moon*). Maxwell argues that Nied's forensic analysis is testimonial, but Gee never said she relied on Nied's report or his interpretation of the data in reaching her own conclusion. Instead, Gee simply testified (1) about how evidence in the crime lab is typically tested when determining whether it contains a controlled substance, (2) that she had reviewed the data generated for the material in this case, and (3) that she reached an independent conclusion that the substance contained cocaine base after reviewing that data.

The court concluded that concluded that "Maxwell was not deprived of his Sixth Amendment right simply by virtue of the fact that Gee relied on Nied's data in reaching her own conclusions, especially since she never mentioned what conclusions Nied reached about the substance."

Expert's reliance on report of another law enforcement agency did not violate the right to confrontation: ***United States v. Huether,*** 673 F.3d 789 (8th Cir. 2012): In a trial on charges of sexual exploitation of minors, an expert testified in part on the basis of a report by the National Center for Missing and Exploited Children. The court found no confrontation violation

because the NCMEC report was not introduced into evidence and the expert drew his own conclusion and was not a conduit for the hearsay.

No confrontation violation where expert who testified did so on the basis of his own retesting: ***United States v. Ortega,*** 750 F.3d 1020 (8th Cir. 2014): In a drug conspiracy prosecution, the defendant argued that his right to confrontation was violated because the expert who testified at trial that the substances seized from a coconspirator's car were narcotics had tested composite samples that another chemist had produced from the substances found in the car. But the court found no error, because the testifying expert had personally conducted his own test of the composite substances, and the original report of the other chemist who prepared the composite (and who concluded the substances were narcotics) was not offered by the government; nor was the testifying expert asked about the original test. The court noted that any objection about the composite really went to the chain of custody --- whether the composite tested by the expert witness was in fact derived from what was found in the car --- and the court observed that "it is up to the prosecution to decide what steps are so crucial as to require evidence." The defendant made no showing of bad faith or evidence tampering, and so any question about the chain of custody was one of weight and not admissibility. Moreover, the government's introduction of the original chemist's statement about creating the composite sample did not violate the Confrontation Clause because "chain of custody alone does not implicated the Confrontation Clause" as it is "not a testimonial statement offered to prove the truth of the matter asserted."

No Confrontation Clause violation where expert's opinion was based on his own assessment and not on the testimonial hearsay: ***United States v. Vera,*** 770 F.3d 1232 (9th Cir. 2014): Appealing from convictions for drug offenses, the defendants argued that the testimony of a prosecution expert on gangs violated the Confrontation Clause because it was nothing but a conduit for testimonial hearsay from former gang members. The court agreed with the premise that expert testimony violates the Confrontation Clause when the expert "is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation." But the court disagreed that the expert operated as a conduit in this case. The court found that the witness relied on his extensive experience with gangs and that his opinion "was not merely repackaged testimonial hearsay but was an original product that could have been tested through cross-examination." ***See also United States v. Holguin,*** 51 F.4th 841 (9th Cir. 2022) (expert testimony on gangs relied on testimonial hearsay; but there was no confrontation problem, because the statements were the type of information upon which other experts in the field rely, and the expert "applied his training and experience to the sources before him and reached an independent judgment without directly repeating what someone told him").

Expert's reliance on notes prepared by lab technicians did not violate the Confrontation Clause: ***United States v. Pablo*****,** 625 F.3d 1285 (10th Cir. 2010), ***on remand for reconsideration under Williams,*** **696 F.3d 1280 (10th Cir. 2012)**: The defendant was tried for

rape and other charges. Two lab analysts conducted tests on the rape kit and concluded that the DNA found at the scene matched the defendant. The defendant complained that the lab results were introduced through the testimony of a forensic expert and the lab analysts were not produced for cross-examination. In the original appeal the court found no plain error, reasoning that the notes of the lab analysts were not admitted into evidence and were never offered for their truth. To the extent they were discussed before the jury, it was only to describe the basis of the expert's opinion --- which the court found to be permissible under Rule 703. The court observed that "[t]he extent to which an expert witness may disclose to a jury otherwise inadmissible testimonial hearsay without implicating a defendant's confrontation rights * * * is a matter of degree." According to the court, if an expert "simply parrots another individual's testimonial hearsay, rather than conveying her own independent judgment that only incidentally discloses testimonial hearsay to assist the jury in evaluating her opinion, then the expert is, in effect, disclosing the testimonial hearsay for its substantive truth and she becomes little more than a backdoor conduit for otherwise inadmissible testimonial hearsay." In this case the court, applying the plain error standard, found insufficient indication that the expert had operated solely as a conduit for testimonial hearsay.

***Pablo* was vacated for reconsideration in light of *Williams*. On remand, the court once again affirmed the conviction.** The court stated that "we need not decide the precise mandates and limits of *Williams,* to the extent they exist." The court noted that five members of the *Williams* Court "might find" that the expert's reliance on the lab test in this case was for its truth. But "we cannot say the district court plainly erred in admitting Ms. Snider's testimony, as it is not plain that a majority of the Supreme Court would have found reversible error with the challenged admission."

The *Pablo* court on remand concluded that "the manner in which, and degree to which, an expert may merely rely upon, and reference during her in-court expert testimony, the out-of-court testimonial conclusions in a lab report made by another person not called as a witness is a nuanced legal issue without clearly established bright line parameters, particularly in light of the discordant 4-1-4 divide of opinions in *Williams*."

Expert's testimony on gang structure and practice did not violate the Confrontation Clause even though it was based in part on testimonial hearsay, where expert applied his own expertise. *United States v. Kamahele,* 748 F.3d 984 (10th Cir. 2014): Appealing from convictions for gang-related activity, the defendants argued that a government expert's testimony about the structure and operation of the gang violated the Confrontation Clause because it was based in part on interviews with cooperating witnesses and other gang members. The court found no error and affirmed, concluding that the admission of expert testimony violates the Confrontation Clause "only when the expert is simply parroting a testimonial fact." The court noted that in this case the expert "applied his expertise, formed by years of experience and multiple sources, to provide an independently formed opinion." Therefore, no testimonial hearsay was offered for its truth against the defendant. ***Compare United States v. Garcia,*** 793 F.3d 1194 (10th Cir. 2015) (gang-expert's testimony violated the Confrontation Clause, where he parroted statements from

former gang members that were testimonial hearsay: "The government cannot plausibly argue that Webb applied his expertise to this statement. It involves no interpretation of gang culture or iconography, no calibrated judgment based on years of experience and the synthesis of multiple sources of information. He simply relayed what DV gang members told him. Admission of the testimony violated the Confrontation Clause.").

Forfeiture

Constitutional standard for forfeiture --- like Rule 804(b)(6) --- requires a showing that the defendant acted wrongfully with the intent to keep the witness from testifying: *Giles v. California,* 554 U.S. 353 (2008): The Court held that a defendant does not forfeit his constitutional right to confront testimonial hearsay unless the government shows that the defendant engaged in wrongdoing *designed to keep the witness from testifying at trial.* Giles was charged with the murder of his former girlfriend. A short time before the murder, Giles had assaulted the victim, and she made statements to the police implicating Giles in that assault. The victim's hearsay statements were admitted against the defendant on the ground that he had forfeited his right to invoke the Confrontation Clause, because he murdered the victim. The government made no showing that Giles murdered the victim with the intent to keep her from testifying. The Court found an intent-to-procure requirement in the common law, and therefore, under the historical analysis mandated by *Crawford*, there is necessarily an intent-to-procure requirement for forfeiture of confrontation rights. Also, at one point in the opinion, the Court in dictum stated that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial --- presumably because the primary motivation for making such statements is for something other than use at trial.

Murder of witness by co-conspirators as a sanction to protect the conspiracy against testimony constitutes forfeiture of both hearsay and Confrontation Clause objections: *United States v. Martinez,* 476 F.3d 961 (D.C. Cir. 2007): Affirming drug and conspiracy convictions, the court found no error in the admission of hearsay statements made to the DEA by an informant involved with the defendant's drug conspiracy. The trial court found by a preponderance of the evidence that the informant was murdered by members of the defendant's conspiracy, in part to procure his unavailability as a witness. The court of appeals affirmed this finding --- rejecting the defendant's argument that forfeiture could not be found because his co-conspirators would have murdered the informant anyway, due to his role in the loss of a drug shipment. The court stated that it is "surely reasonable to conclude that anyone who murders an informant does so intending *both* to exact revenge *and* to prevent the informant from disclosing further information and testifying." It concluded that the defendant's argument would have the "perverse consequence" of allowing criminals to avoid forfeiture if they could articulate more than one bad motivation for disposing of a witness. Finally, the court held that forfeiture under Rule 804(b)(6) by definition constituted forfeiture of the Confrontation Clause objection. It stated that *Crawford* and *Davis*

"foreclose" the possibility that the admission of evidence under Rule 804(b)(6) could nonetheless violate the Confrontation Clause.

Fleeing prosecution constitutes forfeiture: *United States v. Ponzo,* 853 F.3d 558 (1st Cir. 2017): At the defendant's racketeering trial the government offered prior testimony of a witness from the trial of the defendant's coconspirators. The defendant was not tried with his coconspirators because he had fled prosecution. By the time he was caught and tried, the witness had died. The defendant argued that admitting the dead witness's testimony at his trial violated his right to confrontation, but the court found that the defendant had forfeited that right by absenting himself from the prior trial. It reasoned as follows: "Had Ponzo been at the 1988 trial, he could have cross-examined Hildonen. But like a defendant who obtains a witness's absence by killing him, by fleeing and remaining on the lam for years, Ponzo effectively schemed to silence Hildonen's testimony against him. And Hildonen's subsequent unavailability signifies the success of that scheming. So Ponzo forfeited his confrontation rights. To hold otherwise would allow Ponzo to profit from his own wrong and would undermine the integrity of the criminal-trial system --- which we cannot allow."

Forfeiture through veiled threats and prior history of violence: *United States v. Pratt,* 915 F.3d 266 (4th Cir. 2019): Appealing convictions for sex trafficking and child pornography, the defendant argued that it was error to admit a hearsay statement made by one of the trafficking victims to a police officer. The court found no error in the trial court's determination that the defendant had forfeited his hearsay objection and also his right to confrontation. The defendant called the victim three times while he was in jail --- in violation of the magistrate judge's order not to contact her. The court noted that "[a]s an ineffective ruse, Pratt would pretend to be talking to someone other than" the victim; in each of the calls he urged her to deny any knowledge, and his instructions sounded like "veiled threats." This was particularly so "against the backdrop of several women at trial who detailed how Pratt would beat prostitutes --- including [the declarant] --- whom he considered disobedient." The court concluded that these threats, in the context of a history of violence toward the victim, caused the victim not to testify. It recognized that the victim might have had another motivation for refusing to testify: her feelings for the defendant, whom she considered to be her boyfriend. But the court noted that "those feelings were tied up in the same abusive relationship."

Fact that defendant had multiple reasons for killing a witness does not preclude a finding of forfeiture: *United States v. Jackson,* 706 F.3d 262 (4th Cir. 2013): The defendant argued that the constitutional right to confrontation can be forfeited only when a defendant was motivated *exclusively* by a desire to silence a witness. (In this case the defendant argued that while he murdered a witness to silence him, he had additional reasons, including preventing the witness from harming the defendant's drug operation and as retaliation for robbing one of the defendant's friends.) The court rejected the argument, finding nothing in *Giles* to support it. To the contrary,

the Court in *Giles* reasoned that the common law forfeiture rule was designed to prevent the defendant from profiting from his own wrong. Moreover, under a multiple-motive exception to forfeiture, defendants might be tempted to murder witnesses and then cook up another motive for the murder after the fact.

Forfeiture can be found on the basis of *Pinkerton* liability: *United States v. Dinkins,* 691 F.3d 358 (4th Cir. 2012): The court found that the defendant had forfeited his right of confrontation when a witness was killed by a coconspirator as an act to further the conspiracy by silencing the witness. The court concluded that in light of *Pinkerton* liability, "the Constitution does not guarantee an accused person against the legitimate consequence of his own wrongful acts." ***Compare United States v. Brown,*** 2020 WL 5088074 (7th Cir. Aug. 28, 2020) (questioning whether forfeiture can be found under *Pinkerton* under the Constitution, because the constitutional doctrine of forfeiture is based on common law, and *Pinkerton* liability did not exist under common law; but finding it unnecessary to decide the question because any error in admitting the hearsay testimony was harmless).

Imprisonment at time of witness's murder did not preclude a finding of forfeiture: *United States v. Hankton,* 51 F.4th 578 (5th Cir. 2022): A grand jury witness identified the defendant as taking part in a murder. The government offered the grand jury statement, and argued that the defendant had forfeited his right to challenge it under the hearsay rule and the Confrontation Clause. The defendant argued that a forfeiture could not be found, because he could not have been involved in the murder as he was incarcerated at the time. But the trial court found a forfeiture, and the court of appeals held that the ruling was not in error. The witness was murdered only 9 days after testifying at the grand jury; the guns used to kill him were ballistically linked to guns used by the defendant's gang to kill another person; and the person who shot the witness made a statement to an associate that the defendant had paid him $5,000 to kill the witness. The court found that the government had met its burden of showing by a preponderance of the evidence that the defendant "at the very least acquiesced in wrongfully causing" the witness's unavailability.

Retaliatory murder of witnesses who testified against the accused in a prior case is not a forfeiture in the trial for murdering the witnesses: *United States v. Henderson,* 626 F.3d 626 (6th Cir. 2010): The defendant was convicted of bank robbery after two people (including his accomplice) testified against him. Shortly after the defendant was released from prison, the two witnesses were found murdered. At the trial for killing the two witnesses, the government offered statements made by the victims to police officers during the investigation of the bank robbery. These statements concerned their cooperation and threats made by the defendant. The trial judge admitted the statements after finding by a preponderance of the evidence that the defendant killed the witnesses. That decision, grounded in forfeiture, was made before *Giles* was decided. On appeal, the court found error under *Giles* because "Bass and Washington could not have been killed, in 1996 and 1998, respectively, to prevent them from testifying against [the defendant] in the bank robbery prosecution in 1981." Thus there was no showing of intent to keep the witnesses

from testifying, as *Giles* requires for a finding of forfeiture. The court found the errors to be harmless.

Forfeiture of confrontation rights, like forfeiture under Federal Rule 804(b)(6), is found upon a showing by a preponderance of the evidence: *United States v. Johnson*, 767 F.3d 815 (9th Cir. 2014): The court affirmed convictions for murder and armed robbery. At trial hearsay testimony of an unavailable witness was admitted against the defendant, after the government made a showing that the defendant had threatened the witness; the trial court found that the defendant had forfeited his right under both the hearsay rule and the Confrontation Clause to object to the hearsay. The court found no error. It held that a forfeiture of the right to object under the hearsay rule and under the Confrontation Clause is governed by the same standard: the government must establish by a preponderance of the evidence that the defendant acted wrongfully to cause the unavailability of a government witness, with the intent that the witness would not testify at trial. The defendant argued that the Constitution requires a showing of clear and convincing evidence before forfeiture of a right to confrontation can be found. But the court disagreed. It noted that a clear and convincing evidence standard had been applied by some lower courts when the Confrontation Clause regulated the admission of unreliable hearsay. But now, after *Crawford v. Washington*, the Confrontation Clause does not bar unreliable hearsay from being admitted; rather it regulates testimonial hearsay. The court stated that after *Crawford,* "the forfeiture exception is consistent with the Confrontation Clause, not because it is a means for determining whether hearsay is reliable, but because it is an equitable doctrine designed to prevent defendants from profiting from their own wrongdoing." The court also noted that the Supreme Court's post-*Crawford* decisions of Davis v. Washington and Giles v. California "strongly suggest, if not squarely hold, that the preponderance standard applies." On the facts, the court concluded that "the evidence tended to show that Johnson alone had the means, motive, and opportunity to threaten [the witness], and did not show anyone else did. This was sufficient to satisfy the preponderance standard."

Evaluating the kind of action the defendant must take to justify a finding of forfeiture: *Carlson v. Attorney General of California,* 791 F.3d 1003 (9th Cir. 2015): Reviewing the denial of a habeas petition, the court found that statements of victims to police were testimonial, but that the state trial court was not unreasonable in finding that the petitioner had forfeited his right to confront the declarants. In a careful analysis of Supreme Court cases, the court provided "a standard for the kind of action a defendant must take" to be found to have forfeited the right to confrontation. The court concluded that

> [T]he forfeiture-by-wrongdoing doctrine applies where there has been affirmative action on the part of the defendant that produces the desired result, non-appearance by a prospective witness against him in a criminal case. Simple tolerance of, or failure to foil, a third party's previously unexpressed decision either to skip town himself rather than

testifying or to prevent another witness from appearing [is] not a sufficient reason to foreclose a defendant's Sixth Amendment confrontation rights at trial.

On the merits --- and applying the standard of deference required by AEDPA, the court concluded that the trial court could reasonably have found, on the basis of circumstantial evidence, that the petitioner more likely than not was actively involved in procuring unavailability, with the intent to keep the witness from testifying.

Note: The court says that a defendant's mere "acquiescence" is not enough to justify forfeiture. That language might raise a doubt as to whether a forfeiture may be found by the defendant's mere membership in a conspiracy; courts have found such membership to be sufficient where disposing of a witness is within the course and furtherance of the underlying conspiracy. See, e.g., *United States v. Dinkins,* 691 F.3d 358 (4th Cir. 2012). The *Carlson* court, however, cited the conspiracy cases favorably, and noted that in such cases, the defendant *has* acted affirmatively and committed wrongdoing by joining a conspiracy in which a foreseeable result is killing witnesses.

A different panel of the Ninth Circuit, in a case decided around the same time as *Carlson*, upheld a finding of forfeiture based on *Pinkerton* liability. *See United States Cazares,* 788 F.3d 956 (9th Cir. 2015). *But see United States v. Brown,* 2020 WL 5088074 (7th Cir. Aug. 28, 2020) (questioning whether forfeiture can be found under *Pinkerton* under the Constitution, because the constitutional doctrine of forfeiture is based on common law, and *Pinkerton* liability did not exist under common law; but finding it unnecessary to decide the question because any error in admitting the hearsay testimony was harmless).

The *Carlson* court noted that the restyled Rule 804(b)(6) provides a helpful clarification of what the original rule meant by "acquiescence."

Grand Jury, Plea Allocutions, Etc.

Grand jury testimony and plea allocution statement are both testimonial: *United States v. Bruno,* 383 F.3d 65 (2nd Cir. 2004): The court held that a plea allocution statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant. It noted that the Court in *Crawford* had taken exception to previous cases decided by the Circuit that had admitted such statements as sufficiently reliable under *Roberts*. Those prior cases have been overruled by *Crawford.* The court also noted that the admission of grand jury testimony was error as it was clearly testimonial after *Crawford*. **See *also United States v. Becker,*** 502 F.3d 122 (2nd Cir. 2007) (plea allocution is testimonial even though redacted to take out direct reference to the defendant: "any argument regarding the purposes for which the jury might or might not have actually considered the allocutions necessarily goes to whether such error was harmless, not whether it existed at all"); ***United States v. Snype,*** 441 F.3d 119 (2nd Cir. 2006) (plea allocution of the defendant's accomplice was testimonial even though all direct references to the defendant were redacted); ***United States v. Gotti,*** 459 F.3d 296 (2nd Cir. 2006) (redacted guilty pleas of accomplices, offered to show that a bookmaking business employed five or more people, were testimonial under *Crawford*); ***United States v. Al-Sadawi,*** 432 F.3d 419 (2nd Cir. 2005) (*Crawford* violation where the trial court admitted portions of a cohort's plea allocution against the defendant, even though the statement was redacted to take out any direct reference to the defendant).

Defendant charged with aiding and abetting has confrontation rights violated by admission of primary wrongdoer's guilty plea: *United States v. Head,* 707 F.3d 1026 (8th Cir. 2013): The defendant was charged with aiding and abetting a murder committed by her boyfriend in Indian country. The trial court admitted the boyfriend's guilty plea to prove the predicate offense. The court found that the guilty plea was testimonial and reversed the aiding and abetting conviction. The court relied on *Crawford's* statement that "prior testimony that the defendant was unable to cross-examine" is one of the "core class of 'testimonial' statements."

Grand jury testimony is testimonial: *United States v. Wilmore,* 381 F.3d 868 (9th Cir. 2004): The court held, unsurprisingly, that grand jury testimony is testimonial under *Crawford*. It could hardly have held otherwise, because even under the narrowest definition of "testimonial" (i.e., the specific types of hearsay mentioned by the *Crawford* Court) grand jury testimony is covered within the definition.

Implied Testimonial Statements, Statements Not Directly Admitted, etc.

Testimony that a police officer's focus changed after hearing an out-of-court statement impliedly included accusatorial statements from an accomplice and so violated the defendant's right to confrontation: ***United States v. Meises,*** 645 F.3d 5 (1st Cir. 2011): At trial an officer testified that his focus was placed on the defendant after an interview with a cooperating witness. The government did not explicitly introduce the statement of the cooperating witness. On appeal, the defendant argued that the jury could surmise that the officer's focus changed because of an out-of-court accusation of a declarant who was not produced at trial. The government argued that there was no confrontation violation because the testimony was all about the actions of the officer and no hearsay statement was admitted at trial. But the court agreed with the defendant and reversed the conviction. The court noted that it was irrelevant that the government did not introduce the actual statements, because such statements were effectively before the jury in the context of the trial. The court stated that "any other conclusion would permit the government to evade the limitations of the Sixth Amendment and the Rules of Evidence by weaving an unavailable declarant's statements into another witness's testimony by implication. The government cannot be permitted to circumvent the Confrontation Clause by introducing the same substantive testimony in a different form." ***See also, United States v. Ackerly,*** 981 F.3d 70 (1st Cir. 2020) (court rejects the government's argument that a Confrontation violation occurs only when a testimonial statement is directly admitted into evidence; in this case there was no plain error in finding a confrontation violation when the prosecutor referred to a testimonial hearsay statement while questioning a witness); ***Compare United States v. Occhiuto,*** 784 F.3d 862 (1st Cir. 2015)**:** In a narcotics prosecution, an officer testified that he arranged for a cooperating informant to buy drugs from the defendant; that he monitored the transactions; and that the drugs that were in evidence were the same ones that the defendant had sold to the informant. The defendant argued that the officer's conclusion about the drugs must have rested on assertions from the informant, and therefore his right to confrontation was violated. The defendant relied upon *Meises,* but the court distinguished that case, because here the officer's testimony was based on his own personal observations and did not necessarily rely on anything said by the informant. The fact that the officer's surveillance was not airtight did not raise a confrontation issue, rather it raised a question of weight as to the officer's conclusion.

Testimonial statements to law enforcement were admitted by implication, in violation of the Confrontation Clause: ***United States v. Kizzee,*** 877 F.3d 650 (5th Cir. 2017): The defendant was suspected of drug-dealing; an officer arrested Brown after leaving the defendant's house and Brown implicated the defendant. At trial, the officer was asked only whether he asked Brown about the defendant's drug activity. The officer responded that he asked but did not state Brown's answers. The officer was asked what he did after receiving Brown's answers and he responded that he got a warrant to search the defendant's house. The court found that the officer's testimony "introduced Brown's out-of-court testimonial statements by implication" and that an officer's testimony "that allows a fact-finder to infer the statements made to him --- even without revealing

the content of those statements --- is hearsay." ***Accord United States v. Jones,*** 930 F.3d 366 ((5th Cir. 2019) ("Agent Clayborne testified that he *knew* that Jones had received a large amount of methamphetamine because of what the confidential informant told him he had heard from others. The jury was not required to make any logical inferences, clear or otherwise, to link the informant's statement to Jones's guilt"; moreover, the informant's statement was not properly offered to explain the police investigation, because the statement exceeded that permissible purpose by specifically linking the defendant to the crime--- therefore the Agent's testimony rendered testimonial hearsay in violation of the Confrontation Clause.). ***Accord Atkins v. Hooper,*** 969 F.3d 200 (5th Cir. 2020) ("explain-the investigation exceptions to hearsay cannot displace the Confrontation Clause"; statement by a cohort specifically identifying the defendant was in effect offered for its truth). ***Accord United States v. Sharp,*** 6 F.4th 573 (5th Cir. 2021) (in a drug prosecution, a statement from an informant that the defendant was selling drugs was erroneously admitted to explain the investigation; the officer could have just said a tip prompted him to investigate; noting that "backdooring highly inculpatory hearsay via an explaining-the-investigation rationale is a recurring problem."); ***United States v. Hamman,*** 33 F.4th 759 (5th Cir. 2022) (an officer described a drug transaction but was not at the transaction; the government argued that there was no confrontation violation because the officer only testified to the transaction, not any statement; but the court found a confrontation violation, because the officer was relying on testimonial statements from another officer who saw the transaction: "The question is not whether Hamann can identify a particular statement made by a non-testifying declarant, but whether the officer's testimony allows a factfinder to infer the statements made to him.").

Compare United States v. Sosa, 897 F.3d 615 (5th Cir. 2018): Appealing a conviction for bringing methamphetamine into the United States, the defendant argued that his right to confrontation was violated when an officer was allowed to testify that an undercover agent told him that the defendant's mother was recruiting drug couriers. The court found no error because the statement was not offered for its truth. Rather it was offered to explain why the officer took investigative steps regarding the defendant's mother. The court stated that "there is not a hearsay or a confrontation problem when the evidence is not offered for the truth of the matter asserted." The court emphasized, citing *Kizzee,* that "courts must be vigilant in ensuring that these attempts to 'explain the officer's actions' with out-of-court statements do not allow the backdoor introduction of highly inculpatory statements that the jury may also consider for its truth." In this case, the court found no such danger, because the undercover officer's statement was probative in explaining the police investigation, and the prejudicial effect was not high because the statement only implicated the defendant's mother, who was an acknowledged participant in the drug activity.

Statements to law enforcement were testimonial, and right to confrontation was violated even though the statements were not stated in detail at trial: *Ocampo v. Vail,* 649 F.3d 1098 (9th Cir. 2011): In a murder case, an officer testified that on the basis of an interview with Vazquez, the police were able to rule out suspects other than the defendant. Vazquez was not produced for trial. The state court found no confrontation violation on the ground that the officer did not testify to the substance of anything Vazquez said. But the court found that the state court

unreasonably applied *Crawford* and reversed the district court's denial of a grant of habeas corpus. The statements from Vazquez were obviously testimonial because they were made during an investigation of a murder. And the court held that the Confrontation Clause bars not only quotations from a declarant, but also any testimony at trial that conveys the substance of a declarant's testimonial hearsay statement. It reasoned as follows:

> Where the government officers have not only "produced" the evidence, but then condensed it into a conclusory affirmation for purposes of presentation to the jury, the difficulties of testing the veracity of the source of the evidence are not lessened but exacerbated. With the language actually used by the out-of-court witness obscured, any clues to its truthfulness provided by that language --- contradictions, hesitations, and other clues often used to test credibility --- are lost, and instead a veneer of objectivity conveyed.
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> * * *
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> Whatever locution is used, out-of-court statements admitted at trial are "statements" for the purpose of the Confrontation Clause * * * if, fairly read, they convey to the jury the substance of an out-of-court, testimonial statement of a witness who does not testify.

See also United States v. Brooks, 772 F.3d 1161 (9th Cir. 2014): An agent testified that he telephoned a postal supervisor and provided him a description of the suspect, and then later searched a particular parcel with a tracking number and mailing information he had been provided over the phone as identifying the package mailed by the suspect. The postal supervisor was not produced for trial. The government argued that the agent's testimony did not violate the Confrontation Clause because the postal supervisor's actual statements were never offered at trial. But the court declared that "out-of-court statements need not be repeated verbatim to trigger the protections of the Confrontation Clause." Fairly read, the agent's testimony revealed the substance of the postal supervisor's statements. And those statements were made with the motivation that they be used in a criminal prosecution. Therefore the agent's testimony violated the Confrontation Clause.

Accord United States v. Benamor, 937 F.3d 1182 (9th Cir. 2019): In a felon-firearm prosecution, the trial judge declared that an officer's conversation with the defendant's landlord (in which the landlord said that the defendant had a shotgun in his car) could not be admitted because the landlord's accusations were testimonial. The government called the officer who was asked only whether the conversation "affected your decision to investigate" and "confirmed your decision to arrest" the defendant. The officer answered yes to both questions. The court of appeals held that this testimony violated the defendant's right to confrontation. It noted that in context, the answers "implied that the landlord confirmed that Defendant possessed the shotgun" and that the government "made that implication unmistakable during closing argument by again emphasizing the landlord's statement." The court stated that it would be an unreasonable application of *Crawford* "to allow police officers to testify to the substance of an unavailable witness's testimonial statements so long as they do so descriptively rather than verbatim or in detail." The court also noted that a brief description may actually be worse for the defendant than a verbatim description of the testimonial hearsay, quoting from prior cases: "With the language actually used

by the out-of-court witness obscured, any clues to its truthfulness provided by that language --- contradictions, hesitations, and other clues often used to test credibility --- are lost, and instead, a veneer of objectivity conveyed."

Informal Circumstances, Private Statements, No Law Enforcement Involvement, etc.

Statement of young child to his teacher is not sufficiently formal to be testimonial: ***Ohio v. Clark,*** 576 U.S. 237 (2015): This case is fully discussed in Part I. The case involved a statement from a three-year-old boy to his teachers. It accused the defendant of injuring him. The Court held that a statement is extremely unlikely to be found testimonial in the absence of some participation by or with law enforcement. The presence of law enforcement is what signifies that a statement is made formally with the motivation that it will be used in a criminal prosecution. The Court did not establish a bright-line rule, however, leaving at least the remote possibility that an accusation might be testimonial even if law enforcement had no role in the making of the statement.

Private conversations and casual remarks are not testimonial: ***United States v. Malpica-Garcia,*** 489 F.3d 393 (1st Cir. 2007): In a drug prosecution, the defendant argued that testimony of his former co-conspirators violated *Crawford* because some of their assertions were not based on personal knowledge but rather were implicitly derived from conversations with other people (e.g., that the defendant ran a protection racket). The court found that if the witnesses were in fact relying on accounts from others, those accounts were not testimonial. The court noted that the information was obtained from people "in the course of private conversations or in casual remarks that no one expected would be preserved or later used at trial." There was no indication that the statements were made "to police, in an investigative context, or in a courtroom setting."

Threats to cooperating witness were not testimonial: ***United States v. Kirk Tang Yuk,*** 855 F.3d 57 (2nd Cir. 2018): A cooperating witness testified that he felt intimidated by two inmates who were friends of the defendant. The defendant argued that the threats were testimonial, but the court held that the threats were obviously not intended to be used as part of an investigation or prosecution, and so were not testimonial.

Informal letter found reliable under the residual exception is not testimonial: ***United States v. Morgan,*** 385 F.3d 196 (2nd Cir. 2004): In a drug trial, a letter written by the co-defendant was admitted against the defendant. The letter was written to a boyfriend and implicated both the defendant and the co-defendant in a conspiracy to smuggle drugs. The court found that the letter was properly admitted under Rule 807, and that it was not testimonial under *Crawford.* The court noted the following circumstances indicating that the letter was not testimonial: 1) it was not written in a coercive atmosphere; 2) it was not addressed to law enforcement authorities; 3) it was written to an intimate acquaintance; 4) it was written in the privacy of the co-defendant's hotel room; 5) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 6) it was not written to curry favor with the authorities or with anyone

else. These were the same factors that rendered the hearsay statement sufficiently reliable to qualify under Rule 807.

Informal conversation between the defendant and an undercover informant was not testimonial*: United States v. Burden,* 600 F.3d 204 (2nd Cir. 2010): Appealing RICO and drug convictions, the defendant argued that the trial court erred in admitting a recording of a drug transaction between the defendant and a cooperating witness. The defendant argued that the statements on the recording were testimonial, but the court disagreed and affirmed. The defendant's part of the conversation was not testimonial because he was not aware at the time that the statement was being recorded or would be potentially used at his trial. As to the informant, "anything he said was meant not as an accusation in its own right but as bait."

> **Note: Other courts, as seen in the "Not Hearsay" section below, have come to the same result as the Second Circuit in *Burden,* but using a different analysis: 1) admitting the defendant's statement does not violate the Confrontation Clause because it is his own statement and he doesn't have a right to confront himself; 2) the informant's statement, while testimonial, is not offered for its truth but only to put the defendant's statements in context --- therefore it does not violate the right to confrontation because it is not offered as an accusation.**

Prison telephone calls between defendant and his associates were not testimonial: *United States v. Jones,* 716 F.3d 851 (4th Cir. 2013): Appealing from convictions for marriage fraud, the defendant argued that the trial court erred in admitting telephone conversations between the defendant and his associates, who were incarcerated at the time. The calls were recorded by the prison. The court found no error in admitting the conversations because they were not testimonial. The calls involved discussions to cover up and lie about the crime, and they were casual, informal statements among criminal associates, so it was clear that they were not primarily motivated to be used in a criminal prosecution. The defendant argued that the conversations were testimonial because the parties knew they were being recorded. But the court noted that "a declarant's understanding that a statement could potentially serve as criminal evidence does not necessarily denote testimonial intent" and that "just because recorded statements are used at trial does not mean they were created for trial." The court also noted that a prison "has significant institutional reasons for recording phone calls outside or procuring forensic evidence --- i.e., policing its own facility by monitoring prisoners' contact with individuals outside the prison." ***See also United States v. Benson,*** 937 F.3d 218 (4th Cir. 2020) ("testimonial evidence does not include statements made to friends in an informal setting").

Following *Clark,* the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker,* 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark.* The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Statements made to an undercover informant setting up a drug transaction are not testimonial: *Brown v. Epps,* 686 F.3d 281 (5th Cir. 2012)**:** The court found no error in the state court's admission of an intercepted conversation between the defendant, an accomplice, and an undercover informant. The conversation was to set up a drug deal. The court held that statements "unknowingly made to an undercover officer, confidential informant, or cooperating witness are not testimonial in nature because the statements are not made under circumstances which would lead an objective witness to reasonably believe that the statements would be available for later use at trial." The court elaborated further:

> The conversations did not consist of solemn declarations made for the purpose of establishing some fact. Rather, the exchange was casual, often profane, and served the purpose of selling cocaine. Nor were the unidentified individuals' statements made under circumstances that would lead an objective witness reasonably to believe that they would be available for use at a later trial. To the contrary, the statements were furthering a criminal enterprise; a future trial was the last thing the declarants were anticipating. Moreover, they were unaware that their conversations were being preserved, so they could not have predicted that their statements might subsequently become available at trial. * * * No witness goes into court to proclaim that he will sell you crack cocaine in a Wal-Mart parking lot. An objective analysis would conclude that the primary purpose of the unidentified individuals' statements was to arrange the drug deal. Their purpose was not to create a record for trial and thus is not within the scope of the Confrontation Clause.

Statements made by a victim to her friends and family are not testimonial: *Doan v. Carter,* 548 F.3d 449 (6th Cir. 2008): The defendant challenged a conviction for murder of his girlfriend. The trial court admitted a number of statements from the victim concerning physical abuse that the defendant had perpetrated on her. The defendant argued that these statements were testimonial but the court disagreed. The defendant contended that a statement is nontestimonial only if it is in response to an emergency, but the court rejected the defendant's "narrow characterization of nontestimonial statements." The court relied on the statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation * * * would be excluded, if at all, only by hearsay rules." ***See also United States v. Boyd,*** 640 F.3d 657 (6th Cir.

2011) (statements were non-testimonial because the declarant made them to a companion; stating broadly that "statements made to friends and acquaintances are non-testimonial").

Suicide note implicating the declarant and defendant in a crime was testimonial under the circumstances: ***Miller v. Stovall,*** 608 F.3d 913 (6th Cir. 2010): A former police officer involved in a murder wrote a suicide note to his parents, indicating he was going to kill himself so as not go to jail for the crime that he and the defendant committed. The note was admitted against the defendant. The court found that the note was testimonial and its admission against the defendant violated his right to confrontation, because the declarant could "reasonably anticipate" that the note would be passed on to law enforcement --- especially because the declarant was a former police officer.

> **Note: The court's "reasonable anticipation" test appears to be a broader definition of testimoniality than that applied by the Supreme Court in *Davis* and especially *Bryant*. The Court in *Davis* looked to the "primary motivation" of the speaker. In this case, the "primary motivation" of the declarant was probably to explain to his parents why he was going to kill himself, rather than to prepare a case against the defendant. So the case appears wrongly decided.**

Informal statements made about planned criminal activity are not testimonial: ***United States v. Klemis,*** 899 F.3d 436 (7th Cir. 2017): In a narcotics prosecution in which a user died, the court held that statements by the victim to a friend, that he had stolen from her in order to pay a drug debt to the defendant, were not testimonial. The court reasoned that the Supreme Court in *Ohio v. Clark* declared that a statement was very unlikely to be testimonial if it was made outside the law enforcement context. Here, spontaneous statements to a friend about attempts to borrow or steal from her to pay a drug debt, were not "efforts to create an out-of-court substitute for trial testimony."

Statements made by an accomplice to a jailhouse informant are not testimonial: ***United States v. Honken,*** 541 F.3d 1146 (8th Cir. 2008): When the defendant's murder prosecution was pending, the defendant's accomplice (Johnson) was persuaded by a fellow inmate (McNeese) that Johnson could escape responsibility for the crime by getting another inmate to falsely confess to the crime --- but that in order to make the false confession believable, Johnson would have to disclose where the bodies were buried. Johnson prepared maps and notes describing where the bodies were buried, and gave it to McNeese with the intent that it be delivered to the other inmate who would falsely confess. In fact this was all a ruse concocted by McNeese and the authorities to get Johnson to confess, in which event McNeese would get a benefit from the government. The notes and maps were admitted at the defendant's trial, over the defendant's objection that they were testimonial. The defendant argued that Johnson had been subjected to the equivalent of a

police interrogation. But the court held that the evidence was not testimonial, because Johnson didn't know that he was speaking to a government agent. It explained as follows:

> Johnson did not draw the maps with the expectation that they would be used against Honken at trial * * * . Further, the maps were not a "solemn declaration" or a "formal statement." Rather, Johnson was more likely making a casual remark to an acquaintance. We simply cannot conclude Johnson made a "testimonial" statement against Honken without the faintest notion that she was doing so.

See also United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008) (private conversation between inmates about a future course of action is not testimonial).

Incriminatory statements made by an accomplice from a telephone in jail are not testimonial: ***United States v. LeBeau,*** 867 F.3d 960 (8th Cir. 2017): The defendant's codefendant made coded calls while in jail to further drug activity. The defendant argued that these statements were testimonial because the codefendant was aware --- based on a message played at the beginning of the call --- that his call was being monitored by law enforcement. But the court rejected this argument, stating that even though the codefendant might have anticipated that his statements were used in a criminal prosecution, his primary motivation was not related to law enforcement: "the primary purpose of the calls was to further the drug conspiracy, not to create a record for a criminal prosecution." The fact that the codefendant spoke in code was strong evidence that his primary motivation was *not* to have his statement used in a criminal prosecution.

Statement from one friend to another in private circumstances is not testimonial: ***United States v. Wright,*** 536 F.3d 819 (8th Cir. 2008): The defendant was charged with shooting two people in the course of a drug deal. One victim died and one survived. The survivor testified at trial to a private conversation he had with the other victim, before the shootings occurred. The court held that the statements of the victim who died were not testimonial. The statements were made under informal circumstances to a friend. The court relied on the Supreme Court's statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial.

Accusatory statements in a victim's diary are not testimonial: ***Parle v. Runnels***, 387 F.3d 1030 (9th Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The court held that the victim's diary was not testimonial, as it was a private diary of daily events. There was no indication that it was prepared for use at a trial.

Jailhouse conversations among coconspirators were not testimonial: *United States v. Alcorta,* 853 F.3d 1123 (10th Cir. 2017): Affirming drug convictions, the court rejected the defendant's argument that admitting jailhouse conversations of his coconspirators violated his right to confrontation. The court stated that to be testimonial, the statements must be made "with the primary purpose of creating evidence for the prosecution." The court concluded that "[t]he statements here --- jailhouse conversations between criminal codefendants (none of whom were cooperating with the government) --- do not satisfy that definition because that was not their purpose; quite the opposite."

Informal text messages between doctor and patients regarding opioid prescriptions are not testimonial: *United States v. Otuonye,* 995 F.3d 1191 (10th Cir. 2021): In a prosecution of a pharmacist for violation of the Controlled Substances Act, the court found that admission of texts between a doctor and his patients on where to fill opioid prescriptions were not testimonial. There was no indication that these texts were sent with the primary purpose that they would be used in a criminal prosecution.

Private conversation between mother and son is not testimonial: *United States v. Brown,* 441 F.3d 1330 (11th Cir. 2006): In a murder prosecution, the court admitted testimony that the defendant's mother received a phone call, apparently from the defendant; the mother asked the caller whether he had killed the victim, and then the mother started crying. The mother's reaction was admitted at trial as an excited utterance. The court found no violation of *Crawford.* The court reasoned as follows:

> We need not divine any additional definition of "testimonial" evidence to conclude that the private conversation between mother and son, which occurred while Sadie Brown was sitting at her dining room table with only her family members present, was not testimonial. The phone conversation Davis overheard obviously was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial. Thus, it is not testimonial and its admission is not barred by *Crawford*. (Citations omitted).

Defendant's lawyer's informal texts with I.R.S. agent found not testimonial: *United States v. Wilson,* 788 F.3d 1298 (11th Cir. 2015): The defendant was charged with converting checks that he knew to be issued as a result of fraudulently filed income tax returns. He claimed that he was a legitimate cashier and did not know that the checks were obtained by fraud. The trial court admitted texts sent by the defendant's lawyer to the I.R.S. The texts involved the return of certain records that the I.R.S. agent had allowed the defendant to take to copy; the texts contradicted the defendant's account at trial that he didn't know he had to return the boxes (in essence a showing of consciousness of guilt). The defendant argued that the lawyer's texts to the I.R.S. agent were testimonial, but the court disagreed: "Here, the attorney communicated through informal text messages to coordinate the delivery of the boxes. The cooperative and informal

nature of those text messages was such that an objective witness would not reasonably expect the texts to be used prosecutorially." ***See also United States v. Mathis,*** 767 F.3d 1264 (11th Cir. 2014) (text messages between defendant and a minor concerning sex were informal, haphazard communications and therefore not made with the primary motive to be used in a criminal prosecution).

Interpreters

Interpreter is not a witness but merely a language conduit and so testimony recounting the interpreter's translation does not violate *Crawford*: *United States v. Orm Hieng,* 679 F.3d 1131 (9th Cir. 2012): At the defendant's drug trial, an agent testified to inculpatory statements the defendant made through an interpreter. The interpreter was not called to testify, and the defendant argued that admitting the interpreter's statements about what the defendant said violated his right to confrontation. The court found that the interpreter had acted as a "mere language conduit" and so he was not a witness against the defendant within the meaning of the Confrontation Clause. The court noted that in determining whether an interpreter acts as a language conduit, a court must undertake a case-by-case approach, considering factors such as "which party supplied the interpreter, whether the interpreter had any motive to lead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated." The court found that these factors cut in favor of the lower court's finding that the interpreter in this case had acted as a language conduit. Because the interpreter was only a conduit, the witness against the defendant was not the interpreter, but rather himself. The court concluded that when it is the defendant whose statements are translated, "the Sixth Amendment simply has no application because a defendant cannot complain that he was denied the opportunity to confront himself." ***See also United States v. Romo-Chavez,*** 681 F.3d 955 (9th Cir. 2012)(where an interpreter served only as a language conduit, the defendant's own statements were properly admitted under Rule 801(d)(2)(A), and the Confrontation Clause was not violated because the defendant was his own accuser and he had no right to cross-examine himself); ***United States v. Aifang Ye,*** 808 F.3d 395 (9th Cir. 2015) (adhering to pre-*Crawford* case law that a translator acting as a language conduit does not implicate the Confrontation Clause, because that case law "is not clearly irreconcilable with *Crawford*"; finding on the facts that the translator was a language conduit, by applying the four-factor test from *Orm Hieng*). .

Interpreter's statements were testimonial: *United States v. Charles,* 722 F.3d 1319 (11th Cir. 2013): The defendant was convicted of knowingly using a fraudulently authored travel document. When the defendant was detained at the airport, he spoke to the Customs Officer through an interpreter. At trial, the defendant's statements were reported by the officer. The interpreter was not called. The court held that the defendant had the right to confront the interpreter. It stated that the interpreter's translations were testimonial because they were rendered in the

course of an interrogation and for these purposes the interpreter was the relevant declarant. But the court found that the error was not plain and affirmed the conviction. The court did not address the conflicting authority in the Ninth Circuit, supra. ***See also United States v. Curbelo,*** 726 F.3d 1260 (11th Cir. 2013) (transcripts of a wiretapped conversation that were translated constituted the translator's implicit out-of-court representation that the translation was correct, and the translator's implicit assertions were testimonial; but there was no violation of the Confrontation Clause because a party to the conversation testified to what was said based on his independent review of the recordings and the transcript, and the transcript itself was never admitted at trial).

Interrogations, Tips to Law Enforcement, Etc.

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

Accomplice's statements during police interrogation are testimonial: *United States v. Alvarado-Valdez,* 521 F.3d 337 (5th Cir. 2008): The trial court admitted the statements of the defendant's accomplice that were made during a police interrogation. The statements were offered for their truth --- to prove that the accomplice and the defendant conspired with others to transport cocaine. Because the accomplice had absconded and could not be produced for trial, admission of his testimonial statements violated the defendant's right to confrontation.

Identification of a defendant, made to police by an incarcerated person, is testimonial: *United States v. Pugh,* 405 F.3d 390 (6th Cir. 2005): In a bank robbery prosecution, the court found a *Crawford* violation when the trial court admitted testimony from a police officer that he had brought a surveillance photo down to a person who was incarcerated, and that person identified the defendant as the man in the surveillance photo. This statement was testimonial under *Crawford* because "the term 'testimonial' at a minimum applies to police interrogations." The court also noted that the statement was sworn and that a person who "makes a formal statement to government officers bears testimony." ***See also United States v. McGee****,* 529 F.3d 691 (6th Cir. 2008) (confidential informant's statement identifying the defendant as the source of drugs was testimonial).

Circuit Court's opinion that an anonymous tip to law enforcement is testimonial was reversed by the Supreme Court on AEPDA grounds: *Etherton v. Rivard,* 800 F.3d 737 (6th Cir. 2015), ***rev'd sub nom., Woods v. Etherton,*** 136 S.Ct. 1149 (2016): On habeas review, the court held that an anonymous tip to law enforcement, accusing the defendant of criminal misconduct, was testimonial. It further held that the defendant's right to confrontation was violated at his trial where the tip was admitted into evidence for its truth. It noted that "[t]he prosecutor's repeated references both to the existence and the details of the tip went far beyond what was necessary for background --- thereby indicating the content of the tip was admitted for its truth." **But the Supreme Court, in a per curiam opinion, reversed the Sixth Circuit,** holding that it gave insufficient deference to the state court's determination that the anonymous tips were properly admitted for the non-hearsay purpose of explaining the context of the police investigation. The Court stated that a "fairminded jurist" could conclude "that repetition of the tip did not establish

that the uncontested facts it conveyed were submitted for their truth. Such a jurist might reach that conclusion by placing weight on the fact that the truth of the facts was not disputed. No precedent of this Court clearly forecloses that view."

Accomplice statement to law enforcement is testimonial: *United States v. Nielsen,* 371 F.3d 574 (9th Cir. 2004): Nielsen resided in a house with Volz. Police officers searched the house for drugs. Drugs were found in a floor safe. An officer asked Volz who had access to the floor safe. Volz said that she did not but that Nielsen did. This hearsay statement was admitted against Nielsen at trial. The court found this to be error, as the statement was testimonial under *Crawford*, because it was made to police officers during an interrogation. The court noted that even the first part of Volz's statement --- that she did not have access to the floor safe --- violated *Crawford* because it provided circumstantial evidence that Nielsen did have access.

Statement made by an accomplice after arrest, but before formal interrogation, is testimonial: *United States v. Summers,* 414 F.3d 1287 (10th Cir. 2005): The defendant's accomplice in a bank robbery was arrested by police officers. As he was walked over to the patrol car, he said to the officer, "How did you guys find us?" The court found that the admission of this statement against the defendant violated his right to confrontation under *Crawford.* The court explained as follows:

> Although Mohammed had not been read his *Miranda* rights and was not subject to formal interrogation, he had nevertheless been taken into physical custody by police officers. His question was directed at a law enforcement official. Moreover, Mohammed's statement * * * implicated himself and thus was loosely akin to a confession.

Statements made by accomplice to police officers during a search are testimonial: *United States v. Arbolaez,* 450 F.3d 1283 (11th Cir. 2006): In a marijuana prosecution, the court found error in the admission of statements made by one of the defendant's accomplices to law enforcement officers during a search. The government argued that the statements were offered not for truth but to explain the officers' reactions to the statements. But the court found that "testimony as to the details of statements received by a government agent . . . even when purportedly admitted not for the truthfulness of what the informant said but to show why the agent did what he did after he received that information constituted inadmissible hearsay." The court also found that the accomplice's statements were testimonial under *Crawford*, because they were made in response to questions from police officers.

Statements by victims to an officer about why they were refusing to testify were *not* testimonial: *United States v. Cooper,* 926 F.3d 718 (11th Cir. 2019): The defendant was charged with fraud and sex trafficking, resulting from a scheme in which he brought foreign exchange students to the U.S. but then hired them out for sex. By the time of trial, two of the victims were back in their country and were refusing to cooperate. An officer testified that he had contacted them and that they were refusing to cooperate because they feared humiliation, embarrassment, and further stress. The defendant argued that this testimony violated the Confrontation Clause because the victims' statements to the officer were testimonial. But the court disagreed. It stated that because the agent had questioned the victims "to understand why they refused to testify, not to investigate or establish any fact that was part of an element of the charged offenses or necessary to prove Cooper's guilt, their statements were not testimonial and did not implicate the Confrontation Clause."

Statements by customers to police officer about their motivation to obtain sex were testimonial: *United States v. Cooper,* 926 F.3d 718 (11th Cir. 2019): The defendant was charged with fraud and sex trafficking, resulting from a scheme in which he brought foreign exchange students to the U.S. but then hired them out for sex. At trial the government offered visitor logs for apartments leased by the defendant. The defendant argued that the logbooks did not show that the visitor were seeking sex when they visited. In response, the government called an officer who testified that he interviewed the men who registered on the log and they told him that they had visited the apartment to obtain sexual services. The court held that the officer's testimony violated the Confrontation Clause because the reports of the visitors about their motivation were testimonial. The court stated: "Statements to police officers are generally testimonial if the primary purpose is investigative. Agent Nguyen questioned the visitors during his investigation to gain facts probative of Cooper's guilt. Their statements were testimonial." The court found the error to be harmless.

Investigative Reports

Reports by a law enforcement officer on prior statements made by a cooperating witness were testimonial: ***United States v. Moreno,*** 809 F.3d 766 (3rd Cir. 2016): After a cooperating witness testified on direct, defense counsel attacked his credibility on the ground that he had made a deal. On redirect, the trial court allowed the witness to read into evidence the reports of a law enforcement officer who had interviewed the witness. The reports indicated that the witness had made statements consistent with his in-court testimony. The court of appeals found a violation of the Confrontation Clause, because the officer's hearsay statements (about what the witness had told him) were testimonial and the officer was not produced for cross-examination. The court found that the reports were "investigative reports prepared by a government agent in actual anticipation of trial."

Joined Defendants

(See also *Bruton* cases, supra)

Testimonial hearsay offered by another defendant violates *Crawford* where the statement can be used against the defendant: *United States v. Nguyen,* 565 F.3d 668 (9th Cir. 2009): In a trial of multiple defendants in a fraud conspiracy, one of the defendants offered statements he made to a police investigator. These statements implicated the defendant. The court found that the admission of the codefendant's statements violated the defendant's right to confrontation. The statements were clearly testimonial because they were made to a police officer during an interrogation. The court noted that the confrontation analysis "does not change because a co-defendant, as opposed to the prosecutor, elicited the hearsay statement. The Confrontation Clause gives the accused the right to be confronted with the witnesses against him. The fact that Nguyen's co-counsel elicited the hearsay has no bearing on her right to confront her accusers."

Judicial Findings and Judgments

Judicial findings and an order of judicial contempt are not testimonial: *United States v. Sine,* 493 F.3d 1021 (9th Cir. 2007): The court held that the admission of a judge's findings and order of criminal contempt, offered to prove the defendant's lack of good faith in a tangentially related fraud case, did not violate the defendant's right to confrontation. The court found "no reason to believe that Judge Carr wrote the order in anticipation of Sine's prosecution for fraud, so his order was not testimonial."

See also United States v. Ballesteros-Selinger, 454 F.3d 973 (9th Cir. 2006) (holding that an immigration judge's deportation order was nontestimonial because it "was not made in anticipation of future litigation").

Law Enforcement Involvement

Following *Clark,* the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker,* 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark.* The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Accusations made to child psychologist appointed by law enforcement were testimonial: *McCarley v. Kelly,* 759 F.3d 535 (6th Cir. 2014): A three year old boy witnessed a murder but would not talk to the police about it. The police sought out a child psychologist, who interviewed the boy with the understanding that she would try to "extract information" from him about the crime and refer that information to the police. Helping the child was, at best, a secondary motive. Under these circumstances, the court found that the child's statements to the psychologist were testimonial and erroneously admitted in the defendant's state trial. The court noted that the sessions "were more akin to police interrogations than private counseling sessions."

> **Note: *McCarley* was decided before *Ohio v. Clark,* where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. *McCarley* differs in one respect from *Clark,* though. In *McCarley,* the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark,* where the child was being interviewed by his teachers. Still, the result in *McCarley* is questionable after *Clark* --- and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer.**

Airline official's denial to board a plane after the defendant resists law enforcement officials was not testimonial: *United States v. Buluc,* 930 F.3d 383 (5th Cir. 2019): The defendant was convicted for taking action to prevent or hamper his removal from the United States. ICE officials brought him to a plane, and, due to his physical resistance, a Turkish Airlines official (Ozel) refused to let him board. The defendant argued that testimony of the ICE agents about Ozel's refusal violated his right to confrontation. But the court found that Ozel's statement was not testimonial even though law enforcement was involved: "Ozel's statement was made, not in response to police questioning, but instead during the heated encounter caused by Buluc's violent

resistance to being boarded. Under these circumstances, we do not find the primary purpose of the statement was to create evidence to incriminate Buluc at trial."

Note: Ozel's statement did not violation the Confrontation Clause for an independent reason: it wasn't hearsay. "I refuse to let you on the plane" is not hearsay because it is not an assertion of fact that is either true or false.

Police officer's count of marijuana plants found in a search is testimonial: *United States v. Taylor,* 471 F.3d 832 (7th Cir. 2006): The court found plain error in the admission of testimony by a police officer about the number of marijuana plants found in the search of the defendant's premises. The officer did not himself count all of the plants; part of his total count was based on a hearsay statement of another officer who assisted in the count. The court held that the officer's hearsay statement about the amount of plants counted was clearly testimonial as it was an evaluation prepared for purposes of criminal prosecution.

Social worker's interview of child-victim, with police officers present, was the functional equivalent of interrogation and therefore testimonial: *Bobadilla v. Carlson,* 575 F.3d 785 (8th Cir. 2009): The court affirmed the grant of a writ of habeas after a finding that the defendant's state conviction for child sexual abuse was tainted by the admission of a testimonial statement by the child-victim. A police officer arranged to have the victim interviewed at the police station five days after the alleged abuse. The officer sought the assistance of a social worker, who conducted the interview using a forensic interrogation technique designed to detect sexual abuse. The court found that "this interview was no different than any other police interrogation: it was initiated by a police officer a significant time after the incident occurred for the purpose of gathering evidence during a criminal investigation." The court found it important that the interview took place at the police station, it was recorded for use at trial, and the social worker utilized a structured, forensic method of interrogation at the behest of the police. Under the circumstances, the social worker "was simply acting as a surrogate interviewer for the police."

Note: *Bobadilla* was decided before *Ohio v. Clark,* where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. *Bobadilla* differs in one respect from *Clark,* though. In *Bobadilla,* the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark,* where the child was being interviewed by his teachers. Still, the result in *Bobadilla* is questionable after *Clark* --- and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer.

Statements made by a child-victim to a forensic investigator are testimonial: *United States v. Bordeaux,* 400 F.3d 548 (8th Cir. 2005): In a child sex abuse prosecution, the trial court admitted hearsay statements made by the victim to a forensic investigator. The court reversed the conviction, finding among other things that the hearsay statements were testimonial under *Crawford.* The court likened the exchange between the victim and the investigator to a police interrogation. It elaborated as follows:

> The formality of the questioning and the government involvement are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a "forensic" interview . . . That [the victim's] statements may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.
>
> **Note: This case was decided before *Ohio v. Clark,* where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. This case differs in one respect from *Clark,* though --- the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark,* where the child was being interviewed by his teachers. Still, the result here is questionable after *Clark* --- and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer.**
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> **Moreover, the court concedes that there may have been a dual motive here --- treatment being the other motive. At a minimum, a court would have to make the finding that the prosecutorial motive was primary, and the court did not do this.**

See also United States v. Eagle, 515 F.3d 794 (8th Cir. 2008) (statements from a child concerning sex abuse, made to a forensic investigator, are testimonial). ***Compare United States v. Peneaux,*** 432 F.3d 882 (8th Cir. 2005) (distinguishing *Bordeaux* where the child's statement was made to a treating physician rather than a forensic investigator, and there was no evidence that the interview resulted in any referral to law enforcement: "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial."); ***United States v. DeLeon,*** 678 F.3d 317 (4th Cir. 2012) (discussed below under "medical statements" and distinguishing *Bordeaux* and *Bobodilla* as cases where statements were essentially made to law enforcement officers and not for treatment purposes).

Machine-Generated Information

Printout from machine is not hearsay and therefore its admission does not violate *Crawford*: *United States v. Washington,* 498 F.3d 225 (4th Cir. 2007): The defendant was convicted of operating a motor vehicle under the influence of drugs and alcohol. At trial, an expert testified on the basis of a printout from a gas chromatograph machine. The machine issued the printout after testing the defendant's blood sample. The expert testified to his interpretation of the data issued by the machine --- that the defendant's blood sample contained PCP and alcohol. The defendant argued that *Crawford* was violated because the expert had no personal knowledge of whether the defendant's blood contained PCP or alcohol. He read *Crawford* to require the production of the lab personnel who conducted the test. But the court rejected this argument, finding that the machine printout was not hearsay, and therefore its use at trial by the expert could not violate *Crawford* even though it was prepared for use at trial. The court reasoned as follows:

> The technicians could neither have affirmed or denied independently that the blood contained PCP and alcohol, because all the technicians could do was to refer to the raw data printed out by the machine. Thus, the statements to which Dr. Levine testified in court . . . did not come from the out-of-court technicians [but rather from the machine] and so there was no violation of the Confrontation Clause. . . . The raw data generated by the diagnostic machines are the "statements" of the machines themselves, not their operators. But "statements" made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause.

The court noted that the technicians might have needed to be produced to provide a chain of custody, but observed that the defendant made no objection to the authenticity of the machine's report.

> **Note: The result in *Washington* appears unaffected by *Williams,* as the Court in *Williams* had no occasion to consider whether a machine output can be testimonial hearsay.**

See also United States v. Summers, 666 F.3d 192 (4th Cir. 2011): (expert's reliance on a "pure instrument read-out" did not violate the Confrontation Clause because such a read-out is not "testimony").

Compare United States v. Arce, 49 F.3d 382 (4th Cir. 2022): In a child pornography prosecution, use of a software program to categorize information from downloaded files does not violation the Confrontation Clause because it is machine-generated data. Further, using a machine to match hashtags is not a violation because the machine does not make a statement. However, labeling images as Child Exploitation Material (with the hashtag that matches a file possessed by

the defendant) constitutes a testimonial statement. That is not machine-generated data, but rather a conclusion based on human input.

Report extracted from cellphone data was machine data and so did not violate the Confrontation Clause: *United States v. Hill,* 35 F.4th 366 (5th Cir. 2022) In a robbery-murder prosecution, an officer testified to information extracted from the defendant's cellphones. But rather than the full, mechanically-extracted reports, the agent testified to versions that the agent had edited down to those portions he deemed relevant. The defendant argued that admitting information from the reports violated the Confrontation Clause, because the agent did not actually extract the information from the phones. But the court disagreed. It found that the extraction reports were "raw machine created data." As such, they were not hearsay and so admitting them could not violate the Confrontation Clause.

A defendant does not have a right to cross-examine an analyst about automated statements in a report that the analyst did not make: ***United States v. Miller***, 982 F.3d 412, 437 (6th Cir. 2020): The court held that the admission of automatically generated sections of a CyberTipline report did not violate the Confrontation Clause because the content at issue involved no human input and therefore could not be testimonial. The record at issue was a three-part report– parts A and B were automatically generated, and Part C was generated by an analyst. The defendant claimed that the report violated the confrontation clause because he did not have an opportunity to cross-examine the NCMEC analyst about the location information in Section B. However, while the statements made in Part C by the analyst were arguably testimonial, that did not give a right to cross-examine the analyst about the automated statements that the analyst did not make. The court made clear that "[a] computer system that generates data and inputs the data into a report cannot be described as a 'witness' that gives 'testimony.'"

Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone."

Human input into machine can constitute testimonial hearsay: *United States v. Juhic,* 987 F.3d 794 (8th Cir. 2021): The court determined that computer-generated reports contained testimonial hearsay because "human statements and determinations were used to classify" the relevant files that were referenced in the reports and later offered against the defendant. The court stated that although "machine-generated reports usually do not qualify as 'statements' for hearsay purposes," they can "become hearsay when developed with human input."

Google satellite images, and machine-generated location markers, are not hearsay and therefore, even if prepared for trial, their admission does not violate the Confrontation Clause: *United States v. Lizarraga-Tirado,* 789 F.3d 1107 (9th Cir. 2015): The defendant was convicted of illegal re-entry into the United States. The defendant contended that when he was arrested, he was still on the Mexican side of the border. At trial the arresting officer testified that she contemporaneously recorded the coordinates of the defendant's arrest using a handheld GPS device. To illustrate the location of these coordinates, the government introduced a Google Earth satellite image. The image contained a "tack" showing the location of the coordinates to be on the United States side of the border. There was no testimony on whether the tack was automatically generated or manually placed and labeled. The defendant argued that both the satellite image and the tack were inadmissible hearsay and that their admission violated his right to confrontation. As to the satellite image itself, the court found that "[b]ecause a satellite image, like a photograph, makes no assertion, it isn't hearsay." The court found the tack to be a more difficult question. It noted that "[u]nlike a satellite image itself, labeled markers added to a satellite image do make clear assertions. Indeed, that is what makes them useful." The court concluded that if a tack is placed manually and then labeled, "it's classic hearsay" --- for example, a dot manually labeled with the name of a town "asserts that there's a town where you see the dot." On the other hand, "[a] tack placed by the Google Earth program and automatically labeled with GPS coordinates isn't hearsay" because it is completely machine-generated and so no assertion is being made.

In this case, the court took judicial notice that the tack was automatically generated because the court itself accessed Google Earth and typed in the same coordinates to which the arresting officer testified --- which resulted in a tack identical to the one shown on the satellite image admitted at trial. Thus the program "analyze[d] the GPS coordinates and, without any human intervention, place[d] a labeled tack on the satellite image." The court concluded that "[b]ecause the program makes the relevant assertion --- that the tack is accurately placed at the labeled GPS coordinates --- there's no statement as defined by the hearsay rule." The court noted that any issues of malfunction or tampering present questions of authenticity, not hearsay, and the defendant made no authenticity objection. Finally, "[b]ecause the satellite images and tack-coordinates pair weren't hearsay, their admission also didn't violate the Confrontation Clause."

Electronic tabulation of phone calls is not a statement and therefore cannot be testimonial hearsay: *United States v. Lamons,* 532 F.3d 1251 (11th Cir. 2008): Bomb threats were called into an airline, resulting in the disruption of a flight. The defendant was a flight attendant accused of sending the threats. The trial court admitted a CD of data collected from telephone calls made to the airline; the data indicated that calls came from the defendant's cell phone at the time the threats were made. The defendant argued that the information on the CD was testimonial hearsay, but the court disagreed, because the information was entirely machine-generated. The court stated that "the witnesses with whom the Confrontation Clause is concerned are *human* witnesses" and that the purposes of the Confrontation Clause "are ill-served through confrontation of the machine's human operator. To say that a wholly machine-generated statement is unreliable is to speak of mechanical error, not mendacity. The best way to advance the truth-seeking process * * * is through the process of authentication as provided in Federal Rule of Evidence 901(b)(9)."

The court concluded that there was no hearsay statement at issue, and therefore the Confrontation Clause was inapplicable.

Still photos from surveillance videos are not testimonial hearsay: *United States v. Clotaire,* 963 F.3d 1288 (11th Cir. 2020): The defendant argued that admission of still photos taken from video surveillance tapes at an ATM violated his right to confrontation. But the court disagreed. It stated: "Surveillance cameras are not witnesses and surveillance photos are not statements."

Medical/Therapeutic Statements

Statements of victim to her therapist, discussing the effect of defendants' actions on her emotional condition, were not testimonial: ***United States v. Gonzalez,*** 905 F.3d 165 (3rd Cir. 2018): The defendants were charged with stalking and cyberstalking causing death. The victim made statements to her therapist (and others) about the anxiety and depression caused by the defendant's activities. The statements to the therapist were admitted under Rule 803(4), and the appellate court found no error in that ruling. The defendant argued that the statements were testimonial but the court disagreed. The court stated that "the purpose of a visit to a therapist is not to create a record in a criminal case." ***See also United States v. Gonzalez,*** 905 F.3d 165 (3rd Cir. 2018) (Cyberstalking prosecution: "Belford's statements to her therapist are not testimonial in nature. As her therapist testified, the purpose of Belford's visits were to receive therapy to treat her anxiety and depression. The purpose of a visit to a therapist is not to create a record for a future criminal case. * * * Accordingly, the admission of Belford's statements as evidence did not violate the Confrontation Clause.").

Statements by victim of abuse to treatment manager of Air Force medical program were admissible under Rule 803(4) and non-testimonial: ***United States v. DeLeon,*** 678 F.3d 317 (4th Cir. 2012): The defendant was convicted of murdering his eight-year-old son. Months before his death, the victim had made statements about incidents in which he had been physically abused by the defendant as part of parental discipline. The statements were made to the treatment manager of an Air Force medical program that focused on issues of family health. The court found that the statements were properly admitted under Rule 803(4) and (essentially for that reason) were non-testimonial, because their primary purpose was not for use in a criminal prosecution of the defendant. The court noted that the statements were not made in response to an emergency, but that emergency was only one factor under *Bryant.* The court also recognized that the Air Force program "incorporates reporting requirements and a security component" but stated that these factors were not sufficient to render statements to the treatment manager testimonial. The court explained why the "primary motive" test was not met in the following passage:

> We note first that Thomas [the treatment manager] did not have, nor did she tell Jordan [the child] she had, a prosecutorial purpose during their initial meeting. Thomas was not employed as a forensic investigator but instead worked * * * as a treatment manager. And there is no evidence that she recorded the interview or otherwise sought to memorialize Jordan's answers as evidence for use during a criminal prosecution. * * * Rather, Thomas used the information she gathered from Jordan and his family to develop a written treatment plan and continued to provide counseling and advice on parenting techniques in subsequent meetings with family members. * * * Thomas also did not meet with Jordan in an interrogation room or at a police station but instead spoke with him in her office in a building that housed * * * mental health service providers.

> Importantly, ours is also not a case in which the social worker operated as an agent of law enforcement. * * * Here, Thomas did not act at the behest of law enforcement, as there was no active criminal investigation when she and Jordan spoke. * * * An objective review of the parties' actions and the circumstances of the meeting confirms that the primary purpose was to develop a treatment plan --- not to establish facts for a future criminal prosecution. Accordingly, we hold that the contested statements were nontestimonial and that their admission did not violate DeLeon's Sixth Amendment rights.
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> **Note: The court's analysis is strongly supported by the subsequent Supreme Court decision in *Ohio v. Clark.* The *Clark* Court held that: 1) Statements by children are extremely unlikely to be primarily motivated for use in a criminal prosecution; and 2) public officials do not become an agent of law enforcement by asking about suspected child abuse.**

Following *Clark,* the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker,* 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark.* The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Admission of a minor's redacted medical record did not violate the Confrontation Clause: *United States v. Norwood*, 982 F.3d 1032, 1051 (7th Cir. 2020): The court held that admission of statements made by a minor to a sexual assault nurse did not violate the Confrontation clause because although a sexual assault nurse receives special training to aid law enforcement in sexual assault investigations, the Government's redactions, "excised the parts of the victim's statements that lacked the primary purpose of medical treatment." Here, the court found that the redactions left only the victim's descriptions of what happened and when it happened. Those statements were for the primary purpose of medical treatment. The court noted that "[b]ecause identity statements are rarely for the primary purpose of medical treatment, redacting Mr. Norwood's name was a prudent, and here necessary, approach." ***See also Wilson v. Boughton,*** 41 F.4th 803 (7th Cir. 2022): Wilson was convicted in state court for sexual assault of FT, a seven-year-old girl. He brought a habeas petition contending that his lawyer was ineffective for not challenging, on confrontation grounds, a record prepared by a nurse of statements made by FT when the nurse was examining her. The court rejected the argument, because the notes were not testimonial. The court relied on three factors: 1) the consultation and notes were taken before any sexual abuse was suspected or any suspect identified; 2) the nurse was not a law enforcement officer; and 3) the setting in which the examination occurred did not resemble a formal interrogation, but rather indicated the predominant motive of diagnosis and treatment.

Statements admitted under Rule 803(4) are presumptively non-testimonial: *United States v. Peneaux,* 432 F.3d 882 (8th Cir. 2005): "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial."

Statements by an assault victim reporting the assault, and level of pain, to a prison nurse, were not testimonial: *United States v. Latu,* 46 F.4th 1165 (9th Cir. 2022): After a prisoner was assaulted, he was treated by the prison nurse for a broken jaw and asked what happened. He reported that he was assaulted, and that his pain level was an 8 out of 10. The defendant argued that the victim's statements were testimonial, but the court disagreed. The primary motivation of the statements was to seek treatment. The nurse asked about cause because it was pertinent to treatment and diagnosis. Importantly, the victim did not identify or accuse the defendant. While the nurse was employed by BOP, she was not acting as a law enforcement officer in treating the victim.

Miscellaneous

Complaints by borrowers were made with the primary purpose of seeking relief. ***United States v. Moseley***, 980 F.3d 9, 28 (2d Cir. 2020); The defendant ran a "payday-loan business," that was shut down by the Consumer Financial Protection Bureau on the basis of the illegalities later prosecuted against the defendant individually. The district court allowed the verbatim introduction of borrower complaints about Moseley's business into evidence, which Mosely challenged as being incorrectly admitted because they were testimonial. The court held that the complaints by the borrowers were not testimonial because they were made with the primary purpose of "seeking relief from the onerous terms" of the defendant's loans—not to provide evidence for eventual use in the defendant's prosecution.

Labels on electronic devices, indicating that they were made in Taiwan, are not testimonial: ***United States v. Napier*****,** 787 F.3d 333 (6th Cir. 2015): In a child pornography prosecution, the government proved the interstate commerce element by offering two cellphones used to commit the crimes. The cellphones were each labeled "Made in Taiwan." The defendant argued that the statements on the labels were hearsay and testimonial. But the court found that the labels clearly were not made with the primary motive of use in a criminal prosecution.

> **Note: The court in *Napier* reviewed the confrontation argument for plain error, because the defendant objected at trial only on hearsay grounds; a hearsay objection does not preserve a claim of error on confrontation grounds.**

Trade inscriptions are nontestimonial: ***United States v. Wehrle***, 985 F.3d 549, 556 (7th Cir. 2021): The court found the district court did not abuse its discretion in finding that trade inscriptions affixed to the defendant's camera, flashcard, and hard drives were nontestimonial. The inscriptions denoting an item's foreign origin were not made primarily for the purpose of use in a criminal prosecution. Rather, they were created to comply with federal regulations requiring labels of place of origin for imported products.

Statement of an accomplice made to his attorney is not testimonial: ***Jensen v. Pliler,*** 439 F.3d 1086 (9th Cir. 2006): Taylor was in custody for the murder of Kevin James. He confessed the murder to his attorney, and implicated others, including Jensen. After Taylor was released from jail, Jensen and others murdered him because they thought he talked to the authorities. Jensen was tried for the murder of both James and Taylor, and the trial court admitted the statements made by Taylor to his attorney (Taylor's next of kin having waived the privilege). The court found that the statements made by Taylor to his attorney were not testimonial, as they "were not made to a government officer with an eye toward trial, the primary abuse at which the Confrontation Clause was directed." Finally, while Taylor's statements amounted to a confession, they were not given to a police officer in the course of interrogation.

Non-Testimonial Hearsay and the Right to Confrontation

Clear statement and holding that *Crawford* overruled *Roberts* even with respect to non-testimonial hearsay: *Whorton v. Bockting*, 549 U.S. 406 (2007): The habeas petitioner argued that testimonial hearsay was admitted against him in violation of *Crawford.* His trial was conducted ten years before *Crawford*, however, and so the question was whether *Crawford* applies retroactively to benefit habeas petitioners. Under Supreme Court jurisprudence, a new rule is applicable on habeas only if it is a "watershed" rule that is critical to the truthseeking function of a trial. The Court found that *Crawford* was a new rule because it overruled *Roberts.* It further held that *Crawford* was not essential to the truthseeking function; its analysis on this point is pertinent to whether *Roberts* retains any vitality with respect to non-testimonial hearsay. The Court declared as follows:

> *Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials. Indeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay statements. Accordingly, it is not surprising that the overall effect of *Crawford* with regard to the accuracy of fact-finding in criminal cases is not easy to assess.
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> With respect to *testimonial* out-of-court statements, *Crawford* is more restrictive than was *Roberts*, and this may improve the accuracy of fact-finding in some criminal cases. Specifically, under *Roberts*, there may have been cases in which courts erroneously determined that testimonial statements were reliable. But see 418 F.3d at 1058 (O'Scannlain, J., dissenting from denial of rehearing en banc) (observing that it is unlikely that this occurred "in anything but the exceptional case"). *But whatever improvement in reliability Crawford produced in this respect must be considered together with Crawford's elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.* (Emphasis added).

One of the main reasons that *Crawford* is not retroactive (the holding in *Bochting*) is that it is not essential to the accuracy of a verdict. And one of the reasons *Crawford* is not essential to accuracy is that, with respect to non-testimonial statements, *Crawford conflicts* with accurate factfinding because it lifts all constitutional reliability requirements imposed by *Roberts.* Thus, if hearsay is non-testimonial, there is no constitutional limit on its admission.

Non-Verbal Information

See also the cases under the heading "Machine-Generated Evidence" supra.

Videotape of drug transaction was not hearsay and so its introduction did not violate the right to confrontation: ***United States v. Wallace,*** 753 F.3d 671 (7th Cir. 2014): In a drug prosecution, the government introduced a videotape, without sound, which appeared to show the defendant selling drugs to an undercover informant. The defendant argued that the tape was inadmissible hearsay and violated his right to confrontation, because the undercover informant was never called to testify. But the court disagreed and affirmed his conviction. The court reasoned that the video was

> a picture; it was not a witness who could be cross-examined. The agent narrated the video at trial, and his narration was a series of statements, so he was subject to being cross-examined and was, and thus was "confronted." [The informant] could have testified to what he saw, but what could he have said about the recording device except that the agents had strapped it on him and sent him into the house, whether the device recorded whatever happened to be in front of it? Rule 801(a) of the Federal Rules of Evidence does define "statement" to include "nonverbal conduct," but only if the person whose conduct it was "intended it as an assertion." We can't fit the videotape in this definition.

Photographs of seized evidence was not testimony so its admission did not violate the Confrontation Clause: ***United States v. Brooks,*** 772 F.3d 1161 (9th Cir. 2014): In a narcotics trial, the defendant objected to the admission of photographs of a seized package on the ground it would violate his right to confrontation. But the court disagreed. It noted that the *Crawford* Court defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." The photographs did not meet that definition because they "were not 'witnesses' against Brooks. They did not 'bear testimony' by declaring or affirming anything with a 'purpose.'"

Not Offered for Truth

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's own statements: *United States v. Bostick,* 791 F.3d 127 (D.C.Cir. 2015): In a surreptitiously taped conversation, the defendant made incriminating statements to a confidential informant in the course of a drug transaction. The defendant argued that admitting the informant's part of the conversation violated his right to confrontation because the informant was motivated to develop the conversation for purposes of prosecution. But the court found that the Confrontation Clause was inapplicable because the informant's statements were not offered for their truth, but rather to provide "context" for the defendant's own statements regarding the drug transaction. (And the defendant had no right to confront his own statements). Statements that are not hearsay cannot violate the Confrontation Clause even if they fit the definition of testimoniality.

Statement offered to explain a police investigation, and other statements offered to explain witnesses' motivation to cooperate after hearing them, were not hearsay and therefore admission did not violate the right to confrontation. *United States v. Hillie*, 14 F.4th 677 (D.C. Cir. 2021): The defendant was convicted of child sexual abuse. The court of appeals held that the trial judge did not abuse discretion in admitting evidence that a minor and her father had reported to a detective that the defendant had abused the minor. The evidence was non-hearsay because it was admitted to provide context for the origins and timeline of the government's investigation of the defendant, and not for its truth. Two other statements were found properly offered to explain why witnesses who heard them decided to cooperate with the prosecution. Accordingly, none of the challenged statements were offered for truth and therefore admission could not violate the defendant's right to confrontation.

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's own statements: *United States v. Hansen,* 434 F.3d 92 (1st Cir. 2006): After a crime and as part of cooperation with the authorities, the father of an accomplice surreptitiously recorded his conversation with the defendant, in which the defendant admitted criminal activity. The court found that the father's statements during the conversation were testimonial under *Crawford* --- as they were made specifically for use in a criminal prosecution. But their admission did not violate the defendant's right to confrontation. The defendant's own side of the conversation was admissible as a statement of a party-opponent, and the father's side of the conversation was admitted not for its truth but to provide context for the defendant's statements. *Crawford* does not bar the admission of statements

not offered for their truth. ***Accord United States v. Walter,*** 434 F.3d 30 (1st Cir. 2006) (*Crawford* "does not call into question this court's precedents holding that statements introduced solely to place a defendant's admissions into context are not hearsay and, as such, do not run afoul of the Confrontation Clause."); ***United States v. Santiago,*** 566 F.3d 65 (1st Cir. 2009) (statements were not offered for their truth "but as exchanges with Santiago essential to understand the context of Santiago's own recorded statements arranging to 'cook' and supply the crack"); ***United States v. Liriano,*** 761 F.3d 131 (1st Cir. 2014) (even though statements were testimonial, admission did not violation the Confrontation Clause where they were properly offered to place the defendant's responses in context). ***See also Furr v. Brady,*** 440 F.3d 34 (1st Cir. 2006) (the defendant was charged with firearms offenses and intimidation of a government witness; an accomplice's confession to law enforcement did not implicate *Crawford* because it was not admitted for its truth; rather, it was admitted to show that the defendant knew about the confession and, in contacting the accomplice thereafter, intended to intimidate him).

Note: Five members of the Court in *Williams* disagreed with Justice Alito's analysis that the Confrontation Clause was not violated because the testimonial lab report was not admitted for its truth. The question left from *Williams* is whether there are any potential not-for-truth uses of testimonial statements that will escape constitutional proscription. The answer is apparently that *Williams* does not extend to situations in which the statement has a *legitimate* not-for-truth purpose. Thus, Justice Thomas distinguishes the expert's use of the lab report from the prosecution's admission of an accomplice's confession in *Tennessee v. Street,* where the confession "was not introduced for its truth, but only to impeach the defendant's version of events." In *Street* the defendant challenged his confession on the ground that he had been coerced to copy Peele's confession. Peele's confession was introduced not for its truth but only to show that it differed from Street's. For that purpose, it didn't matter whether it was true. Justice Thomas stated that "[u]nlike the confession in *Street,* statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose" because "to use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true." Justice Kagan in her opinion essentially repeats Justice Thomas's analysis and agrees with his distinction between legitimate and illegitimate use of the "not-for-truth" argument. Both Justices Kagan and Thomas agree with the Court's statement in *Crawford* that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Both would simply add the proviso that the not-for-truth use must be *legitimate* or *plausible.*

It follows that the cases under this "not-for-truth" headnote are probably unaffected by *Williams,* as they largely permit admission of testimonial statements as offered "not-for-truth" only when that purpose is legitimate, i.e., *only when the statement is offered for a purpose as to which it is relevant regardless of whether it is true or not.*

Statements by informant to police officers, offered implausibly to prove the "background" of the police investigation, probably violate *Crawford,* but admission is not plain error: *United States v. Maher,* 454 F.3d 13 (1st Cir. 2006): At the defendant's drug trial, several accusatory statements from an informant (Johnson) were admitted ostensibly to explain why the police focused on the defendant as a possible drug dealer. The court found that these statements were testimonial under *Crawford*, because "the statements were made while the police were interrogating Johnson after Johnson's arrest for drugs; Johnson agreed to cooperate and he then identified Maher as the source of drugs. . . . In this context, it is clear that an objectively reasonable person in Johnson's shoes would understand that the statement would be used in prosecuting Maher at trial." The court then addressed the government's argument that the informant's statements were not admitted for their truth, but to explain the background of the police investigation:

> The government's articulated justification --- that any statement by an informant to police which sets context for the police investigation is not offered for the truth of the statements and thus not within *Crawford* --- is impossibly overbroad [and] may be used not just to get around hearsay law, but to circumvent *Crawford's* constitutional rule. . . . Here, Officer MacVane testified that the confidential informant had said Maher was a drug dealer, even though the prosecution easily could have structured its narrative to avoid such testimony. The . . . officer, for example, could merely say that he had acted upon "information received," or words to that effect. It appears the testimony was primarily given exactly for the truth of the assertion that Maher was a drug dealer and should not have been admitted given the adequate alternative approach.

The court noted, however, that the defendant had not objected to the admission of the informant's statements. It found no plain error, noting among other things, the strength of the evidence and the fact that the testimony "was followed immediately by a sua sponte instruction to the effect that

any statements of the confidential informant should not be taken as standing for the truth of the matter asserted, i.e., that Maher was a drug dealer who supplied Johnson with drugs."

Accomplice statements purportedly offered for "background" were actually admitted for their truth, resulting in a Confrontation Clause violation: *United States v. Cabrera-Rivera,* 583 F.3d 26 (1st Cir. 2009): In a robbery prosecution, the government offered hearsay statements that accomplices made to police officers. The government argued that the statements were not offered for their truth, but rather to explain how the government was able to find other evidence in the case. But the court found that the accusations were not properly admitted for the purpose of explaining the police investigation. The government at trial emphasized the details of the accusations that had nothing to do with leading the government to other evidence; and the government did not contend that one of the accomplice's confessions led to any other evidence. Because the statements were testimonial, and because they were in fact offered for their truth, admission of the statements violated *Crawford.*

> **Note: The result in *Cabrera-Rivera* is certainly unchanged by *Williams.* The prosecution's was not offering the accusations for any *legitimate* not-for-truth purpose.**

Statements offered to provide context for the defendant's part of a conversation were not hearsay and therefore could not violate the Confrontation Clause: *United States v. Hicks,* 575 F.3d 130 (1st Cir. 2009): The court found no error in admitting a telephone call that the defendant placed from jail in which he instructed his girlfriend how to package and sell cocaine. The defendant argued that admission of the girlfriend's statements in the telephone call violated *Crawford.* But the court found that the girlfriend's part of the conversation was not hearsay and therefore did not violate the defendant's right to confrontation. The court reasoned that the girlfriend's statements were admissible not for their truth but to provide the context for understanding the defendant's incriminating statements. The court noted that the girlfriend's statements were "little more than brief responses to Hicks's much more detailed statements." ***See also United States v. Occhiuto,*** 784 F.3d 862 (1st Cir. 2015) (statements by undercover informant made to defendant during a drug deal were properly admitted; they were offered not for their truth but to provide context for the defendant's own statements, and so they did not violate the Confrontation Clause).

Accomplice's confession, when offered in rebuttal to explain why police did not investigate other suspects and leads, is not hearsay and therefore its admission does not violate *Crawford: United States v. Cruz-Diaz,* 550 F.3d 169 (1st Cir. 2008): In a bank robbery prosecution, defense counsel cross-examined a police officer about the decision not to pursue certain investigatory opportunities after apprehending the defendants. Defense counsel identified "eleven missed opportunities" for tying the defendants to the getaway car, including potential fingerprint and DNA evidence. In response, the officer testified that the defendant's co-defendant had given a detailed confession. The defendant argued that introducing the cohort's confession violated his right to confrontation, because it was testimonial under *Crawford.* But the court found the confession to be not hearsay --- as it was offered for the not-for-truth purpose of explaining why the police conducted the investigation the way they did. Accordingly admission of the statement did not violate *Crawford.*

The defendant argued that the government's true motive was to introduce the confession for its truth, and that the not-for-truth purpose was only a pretext. But the court disagreed, noting that the government never tried to admit the confession until defense counsel attacked the thoroughness of the police investigation. Thus, introducing the confession for a not-for-truth purpose was proper rebuttal. The defendant suggested that "if the government merely wanted to explain why the FBI and police failed to conduct a more thorough investigation it could have had the agent testify in a manner that entirely avoided referencing Cruz's confession" --- for example, by stating that the police chose to truncate the investigation "because of information the agent had." But the court held that this kind of sanitizing of the evidence was not required, because it "would have come at an unjustified cost to the government." Such generalized testimony, without any context, "would not have sufficiently rebutted Ayala's line of questioning" because it would have looked like one more cover-up. The court concluded that "[w]hile there can be circumstances under which Clause concerns prevent the admission of the substance of a declarant's out-of-court statement where a less prejudicial narrative would suffice in its place, this is not such a case." ***See also United States v. Diaz,*** 670 F.3d 332 (1st Cir. 2012) (testimonial statement from one police officer to another to effect an arrest did not violate the right to confrontation because it was not hearsay: "The government offered Perez's out-of-court statement to explain why Veguilla had arrested [the defendant], not as proof of the drug sale that Perez allegedly witnesses. Out-of-court statements providing directions from one individual to another do not constitute hearsay.").

False alibi statements made to police officers by accomplices are testimonial, but admission does not violate the Confrontation Clause because they are not offered for their truth: *United States v. Logan,* 419 F.3d 172 (2nd Cir. 2005): The defendant was convicted of conspiracy to commit arson. The trial court admitted statements made by his coconspirators to the

police. These statements asserted an alibi, and the government presented other evidence indicating that the alibi was false. The court found no Confrontation Clause violation in admitting the alibi statements. The court relied on *Crawford* for the proposition that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than proving the truth of the matter asserted." The statements were not offered to prove that the alibi was true, but rather to corroborate the defendant's own account that the accomplices planned to use the alibi. Thus "the fact that Logan was aware of this alibi, and that [the accomplices] actually used it, was evidence of conspiracy among [the accomplices] and Logan."

> **Note: The *Logan* court reviewed the defendant's Confrontation Clause argument under the plain error standard. This was because defense counsel at trial objected on grounds of hearsay, but did not make a specific Confrontation Clause objection.**

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's statements: *United States v. Paulino,* 445 F.3d 211 (2nd Cir. 2006): The court stated: "It has long been the rule that so long as statements are not presented for the truth of the matter asserted, but only to establish a context, the defendant's Sixth Amendment rights are not transgressed. Nothing in *Crawford v. Washington* is to the contrary."

> **Note: This typical use of "context" is not in question after *Williams*, because the focus is on the defendant's statements and not on the truth of the declarant's statements. Use of context could be *illegitimate* however if the focus is in fact on the truth of the declarant's statements. See, e.g., *United States v. Powers* from the Sixth Circuit, infra.**

Co-conspirator statements made to government officials to cover-up a crime (whether true or false) do not implicate *Crawford* because they were not offered for their truth: *United States v. Stewart*, 433 F.3d 273 (2nd Cir. 2006)**:** In the prosecution of Martha Stewart, the government introduced statements made by each of the defendants during interviews with government investigators. Each defendant's statement was offered against the other, to prove that the story told to the investigators was a cover-up. The court held that the admission of these statements did not violate *Crawford,* even though they were "provided in a testimonial setting." It noted first that to the extent the statements were false, they did not violate *Crawford* because "*Crawford* expressly confirmed that the categorical exclusion of out-of-court statements that were not subject to contemporaneous cross-examination does not extend to evidence offered for purposes other than to establish the truth of the matter asserted." The defendants argued, however, that some of the statements made during the course of the obstruction were actually true, and as they were made to government investigators, they were testimonial. The court observed that

there is some tension in *Crawford* between its treatment of co-conspirator statements (by definition not testimonial) and statements made to government investigators (by their nature testimonial), where truthful statements are made as part of a conspiracy to obstruct justice. It found, however, that admitting the truthful statements did not violate *Crawford* because they were admitted not for their truth, but rather to provide context for the false statements. The court explained as follows:

> It defies logic, human experience and even imagination to believe that a conspirator bent on impeding an investigation by providing false information to investigators would lace the totality of that presentation with falsehoods on every subject of inquiry. To do so would be to alert the investigators immediately that the conspirator is not to be believed, and the effort to obstruct would fail from the outset. * * * The truthful portions of statements in furtherance of the conspiracy, albeit spoken in a testimonial setting, are intended to make the false portions believable and the obstruction effective. Thus, the truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire testimonial presentation and thereby obstruct justice.

> **Note: Offering a testimonial statement to prove it is false is a typical and presumably legitimate not-for-character purpose and so would appear to be unaffected by *Williams.* That is, to the extent some members of the Court apply a distinction between legitimate and illegitimate not-for-truth usage, offering the statement to prove it is false is certainly on the legitimate side of the line. It is one of the clearest cases of a statement not being offered to prove that the assertions therein are true. Of course, the government must provide independent evidence that the statement is in fact false.**

Admission of statement to police officers offered for "context" violated the right to confrontation, given the limited probative value for context: *Orlando v. Nassau County Dist. Attorney's Office,* 915 F.3d 113 (2nd Cir. 2019): In a habeas proceeding challenging a murder conviction, the court found that Orlando's right to confrontation was clearly violated. Orlando and his accomplice, Jeannot, were arrested and questioned separately. Jeannot confessed, and the confession was offered at Orlando's trial purportedly not for its truth, but only to explain why Orlando changed his confession after hearing what Jeannot had said. The court rejected this "context" argument and found that the statement was offered for its truth. It found that at trial, the government explicitly argued that what Jeannot had told the police was true. Moreover, Jeannot's statement "went far beyond any limited value in showing why Orlando changed his account of

what happened that night." The court noted that "Orlando's changing his account of the homicide was no different than many investigations when suspects make a series of statements; absent the substance of Jeannot's statement, the jury still could have learned that after several hours of interrogation, Orlando revised his story and placed himself at the scene of the murder and admitted to lying about his original account. That approach would have significantly advanced the prosecution's case without a critical narrative gap."

> **Note: The court reviews the case under *Bruton*. But *Bruton* was not applicable here because the defendant and the accomplice were not tried together. Rather, this is simply a *Crawford* case, where testimonial hearsay was offered against a criminal defendant. There is no reason to complicate things by adding *Bruton* to it.**

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

Confessions of other targets of an investigation were testimonial, but did not violate the Confrontation Clause because they were offered to rebut charges against the integrity of the investigation: *United States v. Christie,* 624 F.3d 558 (3rd Cir. 2010): In a child pornography investigation, the FBI obtained the cooperation of the administrator of a website, which led to the arrests of a number of users, including the defendant. At trial the defendant argued that the investigation was tainted because the FBI, in its dealings with the administrator, violated its own guidelines in treating informants. Specifically the defendant argued that these misguided law enforcement efforts led to unreliable statements from the administrator. In rebuttal, the government offered and the court admitted evidence that twenty-four other users identified by the administrator confessed to child pornography-related offenses. The defendant argued that admitting the evidence of the others' confessions violated the hearsay rule and the Confrontation Clause, but the court rejected these arguments and affirmed. It reasoned that the confessions were not offered for their truth, but to show why the FBI could believe that the administrator was a reliable source, and

therefore to rebut the charge of improper motive on the FBI's part. As to the confrontation argument, the court declared that "our conclusion that the testimony was properly introduced for a non-hearsay purpose is fatal to Christie's *Crawford* argument, since the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."

Accomplice's testimonial statement was properly admitted for impeachment purposes, but failure to give a limiting instruction was error: *Adamson v. Cathel,* 633 F.3d 248 (3rd Cir. 2011): The defendant challenged his confession at trial by arguing that the police fed him the details of his confession from other confessions by his alleged accomplices, Aljamaar and Napier. On cross-examination, the prosecutor introduced those confessions to show that they differed from the defendant's confession on a number of details. The court found no error in the admission of the accomplices' confessions. While testimonial, they were offered for impeachment and not for their truth and so did not violate the Confrontation Clause. However, the trial court gave no limiting instruction, and the court found that failure to be error. The court concluded as follows:

> Without a limiting instruction to guide it, the jury that found Adamson guilty was free to consider those facially incriminating statements as evidence of Adamson's guilt. The careful and crucial distinction the Supreme Court made between an impeachment use of the evidence and a substantive use of it on the question of guilt was completely ignored during the trial.
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> **Note: The use of the cohort's confessions to show differences from the defendant's confession is precisely the situation reviewed by the Court in *Tennessee v. Street.* As noted above, while some Justices in *Williams* rejected the "not-for-truth" analysis as applied to expert reliance on testimonial statements, all of the Justices approved of that analysis as applied to the facts of *Street.***

Statements made in a civil deposition might be testimonial, but admission does not violate the Confrontation Clause if they are offered to prove they are false: *United States v. Holmes,* 406 F.3d 337 (5th Cir. 2005): The defendant was convicted of mail fraud and conspiracy, stemming from a scheme with a court clerk to file a backdated document in a civil action. The defendant argued that admitting the deposition testimony of the court clerk, given in the underlying civil action, violated his right to confrontation after *Crawford*. The clerk testified that the clerk's

office was prone to error and thus someone in that office could have mistakenly backdated the document at issue. The court considered the possibility that the clerk's testimony was a statement in furtherance of a conspiracy, and noted that coconspirator statements ordinarily are not testimonial under *Crawford*. It also noted, however, that the clerk's statement "is not the run-of-the-mill co-conspirator's statement made unwittingly to a government informant or made casually to a partner in crime; rather, we have a co-conspirator's statement that is derived from a formalized testimonial source --- recorded and sworn civil deposition testimony." Ultimately the court found it unnecessary to determine whether the deposition testimony was "testimonial" within the meaning of *Crawford* because it was not offered for its truth. Rather, the government offered the testimony "to establish its *falsity* through independent evidence." ***See also United States v. Gurrola,*** 898 F.3d 524 (5th Cir. 2018) ("The Confrontation Clause does not bear on non-testimonial statements. And it is well-settled in this circuit that co-conspirator statements are not testimonial."); ***United States v. Acosta,*** 475 F.3d 677 (5th Cir. 2007) (accomplice's statement offered to impeach him as a witness --- by showing it was inconsistent with the accomplice's refusal to answer certain questions concerning the defendant's involvement with the crime --- did not violate *Crawford* because the statement was not admitted for its truth and the jury received a limiting instruction to that effect); ***United States v. Smith,*** 822 F.3d 755 (5th Cir. 2016)(testimonial statement from an accomplice did not violate the Confrontation Clause because it was "introduced in the context of how Agent Michalik developed suspects . . . for the charged bank robberies. This court has consistently held that out-of-court statements providing background information to explain the actions of investigators are not hearsay" and so do not violate the Confrontation Clause); ***United States v. Sosa,*** 897 F.3d 615 (5th Cir. 2018) (admitting a tip to police about a cohort of the defendant, offered to explain why the officer investigated the cohort, did not violate the right to confrontation; courts must be "vigilant" in assuring that attempts to explain an officer's actions "do not allow the backdoor introduction of highly inculpatory statements that the jury may also consider for their truth"; but the greatest risks of backdoor use occur when the statement implicates the defendant directly; this one did not, and the jury already knew about the cohort, so "at a minimum it was not obvious that this statement was offered for its truth").

Informant's accusation, purportedly offered to explain the police investigation, was hearsay and violated the Confrontation Clause: ***United States v. Kizzee,*** 877 F.3d 650 (5th Cir. 2017): In a drug and firearm prosecution, an officer testified (implicitly) that he received information from an arrestee that the arrestee had purchased drugs from the defendant, and he used that information (as well as other observations of the residence) to obtain a warrant. The government argued that the testimony did not violate the hearsay rule (and so could not violate the Confrontation Clause) because it was offered at trial only to explain the background of the police investigation. But the court disagreed and reversed the conviction. The court stated that the

information from the arrestee "was not necessary to explain Detective Schulz's actions" because "there was minimal need for Detective Schulz to explain the details forming the basis of the search warrant" and his own observations "would have been sufficient to explain his investigatory actions and provide background information." ***See also United States v. Jones,*** 924 F.3d 219 (5th Cir. 2019) (rejecting the government's argument that an informant's accusation was properly admitted to explain why a police officer followed the defendant as opposed to another person: "A witness's statement to police that the defendant is guilty of the crime charged is highly likely to influence the direction of a criminal investigation. But a police officer cannot repeat such out-of-court accusations at trial, even if helpful to explain why the defendant became a suspect."); ***United States v. Hamman,*** 33 F.4th 759 (5th Cir. 2022) (reversing a conviction because the inculpatory details of an informant's tip were improperly admitted to explain the background of the police investigation: "The government has not advance any reason for needing inculpatory evidence to bolster the credibility of the investigation. Hamman never contended that the investigation was inadequate. We perceive no reason why the government could not have begun its case-in-chief by explaining that officer arrived at the motel to execute a search warrant and found Hamann and Davis together in the parking lot holding distributable amounts of meth. The government's inculpatory prequel was unnecessary and highly prejudicial.").

Informant's accusation, offered to explain why police acted as they did, was testimonial but it was not hearsay, and so its admission did not violate the Confrontation Clause: ***United States v. Deitz,*** 577 F.3d 672 (6th Cir. 2009): The court found no error in allowing an FBI agent to testify about why agents tailed the defendant to what turned out to be a drug transaction. The agent testified that a confidential informant had reported to them about Deitz's drug activity. The court found that the informant's statement was testimonial --- because it was an accusation made to a police officer --- but it was not hearsay and therefore its admission did not violate Deitz's right to confrontation. The court found that admitting the testimony "explaining why authorities were following Deitz to and from Dayton was not plain error as it provided mere background information, not facts going to the very heart of the prosecutor's case." The court also observed that "had defense counsel objected to the testimony at trial, the court could have easily restricted its scope." ***See also United States v. Al-Maliki,*** 787 F.3d 784 (6th Cir. 2015) (in a prosecution for child sex abuse, the trial court admitted the defendant's wife's statement to police accusing the defendant of sexual abuse; the court found no error because it was offered for the limited purpose of explaining why an official investigation began: "Two conclusions follow: It is not hearsay, * * * and the government did not violate the Confrontation Clause"); ***United States v. Doxey,*** 833 F.3d 692 (6th Cir. 2016) (informant's tip leading to search of the defendant's vehicle was not hearsay as it was offered "merely by way of background"); ***United States v. Davis***, 577

F.3d 660 (6th Cir. 2009): A woman's statement to police that she had recently seen the defendant with a gun in a car that she described along with the license plate was not hearsay ---and so even though testimonial did not violate the defendant's right to confrontation --- because it was offered only to explain the police investigation that led to the defendant and the defendant's conduct when he learned the police were looking for him. ***Accord United States v. Napier,*** 787 F.3d 333 (6th Cir. 2015): In a child pornography prosecution, the government offered a document from Time Warner cable, obtained pursuant to a government subpoena, showing that an email address was accessed at the defendant's home and that the defendant was the subscriber to the account. The court found no confrontation violation because the document was offered not for its truth, but rather "to demonstrate how the Cincinnati office of the FBI located Napier." The court noted that the trial court gave the jury a limiting instruction that the document could be considered only to prove the course of the investigation.

Undercover statements offered to show representations about money-laundering, in a sting operation, were not offered for truth and so admitting them did not violate the Confrontation Clause: ***United States v. King,*** 865 F.3d 848 (6th Cir. 2017) (Sutton, J.): The defendant was the target of a sting operation. The undercover informant represented in several conversations with the defendant that he had drug money to launder, and the defendant responded with the details of how he would launder the money. The defendant argued that the undercover informant's part of the conversation was testimonial because it was primarily motivated for use in a criminal prosecution. But the court noted that the threshold requirement for violating the Confrontation Clause is that the out-of-court statement is admitted for its truth. That was not the case here. The statements were not offered to prove, for example, that the informant had drug money and wanted to clean it. Rather, the prosecution used the statements to prove that the informant made representations about having drug money, and the defendant believed him.

Statement offered to prove the defendant's knowledge of a crime was non-hearsay and so did not violate the accused's confrontation rights: ***United States v. Boyd,*** 640 F.3d 657 (6th Cir. 2011): A defendant charged with being an accessory after the fact to a carjacking and murder had told police officers that his friend Davidson had told him that he had committed those crimes. At trial the government offered that confession, which included the underlying statements of Boyd. The defendant argued that admitting Davidson's statements violated his right to confrontation. But the court found no error because the hearsay was not offered for its truth: "Davidson's statements to Boyd were offered to prove Boyd's knowledge [of the crimes that Davidson had committed] rather than for the truth of the matter asserted."

Admission of complaints offered for non-hearsay purpose did not violate the Confrontation Clause: *United States v. Adams,* 722 F.3d 788 (6th Cir. 2013): The defendants were convicted for participation in a vote-buying scheme in three elections. They complained that their confrontation rights were violated when the court admitted complaints that were contained within state election reports. The court of appeals rejected that argument, because the complaints were offered for proper non-hearsay purposes. Some of the information was offered to prove it was false, and other information was offered to show that the defendants adjusted their scheme based on the complaints received. The court did find, however, that the complaints were erroneously admitted under Rule 403, because of the substantial risk that the jury would use the assertions for their truth; that the probative value for the non-hearsay purpose was "minimal at best"; and the government had other less prejudicial evidence available to prove the point. Technically, this should mean that there was a violation of the Confrontation Clause, because the evidence was not *properly* offered for a not-for-truth purpose. But the court did not make that holding. It reversed on evidentiary grounds.

Informant's statements were not properly offered for "context," so their admission violated *Crawford*: *United States v. Powers,* 500 F.3d 500 (6th Cir. 2007): In a drug prosecution, a law enforcement officer testified that he had received information about the defendant's prior criminal activity from a confidential informant. The government argued on appeal that even though the informant's statements were testimonial, they did not violate the Confrontation Clause, because they were offered "to show why the police conducted a sting operation" against the defendant. But the court disagreed and found a *Crawford* violation. It reasoned that "details about Defendant's alleged prior criminal behavior were not necessary to set the context of the sting operation for the jury. The prosecution could have established context simply by stating that the police set up a sting operation." ***See also United States v. Hearn***, 500 F.3d 479 (6th Cir.2007) (confidential informant's accusation was not properly admitted for background where the witness testified with unnecessary detail and "[t]he excessive detail occurred twice, was apparently anticipated, and was explicitly relied upon by the prosecutor in closing arguments").

Admission of the defendant's conversation with an undercover informant does not violate the Confrontation Clause, where the undercover informant's part of the conversation is properly offered only for "context": *United States v. Harrison,* 54 F.4th 884 (6th Cir. 2022): In a drug case, the government offered videos of a conversation and transaction between an undercover informant and the defendant. The defendant argued that the recorded statements by the undercover informant were testimonial hearsay and so admission violated the defendant's right to confrontation. The court held that there was no constitutional violation because the informant's

statements were not offered for their truth. Rather, they were used "only to give context to Harrison's admissible words and actions."

Admitting informant's statement to police officer for purposes of "background" did not violate the Confrontation Clause: ***United States v. Gibbs,*** 506 F.3d 479 (6th Cir. 2007): In a trial for felon-firearm possession, the trial court admitted a statement from an informant to a police officer; the informant accused the defendant of having firearms hidden in his bedroom. Those firearms were not part of the possession charge. While this accusation was testimonial, its admission did not violate the Confrontation Clause, "because the testimony did not bear on Gibbs's alleged possession of the .380 Llama pistol with which he was charged." Rather, it was admitted "solely as background evidence to show why Gibbs's bedroom was searched." ***See also United States v. Macias-Farias,*** 706 F.3d 775 (6th Cir. 2013) (officer's testimony that he had received information from someone was offered not for its truth but to explain the officer's conduct, thus no confrontation violation).

Statement offered to prove it was false was not hearsay and so could not violate the defendant's right to confrontation: ***United States v. Porter,*** 886 F.3d 562 (6th Cir. 2018): In a prosecution against a mayor for theft from federal programs and bribery, the government offered statements by an accomplice to investigators. The trial court found that the statements were properly admitted to prove they were false, and that the government established the falsity of statements with independent evidence. The court of appeals held that "because the government's position was that Chet Crace's prior statements to investigators during the April 10, 2015 interview were false, Atkins's statements were not hearsay and did not implicate Porter's confrontation rights."

Admission of the defendant's conversation with an undercover informant does not violate the Confrontation Clause, where the undercover informant's part of the conversation is offered only for "context": ***United States v. Nettles,*** 476 F.3d 508 (7th Cir. 2007): The defendant made plans to blow up a government building, and the government had an undercover informant contact him and ostensibly offer to help him obtain materials. At trial, the court admitted a recorded conversation between the defendant and the informant. Because the informant was not produced for trial, the defendant argued that his right to confrontation was violated. But the court found no error, because the admission of the defendant's part of the conversation was not barred by the Confrontation Clause, and the informant's part of the conversation was admitted only to

place the defendant's part in "context." Because the informant's statements were not offered for their truth, they did not implicate the Confrontation Clause.

The *Nettles* court did express some concern about the breadth of the "context" doctrine, stating: "We note that there is a concern that the government may, in future cases, seek to submit based on 'context' statements that are, in fact, being offered for their truth." But the court found no such danger in this case, noting the following: 1) the informant presented himself as not being proficient in English, so most of his side of the conversation involved asking the defendant to better explain himself; and 2) the informant did not "put words in Nettles's mouth or try to persuade Nettles to commit more crimes in addition to those that Nettles had already decided to commit." ***See also United States v. Tolliver,*** 454 F.3d 660 (7th Cir. 2006) (statements of one party to a conversation with a conspirator were offered not for their truth but to provide context to the conspirator's statements: "*Crawford* only covers testimonial statements proffered to establish the truth of the matter asserted. In this case . . . Shye's statements were admissible to put Dunklin's admissions on the tapes into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth. As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused."); ***United States v. Bermea-Boone***, 563 F.3d 621 (7th Cir. 2009): A conversation between the defendant and a coconspirator was properly admitted; the defendant's side of the conversation was a statement of a party-opponent, and the accomplice's side was properly admitted to provide context for the defendant's statements: "Where there is no hearsay, the concerns addressed in *Crawford* do not come in to play. That is, the declarant, Garcia, did not function as a witness against the accused."; ***United States v. York,*** 572 F.3d 415 (7th Cir. 2009) (informant's recorded statements in a conversation with the defendant were admitted for context and therefore did not violate the Confrontation Clause: "we see no indication that Mitchell tried to put words in York's mouth"); ***United States v. Hicks,*** 635 F.3d 1063 (7th Cir. 2011): (undercover informant's part of conversations were not hearsay, as they were offered to place the defendant's statements in context; because they were not offered for truth their admission did not violate the defendant's right to confrontation); ***United States v. Gaytan,*** 649 F.3d 573 (7th Cir. 2011) (undercover informant's statements to the defendant in a conversation setting up a drug transaction were clearly testimonial, but not offered for their truth: "Gaytan's responses ['what you need?' and 'where the loot at?'] would have been unintelligible without the context provided by Worthen's statements about his or his brother's interest in 'rock'"; the court noted that there was no indication that the informant was "putting words in Gaytan's mouth"); ***United States v. Jackson,*** 940 F.3d 347 (7th Cir. 2019) (noting that the confidential informant's statements were properly offered from context and that the defendant "had not identified any statement where the [confidential informant] put word's into Jackson's mouth"); ***United States v. Foster,*** 701 F.3d 1142 (7th Cir. 2012) ("Here, the CI's statement

regarding the weight [of the drug] was not offered to show what the weight *actually* was * * * but rather to explain the defendant's acts and make his statements intelligible. The defendant's statement to 'give me sixteen fifty' (because the original price was 17) would not have made sense without reference to the CI's comment that the quantity was off. Because the statements were admitted only to prove context, *Crawford* does not require confrontation."); ***United States v. Faruki*,** 803 F.3d 847 (7th Cir. 2015) (no confrontation violation where out-of-court statements were offered to place the defendant's own statements in context).

For more on "context" see ***United States v. Wright,*** 722 F.3d 1064 (7th Cir. 2013): In a drug prosecution, the defendant's statement to a confidential information that he was "stocked up" would have been unintelligible without providing the context of the informant's statements inquiring about drugs, "and a jury would not have any sense of why the conversation was even happening." The court also noted that "most of the CI's statements were inquiries and not factual assertions." The court expressed concern, however, that the district court's limiting instruction on "context" was boilerplate, and that the jury "could have been told that the CI's half of the conversation was being played only so that it could understand what Wright was responding to, and that the CI's statements standing alone were not to be considered as evidence of Wright's guilt."

In ***United States v. Smith,*** 816 F.3d 479 (7th Cir. 2016), a public corruption case, the court rejected the use of "context" where placing the defendant's statement in "context" only worked if the informant's statement to the defendant were true. In *Smith,* the court gave an example of an informant saying to the defendant "Last week I paid you $7000 for a letter that my client will use to seek a grant. Do you remember?" And the defendant says "Yes." The court noted that the informant's statement puts the defendant's answer in context, but only if the informant was speaking the truth. In that situation, the informant's statement would be hearsay and potentially trigger the right to confrontation --- but that right was not violated in this case because the informant's statements were not offered for truth but rather were verbal acts establishing a corrupt agreement. ***See also United States v. Amaya,*** 828 F.3d 518 (7th Cir. 2016), where an informant's statement "that was a big ass pistol" was offered to put the defendant's statement "Hell yea" in context. But the court found that context was unworkable because the informant's statement was only relevant to context if it were true --- only if a gun was present would the "Hell yea" mean anything pertinent to the case. Yet the informant's statement was found not testimonial, because it was simply blurted out, and so was not made with the primary motive that it would be used in a criminal prosecution.

Note: The concerns expressed in *Nettles* and the other 7th Circuit cases discussed above --- about possible abuse of the "context" usage --- are along the same

lines as those expressed by Justices Thomas and Kagan in *Williams,* when they seek to distinguish legitimate and illegitimate not-for-truth purposes. If context is a pretext and the statement is in fact offered for the truth, then the statement is not being offered for a legitimate not-for-truth purpose.

Police report offered for a purpose other than proving the truth of its contents is properly admitted even if it is testimonial: *United States v. Price,* 418 F.3d 771 (7th Cir. 2005): In a drug conspiracy trial, the government offered a report prepared by the Gary Police Department. The report was an "intelligence alert" identifying some of the defendants as members of a street gang dealing drugs. The report was found in the home of one of the conspirators. The government offered the report at trial to prove that the conspirators were engaging in counter-surveillance, and the jury was instructed not to consider the accusations in the report as true, but only for the fact that the report had been intercepted and kept by one of the conspirators. The court found that even if the report was testimonial, there was no error in admitting the report as proof of awareness and counter-surveillance. It relied on *Crawford* for the proposition that the Confrontation Clause does not bar the use of out-of-court statements "for purposes other than proving the truth of the matter asserted." ***See also United States v. Ambrose,*** 668 F.3d 943 (7th Cir. 2012) (conversation between two crime family members about actions of a cooperating witness were not offered for their truth but rather to show that information had been leaked; because the statements were not offered for their truth, there was no violation of the right to confrontation).

Accusation offered not for truth, but to explain police conduct, was not hearsay and did not violate the defendant's right to confrontation: *United States v. Dodds,* 569 F.3d 336 (7th Cir. 2009): Appealing a firearms conviction, the defendant argued that his right to confrontation was violated when the trial court admitted a statement from an unidentified witness to a police officer. The witness told the officer that a black man in a black jacket and black cap was pointing a gun at people two blocks away. The court found no confrontation violation because "the problem that *Crawford* addresses is the admission of hearsay" and the witness's statement was not hearsay. It was not admitted for its truth --- that the witness saw the man he described pointing a gun at people --- but rather "to explain why the police proceeded to the intersection of 35th and Galena and focused their attention on Dodds, who matched the description they had been given." The court noted that the trial judge did not provide a limiting instruction, but also noted that the defendant never asked the court to do so and that the lack of an instruction was not raised on appeal. ***See also United States v. Taylor,*** 569 F.3d 742 (7th Cir. 2009): An accusation from a

bystander to a police officer that the defendant had just taken a gun across the street was not hearsay because it was offered to explain the officers' actions in the course of their investigation: "for example, why they looked across the street * * * and why they handcuffed Taylor when he approached." The court noted that absent "complicating circumstances, such as a prosecutor who exploits nonhearsay statements for their truth, nonhearsay testimony does not present a confrontation problem." The court found no "complicating circumstances" in this case.

> **Note: The Court's reference in *Taylor* to the possibility of exploiting a not-for-truth purpose runs along the same lines as those expressed by Justice Thomas and Kagan in *Williams.***

Testimonial statement was not legitimately offered for context or background and so was a violation of *Crawford: United States v. Adams,* 628 F.3d 407 (7th Cir. 2010): In a narcotics prosecution, statements made by confidential informants to police officers were offered against the defendant. For example, the government offered testimony from a police officer that he stopped the defendant's car on a tip from a confidential informant that the defendant was involved in the drug trade and was going to buy crack. A search of the car uncovered a large amount of money and a crack pipe. The government offered the informant's statement not for the truth of the assertion but as "foundation for what the officer did." The trial court admitted the statement and gave a limiting instruction. But the court of appeals found error, though harmless, because the informant's statements "were not necessary to provide any foundation for the officer's subsequent actions." It explained as follows:

> The CI's statements here are different from statements we have found admissible that gave context to an otherwise meaningless conversation or investigation. [cites omitted] Here the CI's accusations did not counter a defense strategy that police officers randomly targeted Adams. And, there was no need to introduce the statements for context --- even if the CI's statements were excluded, the jury would have fully understood that the officer searched Adams and the relevance of the items recovered in that search to the charged crime.

See also United States v. Walker, 673 F.3d 649 (7th Cir. 2012) (confidential informant's statements to the police --- that he got guns from the defendant --- were not properly offered to explain the police investigation but rather were testimonial hearsay: "The government repeatedly hides behind its asserted needs to provide 'context' and relate the 'course of investigation.' These euphemistic descriptions cannot disguise a ploy to pin the two guns on Walker while avoiding the risk of putting Ringswald on the stand. * * * A prosecutor surely knows that hearsay results when he elicits from a government agent that 'the informant said he got this gun from X' as proof that X supplied the

gun."); ***Jones v. Basinger,*** 635 F.3d 1030 (7th Cir. 2011) (accusation made to police was not offered for background and therefore its admission violated the defendant's right to confrontation; the record showed that the government encouraged the jury to use the statements for their truth); ***United States v. Graham,*** 47 F.4th 561 (7th Cir. 2022) (accusation made to police that the defendant was trafficking women was offered for its effect on one of the women, to explain why she would fear the defendant; but "the government did not actually use Moore's statements in that way. The prosecutor made no effort to connect Moore's statements . . . to Cinderria's state of mind. Nor was Cinderria asked about how the statements . . . affected her." Accordingly, the accusation was hearsay and triggered a confrontation inquiry).

> **Note: *Adams, Walker, Jones* and *Graham* are all examples of illegitimate use of not-for-truth purposes and so finding a Confrontation violation in these cases is quite consistent with the analysis of not-for-truth purposes in the Thomas and Kagan opinions in *Williams.***

Statements by a confidential informant included in a search warrant were testimonial and could not be offered at trial to explain the police investigation: ***United States v. Holmes,*** 620 F.3d 836 (8th Cir. 2010): In a drug trial, the defendant tried to distance himself from a house where the drugs were found in a search pursuant to a warrant. On redirect of a government agent --- after defense counsel had questioned the connection of the defendant to the residence --- the trial judge permitted the agent to read from the statement of a confidential informant. That statement indicated that the defendant was heavily involved in drug activity at the house. The government acknowledged that the informant's statements were testimonial, but argued that the statements were not hearsay, as they were offered only to show the officer's knowledge and the propriety of the investigation. But the court found the admission to be error. It noted that informants' statements are admissible to explain an investigation "only when the propriety of the investigation is at issue in the trial." In this case, the defendant did not challenge the validity of the search warrant and did not dispute the propriety of the investigation. The court stated that if the real purpose of admitting the evidence was to explain the officer's knowledge and the nature of the investigation, "a question asking whether someone had told him that he had seen Holmes at the residence would have addressed the issue * * * without the need to go into the damning details of what the CI told Officer Singh." ***Compare United States v. Brooks,*** 645 F.3d 971 (8th Cir. 2011) ("In this case, the statement at issue [a report by a confidential informant that Brooks was selling narcotics and firearms from a certain premises] was not offered to prove the truth of the matter asserted --- that is, that Brooks was indeed a drug and firearms dealer. It was offered purely to

explain why the officers were at the multi-family dwelling in the first place, which distinguishes this case from *Holmes.* In *Holmes,* it was undisputed that officers had a valid warrant. Accordingly less explanation was necessary. Here, the CI's information was necessary to explain why the officers went to the residence without a warrant and why they would be more interested in apprehending the man on the stairs than the man who fled the scene. Because the statement was offered only to show why the officers conducted their investigation in the way they did, the Confrontation Clause is not implicated here."). ***See also United States v. Shores,*** 700 F.3d 366 (8th Cir. 2012) (confidential informant's accusation made to police officer was properly offered to prove the propriety of the investigation: "From the early moments of the trial, it was clear that Shores would be premising his defense on the theory that he was a victim of government targeting."); ***United States v. Wright,*** 739 F.3d 1160 (8th Cir. 2014) (Officer's statement to another officer, "come into the room, I've found something" was not hearsay because it was offered only to explain why the second officer came into the room and to rebut the defense counsel's argument that the officer entered the room in response to a loud noise: "If the underlying statement is testimonial but not hearsay, it can be admitted without violating the defendant's Sixth Amendment rights.").

Accusatory statements offered to explain why an officer conducted an investigation in a certain way are not hearsay and therefore admission does not violate *Crawford: United States v. Brown,* 560 F.3d 754 (8th Cir. 2009): Challenging drug conspiracy convictions, one defendant argued that it was error for the trial court to admit an out-of-court statement from a shooting victim to a police officer. The victim accused a person named "Clean" who was accompanied by a man named Charmar. The officer who took this statement testified that he entered "Charmar" into a database to help identify "Clean" and the database search led him to the defendant. The court found no error in admitting the victim's statement, stating that "it is not hearsay when offered to explain why an officer conducted an investigation in a certain way." The defendant argued that the purported nonhearsay purpose for admitting the evidence "was only a subterfuge to get Williams' statement about Brown before the jury." But the court responded that the defendant "did not argue at trial that the prejudicial effect of the evidence outweighed its nonhearsay value." The court also observed that the trial court twice instructed the jury that the statement was admitted for the limited purpose of understanding why the officer searched the database for Charmar. Finally, the court held that because the statement properly was not offered for its truth, "it does not implicate the confrontation clause."

Statement offered as foundation for good faith basis for asking question on cross-examination does not implicate *Crawford: United States v. Spears,* 533 F.3d 715 (8th Cir. 2008): In a bank robbery case, the defendant testified and was cross-examined and asked about her knowledge of prior bank robberies. In order to inquire about these bad acts, the government was required to establish to the court a good-faith basis for believing that the acts occurred. The government's good-faith basis was the confession of the defendant's associate to having taken part in the prior robberies. The defendant argued that the associate's statements, made to police officers, were testimonial. But the court held that *Crawford* was inapplicable because the associate's statements were not admitted for their truth --- indeed they were not admitted at all. The court noted that there was "no authority for the proposition that use of an out-of-court testimonial statement merely as the good faith factual basis for relevant cross-examination of the defendant at trial implicates the Confrontation Clause."

Admitting testimonial statements that were part of a conversation with the defendant did not violate the Confrontation Clause because they were not offered for their truth: *United States v. Spencer,* 592 F.3d 866 (8th Cir. 2010): Affirming drug convictions, the court found no error in admitting tape recordings of a conversation between the defendant and a government informant. The defendant's statements were statements by a party-opponent and admitting the defendant's own statements cannot violate the Confrontation Clause. The informant's statements were not hearsay because they were admitted only to put the defendant's statements in context.

Statement offered to prove it was false is not hearsay and so did not violate the Confrontation Clause: *United States v. Yielding,* 657 F.3d 688 (8th Cir. 2011): In a fraud prosecution, the trial court admitted the statement of an accomplice to demonstrate that she used a false cover story when talking to the FBI. The court found no error, noting that "the point of the prosecutor's introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false." The court found that the government introduced other evidence to show that the declarant's assertions that a transaction was a loan were false. The court cited *Bryant* for the proposition that because the statements were not hearsay, their admission did not violate the Confrontation Clause.

Admitting testimonial statements to show a common (false) alibi did not violate the Confrontation Clause: *United States v. Young,* 753 F.3d 757 (8th Cir. 2014): Young was accused of conspiring with Mock to murder Young's husband and make it look like an accident. The government introduced the statement that Mock made to police after the husband was killed. The

statement was remarkably consistent in all details with the alibi that Young had independently provided, and many of the assertions were false. The government offered Mock's statement for the inference that she had Young had collaborated on an alibi. Young argued that introducing Mock's statement to the police violated her right to confrontation, but the court disagreed. It observed that the Confrontation Clause does not bar the admission of out-of-court statements that are not hearsay. In this case, Mock's statement was not offered for its truth but rather "to show that Young and Mock had a common alibi, scheme, or conspiracy. In fact, Mock's statements to Deputy Salsberry are valuable to the government because they are false."

Statement offered for impeachment was not hearsay and therefore admission did not violate the defendant's right to confrontation: *United States v. Cotton,* 823 F.3d 430 (8th Cir. 2016): "Cotton first argued that admission of Frazier's post-arrest statement violated his rights under the Confrontation Clause. Because the statement was offered for impeachment [as a prior inconsistent statement of a hearsay declarant] and not to prove the truth of the matter asserted, there was no Confrontation Clause violation in this case."

Informant's part of a conversation with a coconspirator was properly admitted for context and not for truth: *United States v. Barragan,* 871 F.3d 689 (9th Cir. 2017): In a prosecution for racketeering and drug crimes, the trial court admitted a taped conversation between a defendant's coconspirator and an undercover informant. The defendant conceded that the coconspirator's statement was admissible under Rule 802(d)(2)(E), but contended that admitting the informant's part of the conversation violated his right to confrontation. But the court found no error, because the informant's statements were offered only to place the coconspirator's statements in context, and the jury was instructed to that effect. The court stated that the informant's statements "were not admitted for their truth, and the admission of such context evidence does not offend the Confrontation Clause."

Accusation offered to rebut the defendant's charge of a sloppy investigation were legitimately offered for a non-hearsay purpose and so admission did not violate the right to confrontation: *United States v. Johnson,* 875 F.3d 1265 (9th Cir. 2017): The defendant was charged with felon-firearm possession. He claimed that the gun belonged to Jakith Martin and argued at trial that the police investigation was sloppy. The government countered with testimony from an officer that the defendant's girlfriend told him that the gun was the defendant's. The girlfriend's statement was definitely testimonial. But the court found no error, because the Confrontation Clause does not apply to a statement that is not hearsay. In this case, the statement

was offered not to prove that the defendant possessed the gun, but rather to show that the police investigation was proper (and not sloppy) when it focused on the defendant. The court noted that "Courts must exercise caution to ensure that out-of-court testimonial statements, ostensibly offered to explain the course of a police investigation, are not used as an end-around *Crawford* and hearsay rules, particularly when those statements directly inculpate the defendant." But in this case, the statements were "relevant to rebutting Johnson's theory of the case: that the police were sloppy and had no reason to investigate Johnson's property rather than investigate Jakith Martin's." The court emphasized that the trial court "properly and contemporaneously instructed the jury that the statements were to be considered only for nonhearsay purposes" and that the jury "was again reminded of this admonition in the final jury instructions."

Admitting statements to police officer for purposes of "background" did not violate the Confrontation Clause: ***United States v. Audette,*** 923 F.3d 1227 (9th Cir. 2019): The defendant defrauded people into giving him money by stating that he was on the run from the Mafia and if he didn't get the money, his wife and stepdaughter would be killed. The defendant claimed that he was ordered to make such statements by various CIA and FBI agents. At trial the government offered testimony by an FBI agent who took part in the investigation, to statements made to him by the wife and stepdaughter that contradicted the defendant's account. The court found no violation of the Confrontation Clause. It recognized that the statements were testimonial because made to an investigating officer in the course of an interrogation. But the statements were not offered to prove that the defendant was responsible for the fraud. Rather, "the government offered Agent Hill's testimony to explain why they focused on Audette --- rather than the various CIA and FBI agents who allegedly ordered Audette to borrow money from the victims --- as a suspect."

Statements not offered for truth do not violate the Confrontation Clause even if testimonial: ***United States v. Faulkner,*** 439 F.3d 1221 (10th Cir. 2006): The court stated that "it is clear from *Crawford* that the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement." ***See also United States v. Mitchell,*** 502 F.3d 931 (9th Cir. 2007) (information given by an eyewitness to a police officer was not offered for its truth but rather "as a basis" for the officer's action, and therefore its admission did not violate the Confrontation Clause); ***United States v. Brinson,*** 772 F.3d 1314 (10th Cir. 2014) (In a prosecution for sex trafficking, statements made to an undercover police officer that set up a meeting for sex were properly admitted as not hearsay and so their admission did not violate the Confrontation Clause: "The prosecution did not present the out-of-court statements to prove the truth of the statements about the location, price, or lack of a condom. Rather, the prosecution offered these statements to explain why Officer Osterdyk went to Room 123, how he knew the price, and why he agreed to pay for oral sex."; the court also found that the statements

were not testimonial anyway because the declarant did not know she was talking to a police officer.); ***United States v. Ibarra-Diaz,*** 805 F.3d 908 (10th Cir. 2015) (confidential informant's statements to a police officer about the defendant's interest in doing a drug deal were testimonial, but the right to confrontation was not violated because the statements were offered to "explain why the officer did not put a body wire on the CI for this significant drug transaction --- i.e., because, unlike situations where the detective is in control of the informant from the outset and * * * of the circumstances of the informant's dealings with a potential target, in this instance the CI just called the detective 'out of the blue' about the possible drug transaction"; other statements from accomplices were properly admitted because they were not offered for their truth but to explain the conduct of the detective who heard the statements).

Accomplice's confession, offered to explain a police officer's subsequent conduct, was not hearsay and therefore did not violate the Confrontation Clause: *United States v. Jiminez,* 564 F.3d 1280 (11th Cir. 2009): The court found no plain error in the admission of an accomplice's confession in the defendant's drug conspiracy trial. The police officer who had taken the accomplice's confession was cross-examined extensively about why he had repeatedly interviewed the defendant and about his decision not to obtain a written and signed confession from him. This cross-examination was designed to impeach the officer's credibility and to suggest that he was lying about the circumstances of the interviews and about the defendant's confession. In explanation, the officer stated that he approached the defendant the way he did because the accomplice had given a detailed confession that was in conflict with what the defendant had said in prior interviews. The court held that in these circumstances, the accomplice's confession was properly admitted to explain the officer's motivations, and not for its truth. Accordingly its admission did not violate the Confrontation Clause, even though the statement was testimonial.

> **Note**: **The court assumed that the accomplice's confession was admitted for a proper, not-for-truth purpose, even though there was no such finding on the record, and the trial court never gave a limiting instruction. Part of the reason for this deference is that the court was operating under a plain error standard. The defendant at trial objected only on hearsay grounds, and this did not preserve any claim of error on confrontation clause grounds. The concurring judge noted, however, "that the better practice in this case would have been for the district court to have given an instruction as to the limited purpose of Detective Wharton's testimony" because "there is no assurance, and much doubt, that a typical jury, on its own, would recognize the limited nature of the evidence."**

See also United States v. Pendergrass**,** 995 F. 3d 858 (11th Cir. 2021) (An officer's testimony regarding the contents of cell-tower records was non-hearsay where the contents were offered to show why the officer focused his investigation on the defendant and excluded other potential suspects during his investigation, rather than being offered for their truth. Because it was not hearsay, its admission did not violate the Confrontation Clause); ***United States v. Augustin,*** 661 F.3d 1105 (11th Cir. 2011) (no confrontation violation where declarant's statements "were not offered for the truth of the matters asserted, but rather to provide context for [the defendant's] own statements"); ***United States v. Van Buren,*** 940 F.3d 1192 (11th Cir. 2019) ("Albo's [testimonial] statements were admitted only to provide context for Van Buren's statements and to show their effect on Van Buren" --- therefore no confrontation violation in admitting those statements).

Present Sense Impression

911 call describing ongoing drug crime is admissible as a present sense impression and not testimonial under *Bryant*: *United States v. Polidore*, 690 F.3d 705 (5th Cir. 2012): In a drug trial, the defendant objected that a 911 call from a bystander to a drug transaction --- together with the bystander's answers to questions from the 911 operators --- was testimonial and also admitted in violation of the rule against hearsay. On the hearsay question, the court found that the bystander's statements in the 911 call were admissible as present sense impressions, as they were made while the transaction was ongoing. As to testimoniality, the court held that the case was unlike the 911 call cases decided by the Supreme Court, as there was no ongoing emergency --- rather the caller was simply recording that a crime was taking place across the street, and no violent activity was occurring. But the court noted that under *Bryant* an ongoing emergency is relevant but not dispositive of whether statements about a crime are testimonial. Ultimately the court found that the caller's statements were not testimonial, reasoning as follows:

> [A]lthough the 911 caller appeared to have understood that his comments would start an investigation that could lead to a criminal prosecution, the primary purpose of his statements was to request police assistance in stopping an ongoing crime and to provide the police with the requisite information to achieve that objective. * * * The 911 caller simply was not acting as a witness; he was not testifying. What he said was not a weaker substitute for live testimony at trial. In other words, the caller's statements were not ex parte communications that created evidentiary products that aligned perfectly with their courtroom analogues. No witness goes into court to report that a man is currently selling drugs out of his car and to ask the police to come and arrest the man while he still has the drugs in his possession.

Present sense impression, describing an event that occurred months before a crime, is not testimonial: *United States v. Danford,* 435 F.3d 682 (7th Cir. 2005): The defendant was convicted of insurance fraud after staging a fake robbery of his jewelry store. At trial, one of the employees testified to a statement made by the store manager, indicating that the defendant had asked the manager how to disarm the store alarm. The defendant argued that the store manager's statement was testimonial under *Crawford,* but the court disagreed. The court stated that "the conversation between [the witness] and the store manager is more akin to a casual remark than it is to testimony in the *Crawford*-sense. Accordingly, we hold that the district court did not err in

admitting this testimony under Fed.R.Evid. 803(1), the present-sense impression exception to the hearsay rule."

Present-sense impressions of DEA agents during a buy-bust operation were safety-related and so not testimonial: *United States v. Solorio,* 669 F.3d 943 (9th Cir. 2012): Appealing from a conviction arising from a "buy-bust" operation, the defendant argued that hearsay statements of DEA agents at the scene --- which were admitted as present sense impressions --- were testimonial and so should have been excluded under *Crawford.* The court disagreed. It concluded that the statements were made in order to communicate observations to other agents in the field and thus assure the success of the operation, "by assuring that all agents involved knew what was happening and enabling them to gauge their actions accordingly." Thus the statements were not testimonial because the primary purpose for making them was not to prepare a statement for trial but rather to assure that the arrest was successful and that the effort did not escalate into a dangerous situation. The court noted that the buy-bust operation "was a high-risk situation involving the exchange of a large amount of money and a substantial quantity of drugs" and also that the defendant was visibly wary of the situation. ***Compare United States v. Orm Hieng,*** 679 F.3d 1131 (9th Cir. 2012) (officer's tabulation of the number of marijuana plants found at the defendant's farm could have been admitted as a present sense impression --- but those tabulations were also testimonial hearsay, and so the officers would have had to testify at trial).

Reports on forensic testing by law enforcement are testimonial: *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009): In a drug case, the trial court admitted three "certificates of analysis" showing the results of the forensic tests performed on the seized substances. The certificates stated that "the substance was found to contain: Cocaine." The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health. The Court, in a highly contentious 5-4 case, held that these certificates were "testimonial" under *Crawford* and therefore admitting them without a live witness violated the defendant's right to confrontation. The majority noted that affidavits prepared for litigation are within the core definition of "testimonial" statements. The majority also noted that the only reason the certificates were prepared was for use in litigation. It stated that "[w]e can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose --- as stated in the relevant state-law provision --- was reprinted on the affidavits themselves."

The implications of *Melendez-Diaz* --- beyond requiring a live witness to testify to the results of forensic tests conducted primarily for litigation --- are found in the parts of the majority opinion that address the dissent's arguments that the decision will lead to substantial practical difficulties. These implications are discussed in turn:

1. In a footnote, the majority declared in dictum that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." Apparently these are more like traditional business records than records prepared primarily for litigation, though the question is close --- the reason these records are maintained, with respect to forensic testing equipment, is so that the tests conducted can be admitted as reliable. At any rate, the footnote shows some flexibility, in that not every record involved in the forensic testing process will necessarily be found testimonial.

2. The dissent argued that forensic testers are not "accusatory" witnesses in the sense of preparing factual affidavits about the crime itself. But the majority rejected this distinction, declaring that the text of the Sixth Amendment "contemplates two classes of witnesses: those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." This statement raises questions about the reasoning of some lower courts that have admitted autopsy reports and other certificates after *Crawford*. These cases are discussed below.

3. Relatedly, the defendant argued that the affidavits at issue were nothing like the affidavits found problematic in the case of Sir Walter Raleigh. The Raleigh affidavits were

a substitute for a witness testifying to critical historical facts about the crime. But the majority responded that while the ex parte affidavits in the Raleigh case were the paradigmatic confrontation concern, "the paradigmatic case identifies the core of the right to confrontation, not its limits. The right to confrontation was not invented in response to the use of the ex parte examinations in Raleigh's Case."

4. The majority noted that cross-examining a forensic analyst may be necessary because "[a]t least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination." This implies that if the evidence is nothing but a machine print-out, it will not run afoul of the Confrontation Clause. As discussed earlier in this Outline, a number of courts have held that machine printouts are not hearsay at all because a machine can't make a "statement," and have also held that a machine's output is not "testimony" within the meaning of the Confrontation Clause. This case law appears to survive the Court's analysis in *Melendez-Diaz* and the later cases of *Bullcoming* and *Williams* do not touch the question of machine evidence.

5. The majority does approve the basic analysis of Federal courts after *Crawford* with respect to business and public records, i.e., that if the record is admissible under FRE 803(6) or 803(8) it is, for that reason, non-testimonial under *Crawford.* For business records, this is because, to be admissible under Rule 803(6), it cannot be prepared primarily for litigation. For public records, this is because law enforcement reports prepared for a specific litigation are excluded under Rule 803(8)(A)(ii) and (A)(iii).

6. In response to an argument of the dissent, the majority states that certificates that merely authenticate proffered documents are not testimonial. As seen below, this probably means that certificates of authenticity prepared under Rules 902(11), (13) and (14) may be admitted without violating the Confrontation Clause.

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

> Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an official record under respondent's definition --- it was prepared by a public officer in the regular course of his official duties --- and although the clerk was certainly not a "conventional witness" under the dissent's approach, the clerk was nonetheless subject to confrontation. See People v. Bromwich, 200 N. Y. 385, 388-389, 93 N. E. 933, 934 (1911).

This passage should probably be read to mean that any use of a certificate of absence of a public record in a criminal case is prohibited. But the Court did find that a notice-and-demand provision would satisfy the Confrontation Clause because if, after notice, the defendant made no demand to produce, a waiver could properly be found. Accordingly, the Committee proposed an amendment to Rule 803(10) that added a notice-and-demand provision. That amendment was approved by the Judicial Conference and became effective December 1, 2013.

Admission of a testimonial forensic certificate through the testimony of a witness with no personal knowledge of the testing violates the Confrontation Clause under *Melendez-Diaz: Bullcoming v. New Mexico,* 564 U.S. 647 (2011): The Court reaffirmed the holding in *Melendez-Diaz* that certificates of forensic testing prepared for trial are testimonial, and held further that the Confrontation Clause was not satisfied when such a certificate was entered into evidence through the testimony of a person who was not involved with, and had no personal knowledge of, the testing procedure. Justice Ginsburg, writing for the Court, declared as follows:

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

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

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

> **Note: The court's analysis about certificates of authentication is unaffected by *Melendez-Diaz,* as the Supreme Court stated (in dictum) that certificates that simply authenticate non-testimonial records are not themselves testimonial. Every circuit that has decided the question after *Melendez-Diaz* has upheld authenticating certificates. See below.**

Warrant of deportation is not testimonial: *United States v. Garcia,* 452 F.3d 36 (1st Cir. 2006): In an illegal reentry case, the defendant argued that his confrontation rights were violated by the admission of a warrant of deportation. The court disagreed, finding that the warrant was not testimonial under *Crawford*. The court noted that every circuit considering the matter has held "that defendants have no right to confront and cross-examine the agents who routinely record warrants of deportation" because such officers have no motivation to do anything other than "mechanically register an unambiguous factual matter."

Note: Other circuits before Melendez-Diaz reached the same result on warrants of deportation. See, e.g., United States v. Valdez-Matos, 443 F.3d 910 (5th Cir. 2006) (warrant of deportation is non-testimonial because "the official preparing the warrant had no motivation other than mechanically register an unambiguous factual matter"); ***United States v. Torres-Villalobos,*** 487 F.3d 607 (8th Cir. 2007) (noting that warrants of deportation "are produced under circumstances objectively indicating that their primary purpose is to maintain records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts

for use in future criminal prosecutions."); ***United States v. Bahena-Cardenas,*** 411 F.3d 1067 (9th Cir. 2005) (a warrant of deportation is non-testimonial "because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter."); ***United States v. Cantellano,*** 430 F.3d 1142 (11th Cir. 2005) (noting that a warrant of deportation "is recorded routinely and not in preparation for a criminal trial").

> **Note: Warrants of deportation still satisfy the Confrontation Clause after *Melendez-Diaz*. Unlike the forensic analysis in that case, a warrant of deportation is prepared for regulatory purposes and is clearly not prepared for the illegal reentry litigation, because by definition that crime has not been committed at the time the certificate is prepared. As seen below, post-*Melendez-Diaz* courts have found warrants of deportation to be non-testimonial. See also *United States v. Lopez,* 747 F.3d 1141 (9th Cir. 2014) (adhering to pre-*Melendez-Diaz* case law holding that deportation documents in an A-file are not testimonial when admitted in illegal re-entry cases).**

Proof of absence of business records is not testimonial: *United States v. Munoz-Franco,* 487 F.3d 25 (1st Cir. 2007): In a prosecution for bank fraud and conspiracy, the trial court admitted the minutes of the Board and Executive Committee of the Bank. The defendants did not challenge the admissibility of the minutes as business records, but argued that it was constitutional error to allow the government to rely on the absence of certain information in the minutes to prove that the Board was not informed about such matters. The court rejected the defendants' confrontation argument in the following passage:

> The Court in *Crawford* plainly characterizes business records as "statements that by their nature [are] not testimonial." 541 U.S. at 56. If business records are nontestimonial, it follows that the absence of information from those records must also be nontestimonial.

> **Note: This analysis appears unaffected by *Melendez-Diaz,* as no certificate or affidavit is involved and the record itself was not prepared for litigation purposes.**

Business records are not testimonial: *United States v. Jamieson,* 427 F.3d 394 (6th Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were business records. The court found that admitting the summaries did not violate the defendant's right to confrontation. The underlying records were not testimonial under *Crawford* because they did not "resemble the formal

statement or solemn declaration identified as testimony by the Supreme Court." ***See also United States v. Baker,*** 458 F.3d 513 (6th Cir. 2006) ("The government correctly points out that business records are not testimonial and therefore do not implicate the Confrontation Clause concerns of *Crawford*.").

Note: The court's analysis of business records appears unaffected by *Melendez-Diaz,* because the records were not prepared primarily for litigation and no certificate or affidavit was prepared for use in the litigation.

Post office box records are not testimonial: *United States v. Vasilakos,* 508 F.3d 401 (6th Cir. 2007): The defendants were convicted of defrauding their employer, an insurance company, by setting up fictitious accounts into which they directed unearned commissions. The checks for the commissions were sent to post office boxes maintained by the defendants. The defendants argued that admitting the post office box records at trial violated their right to confrontation. But the court held that the government established proper foundation for the records through the testimony of a postal inspector, and that the records were therefore admissible as business records; the court noted that "the Supreme Court specifically characterizes business records as non-testimonial."

Note: The court's analysis of business records is unaffected by *Melendez-Diaz.*

Drug test prepared by a hospital with knowledge of possible use in litigation is not testimonial; certification of that business record under Rule 902(11) is not testimonial: *United States v. Ellis,* 460 F.3d 920 (7th Cir. 2006): In a trial for felon gun possession, the trial court admitted the results of a drug test conducted on the defendant's blood and urine after he was arrested. The test was conducted by a hospital employee, and indicated a positive result for methamphetamine. At trial, the hospital record was admitted without a qualifying witness; instead, a qualified witness prepared a certification of authenticity under Rule 902(11). The court held that neither the hospital record nor the certification were testimonial within the meaning of *Crawford* and *Davis* --- despite the fact that both records were prepared with the knowledge that they would be used in a prosecution. As to the medical reports, the *Ellis* court concluded as follows:

> While the medical professionals in this case might have thought their observations would end up as evidence in a criminal prosecution, the objective circumstances of this case indicate that their observations and statements introduced at trial were made in nothing else but the ordinary course of business. * * * They were employees simply recording

observations which, because they were made in the ordinary course of business, are "statements that by their nature were not testimonial." *Crawford*, 541 U.S. at 56.

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

Note that the Seventh Circuit, in a case after *Melendez-Diaz,* adhered fully to its ruling in *Ellis* that business records are not testimonial. *United States v. Brown,* 822 F.3d 966 (7th Cir. 2016) (relying on *Ellis* to find that Western Union records of wire transfers were not testimonial: "Logically, if they are made in the ordinary course of business, then they are not made for the purpose of later prosecution.").

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

> The certification at issue in this case is nothing more than the custodian of records at the local hospital attesting that the submitted documents are actually records kept in the ordinary course of business at the hospital. The statements do not purport to convey information about Ellis, but merely establish the existence of the procedures necessary to create a business record. They are made by the custodian of records, an employee of the business, as part of her job. As such, we hold that written certification entered into evidence pursuant to Rule 902(11) is nontestimonial just as the underlying business records are. Both of these pieces of evidence are too far removed from the "principal evil at which the Confrontation Clause was directed" to be considered testimonial.

Note: Many circuits have held that the reasoning of *Ellis* remains sound after *Melendez-Diaz,* and that 902(11) certificates are not testimonial. *See United States v.*

Yeley-Davis, 632 F.3d 673 (10th Cir. 2011), ***United States v. Johnson***, 688 F.3d 494 (8th Cir. 2012), ***United States v. Ayelotan,*** 917 F.3d 394 (5th Cir. 2019), ***United States v. Denton,*** 944 F.3d 170 (4th Cir. 2019), ***United States v. Clotaire,*** 963 F.3d 1288 (11th Cir. 2020), and ***United States v. Anekwu,*** 695 F.3d 967 (9th Cir. 2012) all infra. ***See also Washington v. Griffin,*** 876 F.3d 395 (2nd Cir. 2017) (noting that a certification of a business record "does not transform the underlying notations of the lab analysts into formalized testimonial materials" and relying on the passage from *Melendez-Diaz* which stated that a clerk's authenticating affidavit authenticating an otherwise admissible record does not violate the Confrontation Clause); ***United States v. Clotaire,*** 963 F.3d 1288 (11th Cir. 2020) (relying on the passage from *Melendez-Diaz* to find that a certification authenticating a business record is not testimonial). Cf. ***United States v. Farrad,*** 895 F.3d 859, 876 (6th Cir. 2018)(holding that the defendant forfeited his argument that a 902(11) certificate violated his confrontation rights; but even if not forfeited, "it is unlikely that it would have been a winning argument * * * in light of the Supreme Court's discussion of the 'narrowly circumscribed' exception at common law that allowed a clerk to present a certification authenticating an official record.").

Odometer statements, prepared before any crime of odometer-tampering occurred, are not testimonial: ***United States v. Gilbertson,*** 435 F.3d 790 (7th Cir. 2006): In a prosecution for odometer-tampering, the government proved its case by introducing the odometer statements prepared when the cars were sold to the defendant, and then calling the buyers to testify that the mileage on the odometers when they bought their cars was substantially less than the mileage set forth on the odometer statements. The defendant argued that introducing the odometer statements violated *Crawford.* He contended that the odometer statements were essentially formal affidavits, the very kind of evidence that most concerned the Court in *Crawford*. But the court held that the concern in *Crawford* was limited to affidavits prepared for trial as a testimonial substitute. This concern did not apply to the odometer statements. The court explained as follows:

> The odometer statements in the instant case are not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution. The statements were not initiated by the government in the hope of later using them against Gilbertson (or anyone else), nor could the declarants (or any reasonable person) have had such a belief. The reason is simple: each declaration was made *prior* to Gilbertson even engaging in the crime. Therefore, there is no way for the sellers to anticipate that their statements regarding the mileage on the individual cars would be used as evidence against Gilbertson for a crime he commits in the future.

Note: this result is unaffected by *Melendez-Diaz* as the records clearly were not prepared for purposes of litigation --- the crime had not occurred at the time the records were prepared.

Tax returns are business records and so not testimonial: *United States v. Garth,* 540 F.3d 766 (8th Cir. 2008): The defendant was accused of assisting tax filers to file false claims. The defendant argued that her right to confrontation was violated when the trial court admitted some tax returns of the filers. But the court found no error. The tax returns were business records, and the defendant made no argument that they were prepared for litigation, "as is expected of testimonial evidence."

Note: this result is unaffected by *Melendez-Diaz.*

Certificate of a record of a conviction found not testimonial: *United States v. Weiland,* 420 F.3d 1062 (9th Cir. 2006): The court held that a certificate of a record of conviction prepared by a public official was not testimonial under *Crawford*: "Not only are such certifications a 'routine cataloguing of an unambiguous factual matter,' but requiring the records custodians and other officials from the various states and municipalities to make themselves available for cross-examination in the countless criminal cases heard each day in our country would present a serious logistical challenge without any apparent gain in the truth-seeking process. We decline to so extend *Crawford*, or to interpret it to apply so broadly."

Note: **The reliance on burdens in countless criminal cases is precisely the argument that was rejected in *Melendez-Diaz.* Nonetheless, certificates of conviction are quite probably non-testimonial, because the *Melendez-Diaz* majority states that a certificate is not testimonial if it does nothing more than authenticate another document --- and specifically uses as an example a certificate of conviction.**

In *United States v. Albino-Loe,* 747 F.3d 1206 (9th Cir. 2014), the court adhered to its ruling in *Weiland,* declaring that a routine certification of authenticity of a record (in that case documents in an A-file) are not testimonial in nature, because they "did not accomplish anything other than authenticating the A-file documents to which they were attached."

Absence of records in database is not testimonial; and drug ledger is not testimonial: ***United States v. Mendez,*** 514 F.3d 1035 (10th Cir. 2008): In an illegal entry case, an agent testified that he searched the ICE database for information indicating that the defendant entered the country legally and found no such information. The ICE database is "a nation-wide database of information which archives records of entry documents, such as permanent resident cards, border crossing cards, or certificates of naturalization." The defendant argued that the entries into the database (or the asserted lack of entries in this case) were testimonial. But the court disagreed, because the records "are not prepared for litigation or prosecution, but rather administrative and regulatory purposes." The court also observed that Rule 803(8) tracked *Crawford* exactly: a public record is admissible under Rule 803(8) unless it is prepared with an eye toward litigation or prosecution; and under *Crawford,* "the very same characteristics that preclude a statement from being classified as a public record are likely to render the statement testimonial."

Mendez also involved drug charges, and the defendant argued that admitting a drug ledger with his name on it violated his right to confrontation under *Crawford.* The court also rejected this argument. It stated first that the entries in the ledger were not hearsay at all, because they were offered to show that the book was a drug ledger and thus a "tool of the trade." As the entries were not offered for truth, their admission could not violate the Confrontation Clause. But the court further held that even if the entries were offered for truth, they were not testimonial, because "[a]t no point did the author keep the drug ledger for the *primary purpose* of aiding police in a criminal investigation, the focus of the *Davis* inquiry." (emphasis the court's). The court noted that it was not enough that the statements were relevant to a criminal prosecution, otherwise "any piece of evidence which aids the prosecution would be testimonial."

> **Note: Both holdings in the above case survive *Melendez-Diaz.* The first holding is about the absence of public records, where the records themselves were not prepared in testimonial circumstances. If that absence had been proved by a *certificate*, then the Confrontation Clause, after *Melendez-Diaz*, would have been violated. But the absence was proved by a testifying agent. The second holding states the accepted proposition that business records admissible under Rule 803(6) are, for that reason, non-testimonial. Drug ledgers in particular are absolutely not prepared for purposes of litigation.**

Lower Court Cases on Records and Certificates After Melendez-Diaz

Letter describing results of a search of court records is testimonial after *Melendez-Diaz: United States v. Smith,* 640 F.3d 358 (D.C. Cir. 2011): To prove a felony in a felon firearm case, the government admitted a letter from a court clerk stating that "it appears from an examination of the files in this office" that Smith had been convicted of a felony. Each letter had a seal and a signature by a court clerk. The court found that the letters were testimonial. The clerk did not merely authenticate a record, rather he created a record of the search he conducted. The letters were clearly prepared in anticipation of litigation --- they "respond[ed] to a prosecutor's question with an answer."

> **Note: The analysis in *Smith* provides more indication that certificates of the absence of a record are testimonial after *Melendez-Diaz.* The clerk's letters in *Smith* are exactly like a CNR; the only difference is that they report on the presence of a record rather than an absence.**

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

> The Office of the Medical Examiner is required by D.C.Code 5-1405(b)(11) to investigate "[d]eaths for which the Metropolitan Police Department ["MPD"], or other law enforcement agency, or the United States Attorney's Office requests, or a court orders investigation." The autopsy reports do not indicate whether such requests were made in the instant case but the record shows that MPD homicide detectives and officers from the Mobile Crimes Unit were present at several autopsies. Another autopsy report was supplemented with diagrams containing the notation: "Mobile crime diagram (not [Medical Examiner] --- use for info only)." Still another report included a "Supervisor's Review Record" from the MPD Criminal Investigations Division commenting: "Should have indictment re John Raynor for this murder." Law enforcement officers thus not only observed the autopsies, a fact that would have signaled to the medical examiner that the autopsy might bear on a criminal investigation, they participated in the creation of reports. Furthermore, the autopsy reports were formalized in signed documents titled "reports."

> These factors, combined with the fact that each autopsy found the manner of death to be a homicide caused by gunshot wounds, are "circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez-Diaz*, 129 S.Ct. at 2532 (citation and quotation marks omitted).

In a footnote, the court emphasized that it was *not* holding that all autopsy reports are testimonial:

> Certain duties imposed by the D.C. Code on the Office of the Medical Examiner demonstrate, the government suggests, that autopsy reports are business records not made for the purpose of litigation. It is unnecessary to decide as a categorical matter whether autopsy reports are testimonial, and, in any event, it is doubtful that such an approach would comport with Supreme Court precedent.

Finally, the court rejected the government's argument that there was no error because the expert witness simply relied on the autopsy reports in giving independent testimony. In this case, the autopsy reports were clearly entered into evidence. ***See also United States v. McGill,*** 815 F.3d 846 (D.C.Cir. 2016) (relying on *Moore* to find a Confrontation violation where drug analysis reports and autopsy reports were admitted through testimony from witnesses other than the reports' authors).

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

> Abstractly, an autopsy report can be distinguished from, or assimilated to, the sworn documents in *Melendez-Diaz* and *Bullcoming*, and it is uncertain how the Court would resolve the question. We treated such reports as not covered by the Confrontation Clause, *United States v. De La Cruz*, 514 F.3d 121, 133-34 (1st Cir. 2008), but the law has continued to evolve and no one can be certain just what the Supreme Court would say about that issue today. However, our concern here is with "clearly established" law when the SJC acted. * * * That close decisions in the later Supreme Court cases extended *Crawford* to new situations hardly shows the outcomes were clearly preordained. And, even now it is uncertain whether, under its primary purpose test, the Supreme Court would classify autopsy reports as testimonial.

Immigration interview form was not testimonial: *United States v. Phoeun Lang,* 672 F.3d 17 (1st Cir. 2012): The defendant was convicted of making false statements and unlawfully applying for and obtaining a certificate of naturalization. The defendant argued that his right to confrontation was violated because the immigration form (N-445) on which he purportedly lied contained verification checkmarks next to his false responses. Thus the contention was that the verification checkmarks were testimonial hearsay of the immigration agent who conducted the interview. But the court found no error. The court concluded that the form was not "primarily to be used in court proceedings." Rather it was a record prepared as "a matter of administrative routine, for the primary purpose of determining Lang's eligibility for naturalization." For essentially the same reasons, the court held that the form was admissible under Rule 803(8)(A)(ii) despite the fact that the rule appears to exclude law enforcement reports. The court distinguished between "documents produced in an adversarial setting and those produced in a routine non-adversarial setting for purposes of Rule 803(8)(A)(ii)." The court relied on the passage in *Melendez-Diaz* which declared that the test for admissibility or inadmissibility under Rule 803(8) was the same as the test of testimoniality under the Confrontation Clause, i.e., whether the primary motive for preparing the record was for use in a criminal prosecution.

> **Note: This case was decided before *Williams,* but it would appear to satisfy both the Alito and the Kagan version of the "primary motive" test. Both tests agree that a statement cannot be testimonial unless the primary motive for making it is to have it used in a criminal prosecution. The difference is that Justice Alito provides another qualification: the statement is testimonial only if it was made to be used in the *defendant's* criminal prosecution. In *Phoeun Lang* the first premise was not met --- the statements were made for administrative purposes, and not primarily for use in *any* criminal prosecution.**

Expert's reliance on standard samples for comparison does not violate the Confrontation Clause because any communications regarding the preparation of those samples was not testimonial: *United States v. Razo*, 782 F.3d 31 (1st Cir. 2015). A chemist testified about the lab analysis she performed on a substance seized from the defendant's coconspirator. The crime lab used a "known standard" methamphetamine sample to create a reference point for comparison with seized evidence. That sample was received from a chemical company. The chemist testified that in comparing the seized sample with the known standard sample, she relied on the manufacturer's assurance that the known standard sample was 100% pure. The court found no confrontation violation because the known standard sample --- and the manufacturer's assurance about it --- were not testimonial. Any statements regarding the known

standard sample were not made with the primary motivation that they would be used at a criminal trial, because the sample was prepared for general use by the laboratory. The court noted that the chemist's conclusions about the *seized* sample would raise confrontation questions, but the government produced the chemist to be cross-examined about those conclusions. As to the standard sample, it was prepared "prior to and without regard to any particular investigation, let alone any particular prosecution."

> **Note: In reaching its result, the *Razo* court provided a good interpretation of *Williams*. The court saw support in the fact that the Alito plurality would find any communications regarding the known standard sample to be non-testimonial because that sample was "not prepared for the primary purpose of accusing a targeted individual." And Justice Thomas would be happy, because nothing about the known standard sample was in the nature of a formalized statement.**

Certain records of internet activity sent to law enforcement found testimonial: *United States v. Cameron*, 699 F.3d 621 (1st Cir. 2012): In a child pornography prosecution, the court held that certain records about suspicious internet activity were testimonial and their admission violated the defendant's right to confrontation. The evidence principally at issue related to accounts with Yahoo. Yahoo received an anonymous report that child pornography images were contained in a Yahoo account. Yahoo sent a report --- called a "CP Report"--- to the National Center for Missing and Exploited Children (NCMEC), listing the images being sent with the report, attaching the images, and listing the date and time at which the image was uploaded and the IP Address from which it was uploaded. NCMEC in turn sent a report of child pornography to the Maine State Police Internet Crimes Against Children Unit (ICAC), which obtained a search warrant for the defendant's computers. The government introduced testimony of a Yahoo employee as to how certain records were kept and maintained by the company, but the government did not introduce the Image Upload Data indicating the date and time each image was uploaded to the Internet. The government also introduced testimony by a NCMEC employee explaining how NCMEC handled tips regarding child pornography. The court held that admission of various data collected by Yahoo and Google automatically in order to further their business purposes was proper, because the data was contained in business records and was not testimonial for Sixth Amendment purposes. But the court held, 2-1, that the reports Yahoo prepared and sent to NCMEC were different and were testimonial because the primary purpose for the reports was to record past events that were potentially relevant to a criminal prosecution. The court relied on the following considerations to conclude that the CP Reports were testimonial: 1) they referred to a "suspect" screen name, email address, and IP address --- and Yahoo did not treat its customers as "suspects" in the ordinary course of its business; 2) before a CP Report is created, someone in the

legal department at Yahoo has to determine that an account contained child pornography images; 3) Yahoo did not simply keep the reports but sent them to NCMEC, which was under the circumstances an agent of law enforcement, because it received a government grant to accept reports of child pornography and forward them to law enforcement. The government argued that Confrontation was not at issue because the CP Reports contained business records that were unquestionably nontestimonial, such as records of users' IP addresses. But the court responded that the CP Reports were themselves statements. The court noted that "[i]f the CP Reports simply consisted of the raw underlying records, or perhaps underlying records arranged and formatted in a reasonable way for presentation purposes, the Reports might well have been admissible."

The government also argued that the CP Reports were not testimonial under the Alito definition of primary motive in *Williams.* Like the DNA reports in *Williams*, the CP Reports were prepared at a time when the perpetrator was unknown and so they were not targeted toward a particular individual. The court distinguished *Williams* by relying on a statement in the Alito opinion that at the time of the DNA report, the technicians had "no way of knowing whether it will turn out to be incriminating or exonerating." In contrast, when the CP Reports were prepared, Yahoo personnel knew that they were incriminating: "Yahoo's employees may not have known *whom* a given CP Report might incriminate, but they almost certainly were aware that a Report would incriminate *somebody."*

Finally, the court held that the NCMEC reports sent to the police were testimonial, because they were statements independent of the CP Reports, and they were sent to law enforcement for the primary purpose of using them in a criminal prosecution. One judge, dissenting in part, argued that the connection between an identified user name, the associated IP address, and the digital images archived from that user's account all existed well before Yahoo got the anonymous tip, were an essential part of the service that Yahoo provided, and thus were ordinary business records that were not testimonial.

> **Note: *Cameron* cannot be read to hold that business records admissible under Rule 803(6) can be testimonial under *Crawford.* The court notes that under *Palmer v. Hoffman,* 318 U.S. 109 (1943), records are not admissible as business records when they are calculated for use in court. *Palmer* is still good law under Rule 803(6), as the Court recognized in *Melendez-Diaz.* The *Cameron* court noted that the Yahoo reports were subject to the same infirmity as the records found inadmissible in *Hoffman:* they were not made for business purposes, but rather for purposes of litigation. Thus according to the court, the Yahoo reports were probably not admissible as business records anyway.**

Airline records of passengers on a plane are not testimonial: ***Tran v. Roden,*** 847 F.3d 44 (1st Cir. 2017): On habeas review of a murder conviction, the court considered whether the admission of a manifest prepared by United Airlines violated the defendants' right to confrontation. The manifest showed that two people with the same names as the defendants were on a flight out of the country. This was evidence of consciousness of guilt. The court found that the manifest was a business record prepared by United, outside the context of litigation, and therefore it was not testimonial. The defendants argued that the record was testimonial because it was *delivered* by United to the prosecution. But the court found this irrelevant, because the question under the Confrontation Clause is whether a document was *prepared* with the primary motive of use in a criminal prosecution. The defendants relied on *Cameron,* immediately above, but the court distinguished *Cameron* by noting that the Yahoo records in that case were *prepared* by Yahoo with the intent to send them to the government in order to investigate and prosecute child pornography.

Telephone records are not testimonial: ***United States v. Burgos-Montes,*** 786 F.3d 92 (1st Cir. 2015): The government introduced phone records of a conspirator. They were accompanied by a certification made under Rule 902(11). The defendant argued that the phone records were testimonial but the court disagreed. The defendant argued that the records were produced by the phone company in response to a demand from the government, but the court found this irrelevant. The records were gathered and maintained by the phone company in the routine course of business. "The fact that the print-out of this data in this particular format was requested for litigation does not turn the data contained in the print-out into information created for litigation."

Routine autopsy report was not testimonial: ***United States v. James,*** 712 F.3d 79 (2nd Cir. 2013): The court considered whether its *pre-Melendez-Diaz* case law --- stating that autopsy reports were not testimonial --- was still valid. The court adhered to its view that "routine" autopsy reports were not testimonial because they are not prepared with the primary motivation that they will be used in a criminal trial. Applying the test of "routine" to the facts presented, the court found as follows:

> Somaipersaud's autopsy was nothing other than routine --- there is no suggestion that Jindrak or anyone else involved in this autopsy process suspected that Somaipersaud had been murdered and that the medical examiner's report would be used at a criminal trial. [A government expert] testified that causes of death are often undetermined in cases like this because it could have been a recreational drug overdose or a suicide. The autopsy report

> itself refers to the cause of death as "undetermined" and attributes it both to "acute mixed intoxication with alcohol and chlorpromazine" combined with "hypertensive and arteriosclerotic cardiovascular disease."
>
> The autopsy was completed on January 24, 1998, and the report was signed June 16, 1998, substantially before any criminal investigation into Somaipersaud's death had begun. [N]either the government nor defense counsel elicited any information suggesting that law enforcement was ever notified that Somaipersaud's death was suspicious, or that any medical examiner expected a criminal investigation to result from it. Indeed, there is reason to believe that none is pursued in the case of most autopsies.

The court noted that "something in the order of ten percent of deaths investigated by the OCME lead to criminal investigations." It distinguished the 11th Circuit's opinion --- discussed below --- which found an autopsy report to be testimonial, noting that "the decision was based in part on the fact that the Florida Medical Examiner's Office was created and exists within the Department of Law Enforcement. Here, the OCME is a wholly independent office." Thus, an autopsy report prepared outside the auspices of a criminal investigation is very unlikely to be found testimonial under the Second Circuit's view.

> **Note: In considering the effect of *Williams,* the court found that in fact there was no lesson at all to be derived from *Williams,* as there was no rationale on which five members of the Court could agree. Thus, the Court found that *Williams* controlled only cases exactly like it.**

Autopsy report prepared with the participation of law enforcement was testimonial: *Garlick v. Lee,* 1 F.4th 122 (2nd Cir. 2021): The court found that a state court unreasonably applied *Crawford* and *Melendez-Diaz* in holding that an autopsy report was nontestimonial. The report was prepared at the request of law enforcement officers during an active murder investigation. Law enforcement officers were present during the autopsy and informed the medical examiner of their accusations and expectations. The court found under these circumstances, the primary motivation of the autopsy report was to have it used as evidence at a trial --- it was used throughout the trial, to prove that the injury the defendant inflicted on the victim caused the death, as opposed to other injuries inflicted by another person.

Business records are not testimonial: *United States v. Bansal,* 663 F.3d 634 (3rd Cir. 2011): In a prosecution related to a controlled substance distribution operation, the trial court admitted records kept by domestic and foreign businesses of various transactions. The court rejected the claim that the records were testimonial, stating that "the statements in the records here

were made for the purpose of documenting business activity, like car sales and account balances, and not for providing evidence to law enforcement or a jury."

Rule 902(11) certifications are not testimonial: ***United States v. Denton,*** 944 F.3d 170 (4th Cir. 2019): The court found no error in admitting certifications of business records of Facebook, Google, and Time Warner Cable. These certifications authenticated the business records under Rule 902(11). The court noted that "the Supreme Court has differentiated between an affidavit that is created for the sole purpose of providing evidence against a defendant and an affidavit that is created to authenticate or provide a copy of an otherwise admissible record. Put simply, the former is testimonial and therefore subject to confrontation, while the latter is not."

Admission of credit card company's records identifying customer accounts that had been compromised did not violate the right to confrontation: ***United States v. Keita,*** 742 F.3d 184 (4th Cir. 2014): In a prosecution for credit card fraud, the trial court admitted "common point of purchase" records prepared by American Express. These were internal documents revealing which accounts have been compromised. American Express creates the reports daily as part of regular business practice, and they are used by security analysts to determine whether to contact law enforcement or to investigate the matter internally in the first instance. The court held that the records were not testimonial (even though they could possibly be used for criminal prosecution), relying on the language in *Melendez-Diaz* stating that "business records are generally admissible absent confrontation." The court concluded that the records were primarily prepared for the administration of Amex's regularly conducted business.

Warrant of removal, offered in an illegal reentry prosecution, is non-testimonial: ***United States v. Garcia,*** 887 F.3d 205 (5th Cir. 2018): In an illegal re-entry prosecution, to prove that the defendant had been deported, the government offered the warrant of removal that was entered just after the defendant was removed. The defendant argued that the warrant was testimonial under *Melendez-Diaz,* but the court disagreed. The court stated that the problem with the forensic certificates in *Melendez-Diaz* was that they were produced specifically for purposes of trial. In contrast, warrants of removal are prepared "to memorialize an alien's departure --- not specifically or primarily to prove facts in a hypothetical future criminal prosecution."

Certificate of non-existence of a record, while testimonial, did not violate the Confrontation Clause because the person who authored and signed the certificate testified:

United States v. Arellano-Banuelos, 927 F.3d 355 (5th Cir. 2019): In an illegal reentry prosecution, the government offered a certificate of the non-existence of a record permitting reentry. The defendant argued that the certificate was testimonial, and the court conceded that it had found such a certificate testimonial after *Melendez-Diaz,* in *United States v. Martinez-Rios,* 595 F.3d 581 (5th Cir. 2010), because the affidavit was prepared solely to prove a fact in a criminal prosecution. But the court held that the Confrontation Clause was not violated in this case because the person who authored and signed the certificate was presented at trial, and testified to the search process. The defendant did not cross-examine the witness, but the witness was available for cross-examination, which is all that the Constitution requires. The defendant argued that the Confrontation Clause was nonetheless violated because the witness did not personally check all the systems that led to the certification --- a staff member ran the initial checks and created the printout. But the court found that this did not matter, finding no authority "for the proposition that every individual involved in the preparation of a document such as a CNR must testify at trial." It was enough that the defendant "had an opportunity to cross-examine the person who prepared and signed the CNR."

Certifications by Google and Yahoo of email traffic were not testimonial: *United States v. Ayelotan,* 917 F.3d 394 (5th Cir. 2019): In a fraud scheme involving emails, the trial court admitted the emails, including transmittal data, that were accompanied by certificates from Google and Yahoo. The certificate authenticated the business records of the providers, stating that these providers recorded the transmittal data as part of the regular practice of a regularly conducted business activity. The court found that the transmittal certificates were not testimonial, because the providers "didn't create the records to prove a particular fact at a particular trial --- let alone this trial."

Admission of purported drug ledgers violated the defendant's confrontation rights where the proof of authenticity was the fact that they were produced by an accomplice at a proffer session: *United States v. Jackson,* 625 F.3d 875 (5th Cir. 2010), amended 636 F.3d 687 (5th Cir. 2011): In a drug prosecution, purported drug ledgers were offered to prove the defendant's participation in drug transactions. An officer sought to authenticate the ledgers as business records but the court found that he was not a "qualified witness" under Rule 803(6) because he had no knowledge that the ledgers came from any drug operation associated with the defendant. The court found that the only adequate basis of authentication was the fact that the defendant's accomplice had produced the ledgers at a proffer session with the government. But because the production at the proffer session was unquestionably a testimonial statement --- and because the accomplice was not produced to testify --- admission of the ledger against the defendant violated his right to confrontation under *Crawford.*

Note: **The *Jackson* court does *not* hold that business records are testimonial. The reasoning is muddled, but the best way to understand it is that the evidence used to *authenticate* the business record --- the cohort's production of the records at a proffer session --- was testimonial.**

Pseudoephedrine logs are not testimonial: ***United States v. Towns,*** 718 F.3d 404 (5th Cir. 2013): In a methamphetamine prosecution, the agent testified to patterns of purchasing pseudoephedrine at various pharmacies. This testimony was based on logs kept by the pharmacies of pseudoephedrine purchases. The court found that the logs --- and the certifications to the logs provided by the pharmacies --- were properly admitted as business records. It further held that the records were not testimonial. As to the Rule 803(6) question, the court found irrelevant the fact that the records were required by statute to be kept and were pertinent to law enforcement. The court stated that "the regularly conducted activity here is selling pills containing pseudoephedrine; the purchase logs are kept in the course of that activity. Why they are kept is irrelevant at this stage." As to the certifications from the records custodians of the pharmacies, the court found them proper under Rule 803(6) and 902(11) ---the certifications tracked the language of Rule 803(6) and there was no requirement that the custodians do anything more, such as explain the process of record keeping. As to the Confrontation Clause, the court noted that the Supreme Court in *Melendez-Diaz* had declared that business records are ordinarily non-testimonial. Moreover, the logs were not prepared solely with an eye toward trial. The court concluded as follows:

> The pharmacies created these purchase logs *ex ante* to comply with state regulatory measures, not in response to an active prosecution. Additionally, requiring a driver's license for purchases of pseudoephedrine deters crime. The state thus has a clear interest in businesses creating these logs that extends beyond their evidentiary value. Because the purchase logs were not prepared specifically and solely for use at trial, they are not testimonial and do not violate the Confrontation Clause.

Biographical information contained in a Form I-213 is not testimonial: ***United States v. Noria,*** 945 F.3d 847 (5th Cir. 2019): In an illegal-reentry prosecution, the government proved biographical information about the defendant by offering statements made on an I-213 form that documented encounters between the defendant and ICE agents. The defendant argued that the statements on the form were testimonial, but the court disagreed. The court reasoned as follows:

> Here, it is uncontested that the Form I-213s are routinely produced by DHS and are not generated solely for use at trial. Moreover, there is no indication that the specific Form I-213s introduced at Noria's trial are untrustworthy or unusually litigation-focused; by all accounts, they are standard I-213s created contemporaneously with each of Noria's interviews by immigration agents. No doubt, the biographical portion of an I-213 can be helpful to the Government in a later criminal prosecution. However, we agree with the Ninth and Eleventh Circuits that the forms' primary purpose is administrative, not investigative or prosecutorial. After all, immigration agents prepare an I-213 every time they encounter an alien suspected of being removable, regardless of whether that alien is ever criminally prosecuted or civilly removed. The forms are then stored in the regular course of business. * * * I-213's serve primarily as administrative records used to track undocumented entries, not as evidence in criminal trials.

The court also rejected the defendant's argument that the reports were not admissible under Rule 803(8), the public records exception to the hearsay rule. That rule does not bar all law enforcement reports in criminal cases, but only those prepared for purposes of litigation. Thus, the public records exception tracks the "primary purpose" test of the Confrontation Clause.

Court rejects the "targeted individual" test in reviewing an affidavit pertinent to illegal immigration: *United States v. Duron-Caldera,* 737 F.3d 988 (5th Cir. 2013): The defendant was charged with illegal reentry. The dispute was over whether he was in fact an alien. He claimed he was a citizen because his mother, prior to his birth, was physically present in the U.S. for at least ten years, at least five of which were before she was 14. To prove that this was not the case, the government offered an affidavit from the defendant's grandmother, prepared 40 years before the instant case. The affidavit was prepared in connection with an investigation into document fraud, including the alleged filing of fraudulent birth certificates by the defendant's parents and grandmother. The affidavit accused others of document fraud, and stated that the defendant's mother did not reside in the United States for an extended period of time. The trial court admitted the affidavit but the court of appeals held that it was testimonial and reversed. The government argued that the affidavit was a business record because it was found in regularly kept immigration records. But the court noted that it could not qualify as a business record because the grandmother was not acting in the ordinary course of regularly conducted activity.

The court found that the government had not shown that the affidavit was prepared outside the context of a criminal investigation, and therefore the affidavit was testimonial under the primary motive test. The government relied on the Alito opinion in *Williams*, under which the

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

> ***Reporter's Note:*** **The court's construction of the Confrontation Clause could come out the other way. The reference to "witnesses against him" in the Sixth Amendment could be interpreted as *at the time the statement was made*, it was being directed at the defendant. The *Duron-Caldera* court reads "witnesses" as of the time the statement is being introduced. But at that time, the witness is not there. All the "witnessing" is done at the time the statement is made; and if the witness is not targeting the individual at the time the statement is made, it could well be argued that the witness is not testifying "against *him*."**
>
> **Another note from *Duron-Caldera:* The court notes that there is no rule to be taken from *Williams* under the *Marks* test --- under which you take the narrowest view on which the plurality and the concurrence can agree. In *Williams,* there is nothing on which the plurality and Justice Thomas agreed.**

Pseudoephedrine purchase records are not testimonial: *United States v. Collins,* 799 F.3d 554 (6th Cir. 2015): Relying on the Fifth Circuit's decision in *United States v. Towns, supra,* the court held that pharmaceutical records of pseudoephedrine purchases were not testimonial. The court noted that while law enforcement officers use the records to track purchases, the "system is designed to prevent customers from purchasing illegal quantities of pseudoephedrine by indicating to the pharmacy employee whether the customer has exceeded federal or state purchasing restrictions" --- and accordingly was not primarily motivated to generate evidence for a prosecution.

Pseudoephedrine logs are not testimonial: *United States v. Lynn,* 851 F.3d 786 (7th Cir. 2017): Affirming convictions for methamphetamine manufacturing and related offenses, the court

found no error in admitting logs of pseudoephedrine purchases prepared by pharmacies. These logs indicated that the defendant and associates had purchased pseudoephedrine, a necessary ingredient of methamphetamine. The defendant argued that introducing the logs violated his right to confrontation because they were prepared in anticipation of a prosecution and so were testimonial. But the court disagreed. It stated that "regulatory bodies may have legitimate interests in maintaining these records that far exceed their evidentiary value in a given case. For example, requiring identification for each pseudoephedrine purchase may deter misuse or pseudoephedrine-related drug offenses." The logs were therefore not testimonial.

Preparing an exhibit for trial is not testimonial: ***United States v. Vitrano,*** 747 F.3d 922 (7th Cir. 2014): In a prosecution for fraud and perjury, the government offered records of phone calls made by the defendant. The defendant argued that there was a confrontation violation because the technician who prepared the phone calls as an exhibit did not testify. The court found that the confrontation argument was properly rejected, because no statements of the technician were admitted at trial. The court declared that "[p]reparing an exhibit for trial is not itself testimonial."

Records of wire transfers are not testimonial: ***United States v. Brown,*** 822 F.3d 966 (7th Cir. 2016): In a drug prosecution, the government offered records of Western Union wire transfers. The court found that the records were not testimonial, noting that "[l]ogically, if they are made in the ordinary course of business, then they are not made for the purpose of later prosecution." It concluded that the records were "routine and prepared in the ordinary course of business, not in anticipation of prosecution."

> **Note: The Western Union records in *Brown* were proven up by way of certificates offered under Rule 902(11). The court did not even mention any possible concern that those certifications would themselves be testimonial. It focused only on the testimoniality of the underlying records.**

Certifications that a gun dealer was federally licensed were testimonial: ***United States v. Barber,*** 937 F.3d 965 (7th Cir. 2019): The defendant was charged with stealing guns from a federally licensed gun dealer. To prove the federal license, the government offered a License Registration Report – a database search report --- which showed when the license was issued, expiration date, and its status as active. Appended to that report, the government submitted two affidavits from ATF officials, which explained the purposes of the records, that the records were for firearm licensing, that a search of the records was conducted, and concluded that the dealer

was licensed during the relevant period. The court found that the affidavits were testimonial because "they go beyond simple authentication of a copy." The court reasoned that the affidavits rested "on an inference about the *continuing validity* of the license, and that inference requires an interpretation of what the records shows or a certification about its substance or effect. In other words, the government is relying on information [in the affidavit] beyond what the license itself says." As an example, the court stated that "the affidavit could imply that ATF has a practice of documenting on its copy of a license information about suspensions (if any), or it might suggest that the affiant agent ran a search in order to confirm that [the dealer] did not have a licensing issue at the time of the robbery." The court concluded that the defendant was "entitled to know about and challenge whatever process went into generating this type of evidence."

> **Note: The internet search and the affidavits were clearly in anticipation of the prosecution, and were generated to prove an element of the crime. So the case is like those about certificates about the absence of a public record in the illegal re-entry prosecutions. And it is unlike the cases in which business records are authenticated by certificate under Rule 902(11), or in which electronic information is authenticated by certificate under Rule 902(13) and (14). In the latter cases, the underlying information being authenticated is not itself testimonial.**

Record of a test conducted on a possible victim of sexual abuse is not testimonial: *Wilson v. Boughton*, 41 F.4th 803 (7th Cir. 2022): Wilson was convicted in state court for sexual assault of FT, a seven-year-old girl. He brought a habeas petition contending that his lawyer was ineffective for not challenging, on confrontation grounds, a medical report indicating that the child tested positive for herpes. The court rejected the argument, because the medical report was not testimonial. The doctor who ordered the testing testified that the Hospital routinely tests for sexual diseases when patients have lesions, as FT did. Thus, the primary motive for the test was to treat the patient.

Records of sales at a pharmacy are business records and not testimonial under *Melendez-Diaz: United States v. Mashek,* 606 F.3d 922 (8th Cir. 2010): The defendant was convicted of attempt to manufacture methamphetamine. At trial the court admitted logbooks from local pharmacies to prove that the defendant made frequent purchases of pseudoephedrine. The defendant argued that the logbooks were testimonial under *Melendez-Diaz,* but the court disagreed and affirmed his conviction. The court first noted that the defendant probably waived his confrontation argument because at trial he objected only on the evidentiary grounds of hearsay and Rule 403. But even assuming the defendant preserved his confrontation argument, the pseudoephedrine logs were kept in the ordinary course of business pursuant to Iowa law were business records under Federal Rule of Evidence 803(6) and so not testimonial. ***Accord, United***

States v. Ali, 616 F.3d 745 (8th Cir. 2010) (business records prepared by financial services company, offered as proof that tax returns were false, were not testimonial, as "*Melendez-Diaz* does not apply to the HSBC records that were kept in the ordinary course of business."); ***United States v. Wells,*** 706 F.3d 908 (8th Cir. 2013) (*Melendez-Diaz* did not preclude the admission of pseudoephedrine logs, because they constitute non-testimonial business records under Federal Rule of Evidence 803(6)).

Rule 902(11) authentication was not testimonial: ***United States v. Thompson,*** 686 F.3d 575 (8th Cir. 2012): To prove unexplained wealth in a drug case, the government offered and the court admitted a record from the Iowa Workforce Development Agency showing no reported wages for Thompson's social security number during 2009 and 2010. The record was admitted through an affidavit of self-authentication offered pursuant to Rule 902(11). The court found that the earnings records themselves were non-testimonial because they were prepared for administrative purposes. As to the exhibit, the court stated that "[b]ecause the IWDA record itself was not created for the purpose of establishing or proving some fact at trial, admission of a certified copy of that record did not violate Thompson's Confrontation Clause rights." The court emphasized that "[b]oth the majority and dissenting opinions in *Melendez-Diaz* noted that a clerk's certificate authenticating a record --- or a copy thereof --- for use as evidence was traditionally admissible even though the certificate itself was testimonial, having been prepared for use at trial." It concluded that "[t]o the extent Thompson contends that a copy of an existing record or a printout of an electronic record constitutes a testimonial statement that is distinguishable from the non-testimonial statement inherent in the original business record itself, we reject this argument." ***See also United States v. Johnson***, 688 F.3d 494 (8th Cir. 2012) (certificates of authenticity presented under Rule 902(11) are not testimonial, and the notations on the lab report by the technician indicating when she checked the samples into and out of the lab did not raise a confrontation question because they were offered only to establish a chain of custody and not to prove the truth of any matter asserted).

GPS tracking reports were properly admitted as non-testimonial business records: ***United States v. Brooks,*** 715 F.3d 1069 (8th Cir. 2013): Affirming bank robbery and related convictions, the court rejected the defendant's argument that admission at trial of GPS tracking reports violated his right to confrontation. The reports recorded the tracking of a GPS device that was hidden by a teller in the money taken from the bank. The court held that the records were properly admitted as business records under Rule 803(6), and they were not testimonial. The court reasoned that the primary purpose of the tracking reports was to track the perpetrator in an ongoing pursuit --- not for use at trial. The court stated that "[a]lthough the reports ultimately were used to

link him to the bank robbery, they were not *created* . . . to establish some fact at trial. Instead, the GPS evidence was generated by the credit union's security company for the purpose of locating a robber and recovering stolen money."

Certificates attesting to Indian blood are not testimonial: *United States v. Rainbow,* 813 F.3d 1097 (8th Cir. 2016): To prove a jurisdictional element of a charge that the defendants committed an assault within Indian Country, the government offered certificates of degree of Indian blood. The certificates certified that the respective defendants possessed the requisite degree of Indian blood. The defendants argued that, because the certificates were formalized and prepared for litigation, they were testimonial and so admitting them violated their right to confrontation. The certificates were prepared by a clerk of an officer of the BIA, and introduced at trial by the assistant supervisor of that office. The certificates reflected information about what was in records regularly kept by the BIA. The court found that the certificates were not testimonial. It explained as follows:

> Although Archambault [the assistant supervisor] testified that he had these particular certificates prepared for his testimony, BIA officials regularly certify blood quantum for the purpose of establishing eligibility for federal programs available only to Indians. Archambault explained that his office maintained the records of tribal enrollment and of each member's blood quantum. He could look up an individual's enrollment status and blood quantum at any time—that information existed regardless of whether any crime was committed. Unlike the analysts in *Melendez–Diaz* and *Bullcoming,* the enrollment clerk here did not complete forensic testing on evidence seized during a police investigation, but instead performed the ministerial duty of preparing certificates based on information that was kept in the ordinary course of business. An objective witness would not necessarily know that the certificates would be used at a later trial, because certificates of degree of Indian blood are regularly used in the administration of the BIA's affairs. Simply put, the enrollment clerk prepared certificates using records maintained in the ordinary course of business by the Standing Rock Agency, and the BIA routinely issues certificates in the administration of its affairs. Thus, the certificates were admissible as non-testimonial business records.

Prior conviction in which the defendant did not have the opportunity to cross-examine witnesses cannot be used in a subsequent trial to prove the facts underlying the conviction: *United States v. Causevic,* 636 F.3d 998 (8th Cir. 2011): The defendant was charged with making materially false statements in an immigration matter --- specifically that he lied about

committing a murder in Bosnia. To prove the lie at trial, the government offered a Bosnian judgment indicating that the defendant was convicted in absentia of the murder. The court held that the judgment was testimonial to prove the underlying facts, and there was no showing that the defendant had the opportunity to cross-examine the witnesses in the Bosnian court. The court distinguished proof of the *fact* of a conviction being entered (such as in a felon-firearm prosecution), as in that situation the public record is prepared for recordkeeping and not for a trial. In contrast the factual findings supporting the judgment were obviously generated for purposes of a criminal prosecution.

Affidavit that birth certificate existed was testimonial: *United States v. Bustamante,* 687 F.3d 1190 (9th Cir. 2012): The defendant was charged with illegal entry and the dispute was whether he was a United States citizen. The government contended that he was a citizen of the Philippines but could not produce a birth certificate, as the records had been degraded and were poorly kept. Instead it produced an affidavit from an official who searched birth records in the Philippines as part of the investigation into the defendant's citizenship by the Air Force 30 years earlier. The affidavit stated that birth records indicated that the defendant was born in the Philippines, and the affidavit purported to transcribe the information from the records. The court held that the affidavit was testimonial under *Melendez-Diaz* and reversed the conviction. The court distinguished this case from cases finding that birth records and certificates of authentication are not testimonial:

> Our holding today does not question the general proposition that birth certificates, and official duplicates of them, are ordinary public records "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial." *Melendez-Diaz*, 129 S.Ct. at 2539-40. But Exhibit 1 is not a copy or duplicate of a birth certificate. Like the certificates of analysis at issue in *Melendez-Diaz*, despite being labeled a copy of the certificate, Exhibit 1 is "quite plainly" an affidavit. It is a typewritten document in which Salupisa testifies that he has gone to the birth records of the City of Bacolod, looked up the information on Napoleon Bustamante, and summarized that information at the request of the U.S. government for the purpose of its investigation into Bustamante's citizenship. Rather than simply authenticating an existing non-testimonial record, Salupisa created a new record for the purpose of providing evidence against Bustamante. The admission of Exhibit 1 without an opportunity for cross examination therefore violated the Sixth Amendment.

Filed statement of registered car owner, made after impoundment, that he sold the car to the defendant, was testimonial: *United States v. Esparza,* 791 F.3d 1067 (9th Cir. 2015): The defendant was arrested entering the United States with marijuana hidden in the gas tank and dashboard; the fact in dispute was the defendant's knowledge, and specifically whether he owned the car he was driving. At the time of arrest, the registered owner was Donna Hernandez. The government relied on two hearsay statements made in records filed with the DMV by Hernandez that she had sold the car to the defendant six days before the defendant's arrest. But these records were filed *after* the defendant was arrested and Hernandez had received a notice indicating that the car had been seized because it was used to smuggle marijuana into the country. Under the circumstances, the court found that the post-hoc records filed by Hernandez with the DMV were testimonial. The court noted that Hernandez did not create the record "for the routine administration of the DMV's affairs." Nor was Hernandez merely "a private citizen who, in the course of a routine sale, simply notified the DMV of the transfer of her car. Instead, her car had already been seized for serious criminal violations, and she sent the transfer form to the DMV only after receiving a notice of seizure from [Customs and Border Protection]."

> **Note: This is an interesting case in which a statement was found testimonial in the absence of significant law enforcement involvement in the generation of the statement. As the Court has noted in *Bryant* and *Clark*, law enforcement involvement is critical to finding a statement testimonial, because a statement not made to or with law enforcement is unlikely to be sufficiently formal, and unlikely to be primarily motivated for use in a criminal trial. But at least it can be said that there is formality here --- Hernandez filed formal statements claiming that the ownership was transferred. And there was involvement of the state both in spurring her interest in filing (by sending her the notice) and in receiving her filing.**

Government concedes a *Melendez-Diaz* error in admitting affidavit on the absence of a public record: *United States v. Norwood,* 603 F.3d 1063 (9th Cir. 2010): In a drug case, the government sought to prove that the defendant had no legal source for the large amounts of cash found in his car. The trial court admitted an affidavit of an employee of the Washington Department of Employment Security, which certified that a diligent search failed to disclose any record of wages reported for the defendant in a three-month period before the crime. On appeal, the government conceded that the affidavit was erroneously admitted in light of the intervening decision in *Melendez-Diaz.* (The court found the error to be harmless).

CNR is testimonial but a warrant of deportation is not: ***United States v. Orozco-Acosta,*** 607 F.3d 1156 (9th Cir. 2010): In an illegal reentry case, the government proved removal by introducing a warrant of deportation under Rule 803(8), and it proved unpermitted reentry by introducing a certificate of non-existence of permission to reenter (CNR) under Rule 803(10). The trial was conducted and the defendant convicted before *Melendez-Diaz.* On appeal, the government conceded that introducing the CNR violated the defendant's right to confrontation because under *Melendez-Diaz* that record is testimonial. The court in a footnote agreed with the government's concession, stating that its previous cases holding that CNRs were not testimonial were "clearly inconsistent with *Melendez-Diaz*" because like the certificates in that case, a CNR is prepared solely for purposes of litigation, after the crime has been committed. In contrast, however, the court found that the warrant of deportation was properly admitted even under *Melendez-Diaz.* The court reasoned that "neither a warrant of removal's sole purpose nor even its primary purpose is use at trial." It explained that a warrant of removal must be prepared in every case resulting in a final order of removal, and only a "small fraction of these warrants are used in immigration prosecutions." The court concluded that "*Melendez-Diaz* cannot be read to establish that the mere possibility that a warrant of removal --- or, for that matter, any business or public record --- could be used in a later criminal prosecution renders it testimonial under *Crawford*." The court found that the error in admitting the CNR was harmless and affirmed the conviction. ***See also United States v. Rojas-Pedroza,*** 716 F.3d 1253 (9th Cir. 2013) (adhering to *Orozco-Acosta* in response to the defendant's argument that it had been undermined by *Bullcoming* and *Bryant;* holding that a Notice of Intent in the defendant's A-File --- which apprises the alien of the determination that he is removable --- was non-testimonial because its "primary purpose is to effect removals, not to prove facts at a criminal trial."); ***United States v. Lopez,*** 762 F.3d 852 (9th Cir. 2014) (verification of removal, recording the physical removal of an alien across the border, is not testimonial; like a warrant of removal, it is made for administrative purposes and not primarily designed to be admitted as evidence at a trial; the only difference from a warrant of removal "is that a verification of removal is used to record the removal of aliens pursuant to expedited removal procedures, while the warrant of removal records the removal of aliens following a hearing before an immigration judge"; also holding that, for the same reasons, the verification of removal was admissible as a public record under Rule 803(8)(A)(ii), despite the Rule's apparent exclusion of law enforcement reports); ***United States v. Albino-Loe,*** 747 F.3d 1206 (9th Cir. 2014) (statements concerning the defendant's alienage in a notice of removal --- which is the charging document for deportation --- are not testimonial in an illegal entry case; the primary purpose of a notice of removal "is simply to effect removals, not to prove facts at a criminal trial"); ***United States v. Torralba-Mendia,*** 784 F.3d 652 (9th Cir. 2015) (I-213 Forms, offered to show that passengers detained during an investigation were deported, were admissible under the public records hearsay exception and were not testimonial: "The admitted record of a deportable alien contains the same information as a

verification of removal: The alien's name, photograph, fingerprints, as well as the date, port and method of departure . . . .[T]he admitted forms are a ministerial, objective observation [and] Agents complete I-213 forms regardless of whether the government decides to prosecute anyone criminally.").

Documents in alien registration file not testimonial: *United States v. Valdovinos-Mendez,* 641 F.3d 1031 (9th Cir. 2011): In an illegal re-entry prosecution, the defendant argued that admission of documents from his A-file violated his right to Confrontation. The court held that the challenged documents a --- Warrant of Removal, a Warning to Alien ordered Deported, and the Order from the Immigration Judge --- were not testimonial. They were not prepared with the primary motive of use in a criminal prosecution, because at the time they were prepared the crime of illegal reentry had not occurred.

Forms prepared by border patrol agents interdicting aliens found not testimonial: *United States v. Morales,* 720 F.3d 1194 (9th Cir. 2013): In a prosecution for illegally transporting aliens, the trial court admitted Field 826 forms, prepared by Border Patrol agents who interviewed the aliens. The Field 826 form records the date and location of arrest, the funds found in the alien's possession, and basic biographical data about the alien, and also provides the alien options, including the making of a concession that the alien is illegally in the country and wishes to return home. The court of appeals rejected the defendant's argument that these forms were testimonial. It stated as follows:

> A Border Patrol agent uses the form in the field to document basic information, to notify the aliens of their administrative rights, and to give the aliens a chance to request their preferred disposition. The Field 826s are completed whether or not the government decides to prosecute the aliens or anyone else criminally. The nature and use of the Field 826 makes clear that its primary purpose is administrative, not for use as evidence at a future criminal trial. Even though statements within the form may become relevant to later criminal prosecution, this potential future use does not automatically place the statements within the ambit of 'testimonial.'

The court did find that the part of the report that contained information from the aliens was improperly admitted in violation of the *hearsay* rule. The Field 826 is a public record but information coming from the alien is not information coming from a public official. The court found the violation of the hearsay rule to be harmless error.

Note: The court appears to be wrong about the hearsay rule because statements coming from the alien would be admissible as party-opponent statements in a public record.

Return of Service, offered to prove that the Defendant had been provided with notice of a hearing on a domestic violence protection order, was not testimonial: *United States v. Fryberg,* 854 F.3d 1126 (9th Cir. 2017): The defendant was convicted for possession of a firearm by a prohibited person. The prohibition was that he was subject to a domestic violence protection order. Critical to the validity of that order was that the defendant was served with notice of a hearing on a permanent protection order. As proof of that the defendant was served with that notice, the government offered the return of service by a law enforcement officer, completed on the day that service was purportedly made. The court held that the return of service was admissible over a hearsay exception as a public record; it was not barred by the law enforcement prohibition of Rule 803(8) because it was a ministerial, non-adversarial record, proving only that service was made. The court further held that the return of service was admissible over a confrontation objection, because it was not testimonial. The court likened the return of service to the certificate of deportation upheld in *Orozco-Acosta, supra.* The court stated that the primary purpose for preparing the return of service was not to have it used as evidence in a prosecution but rather to inform the court "that the defendant had been served with notice of the hearing on the protection order, which enabled the hearing to proceed." At the time the notice was filed, no crime had yet occurred and so the return of service was not primarily prepared for the purpose of a criminal prosecution.

Social Security application was not testimonial as it was not prepared under adversarial circumstances: *United States v. Berry*, 683 F.3d 1015 (9th Cir. 2012): The court affirmed the defendant's conviction for social security fraud for taking money paid for maintenance of his son while the defendant was a representative payee. The trial judge admitted routine Social Security Administration records showing that the defendant applied for benefits on behalf of the son. The defendant argued that an SSA application was tantamount to a police report and therefore the record was inadmissible under Rule 803(8), and also that its admission violated his right to confrontation. The court disagreed, reasoning that "a SSA interviewer completes the application as part of a routine administrative process" and such a record is prepared for each and every request for benefits. "No affidavit was executed in conjunction with preparation of the documents, and there was no anticipation that the documents would become part of a criminal proceeding. Rather, every expectation was that Berry would use the funds for their intended

purpose." The court quoted *Melendez-Diaz* for the proposition that "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because --- having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial --- they are not testimonial." The court concluded as follows:

> [N]o reasonable argument can be made that the agency documents in this case were created solely for evidentiary purposes and/or to aid in a police investigation. Importantly, no police investigation even existed when the documents were created. * * * Because the evidence at trial established that the SSA application was part of a routine, administrative procedure unrelated to a police investigation or litigation, we conclude that the district court did not abuse its discretion by admitting the application under Fed.R.Evid. 803(8), and no constitutional violation occurred.

Affidavit seeking to amend a birth certificate, prepared by border patrol agents for use at trial, was testimonial: *United States v. Macias,* 789 F.3d 1011 (9th Cir. 2015): The defendant was arrested for illegal reentry but claimed that he had a California birth certificate and was a U.S. citizen. He was charged with illegal reentry and making a false claim of citizenship. During his trial he introduced a "delayed registration of birth" document issued by the State of California, and the jury deadlocked. After the trial, border patrol agents conducted an investigation into the defendant's place of birth, interviewing family members and reviewing family documents, and determined that he had been born in Mexico. They then attempted to correct the birthplace on the California document; pursuant to California law, they submitted sworn affidavits in an application to amend the California document. At the second trial, the government introduced the delayed registration as well as the amending affidavit. On appeal, the defendant argued that the amending affidavit was testimonial and its admission violated his right to confrontation. The court reviewed this claim for plain error because at trial the defendant's objection was on hearsay grounds only. The court found that the amending affidavit was clearly testimonial, as its sole purpose was to create evidence for the defendant's second trial. However, the court found that the plain error did not affect the defendant's substantial rights, because the government at trial introduced the defendant's Mexican birth certificate, as well as testimony from family members that the defendant was born in Mexico.

Affidavits authenticating business records and foreign public records are not testimonial: *United States v. Anekwu,* 695 F.3d 967 (9th Cir. 2012): In a fraud case, the government authenticated foreign public records and business records by submitting certificates

of knowledgeable witnesses. This is permitted by 18 U.S.C.§ 3505 for foreign records in criminal cases. The court found that the district court did not commit plain error in finding that the certificates were not testimonial. The certificates were not themselves substantive evidence but rather a means to authenticate records. The court relied on the 10th Circuit's decision in *Yeley-Davis,* immediately below, and on the statement in *Melendez-Diaz* that certificates that do no more than authenticate non-testimonial records are not themselves testimonial.

Records of cellphone calls kept by provider as business records are not testimonial, and Rule 902(11) affidavit authenticating the records is not testimonial: *United States v. Yeley-Davis,* 632 F.3d 673 (10th Cir. 2011): In a drug case the trial court admitted cellphone records indicating that the defendant placed calls to coconspirators. The foundation for the records was provided by an affidavit of the records custodian that complied with Rule 902(11). The defendant argued that both the cellphone records and the affidavit were testimonial. The court rejected both arguments and affirmed the conviction. As to the records, the court found that they were not prepared "simply for litigation." Rather, the records were kept for Verizon's business purposes, and accordingly were not testimonial. As to the certificate, the court relied on pre-*Melendez-Diaz* cases such as *United States v. Ellis, supra*, which found that authenticating certificates were not the kind of affidavits that the Confrontation Clause was intended to cover. The defendant responded that cases such as *Ellis* had been abrogated by *Melendez-Diaz*, but the court disagreed:

> If anything, the Supreme Court's recent opinion supports the conclusion in *Ellis.* * * * Justice Scalia expressly described the difference between an affidavit created to provide evidence against a defendant and an affidavit created to authenticate an admissible record: "A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant." Id. at 2539. In addition, Justice Scalia rejected the dissent's concern that the majority's holding would disrupt the long-accepted practice of authenticating documents under Rule 902(11) and would call into question the holding in *Ellis*. See *Melendez-Diaz*, 129 S.Ct. at 2532 n. 1 ("Contrary to the dissent's suggestion, ... we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the ... authenticity of the sample ... must appear in person as part of the prosecution's case."); see also id. at 2547 (Kennedy, J., dissenting) (expressing concern about the implications for evidence admitted pursuant to Rule 902(11) and future of *Ellis*). The Court's ruling in *Melendez-Diaz* does not change our holding that Rule 902(11) certifications of authenticity are not testimonial.

The court found *Yeley-Davis* "dispositive" in *United States v. Brinson,* 772 F.3d 1314 (10th Cir. 2014), in which the court admitted a certificate of authenticity of credit card records. The court again distinguished *Melendez-Diaz* as a case concerned with affidavits showing the results of a forensic analysis --- whereas the certificate of authenticity "does not contain any 'analysis' that would constitute out-of-court testimony. Without that analysis, the certificate is simply a non-testimonial statement of authenticity." ***See also United States v. Keck,*** 643 F.3d 789 (10th Cir. 2011): Records of wire-transfer transactions were not testimonial because they "were created for the administration of Moneygram's affairs and not the purpose of establishing or proving some fact at trial. And since the wire-transfer data are not testimonial, the records custodian's actions in preparing the exhibits [by cutting and pasting the data] do not constitute a Confrontation Clause violation."

Notation on a fax attaching documents sent to law enforcement was not testimonial: *United States v. Stegman,* 873 F.3d 1215 (10th Cir. 2017): In a tax fraud prosecution, the government introduced the defendant's records, as sent by the defendant's accountant. The defendant objected that the fax cover sheet transmitting the document contained a notation made by the accountant that was potentially incriminating. The court found that the notation was not testimonial. It explained that the accountant's notation was "cooperative and informal in nature and there is no indication that [the accountant] would have reasonably expected the notation to be used prosecutorially."

Immigration forms containing biographical data, country of origin, etc. are not testimonial: *United States v. Caraballo,* 595 F.3d 1214 (11th Cir. 2010): In an alien smuggling case, the trial court admitted I-213 forms prepared by an officer who found aliens crammed into a small room in a boat near the shore of the United States. The forms contained basic biographical information, and were used at trial to prove that the persons were non-citizens and not admittable. The defendant argued that the forms were inadmissible hearsay and also testimonial. The court of appeals found no error. On the hearsay question, the court held that the forms were properly admitted as public records --- the exclusion of law enforcement records in Rule 803(8) did not apply because the forms were routine and nonadversarial documents requested from every alien entering the United States. Nor were the forms testimonial, even after *Melendez-Diaz.* The court distinguished *Melendez-Diaz* in the following passage:

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

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

See also United States Santos, 947 F.3d 711 (11th Cir. 2020) (Information entered on a naturalization form (Form N-400 application), was not testimonial, because preparing such a record is a matter of administrative routine, for the primary purpose of determining the applicant's eligibility for naturalization).

Summary charts of admitted business records is not testimonial: *United States v. Naranjo,* 634 F.3d 1198 (11th Cir. 2011): In a prosecution for concealing money laundering, the defendant argued that his confrontation rights were violated when the government presented summary charts of business records. The court found no error. The bank records and checks that were the subject of the summary were business records and "[b]usiness records are not testimonial." And "[s]ummary evidence also is not testimonial if the evidence underlying the summary is not testimonial."

Surveillance tapes of ATM transactions are business records and so not testimonial; submitting still frames from the videos is not hearsay and so not testimonial; and foundation by certificate is permissible under *Melendez-Diaz: United States v. Clotaire,* 963 F.3d 1288 (11th Cir. 2020): Identification of the defendant as having made ATM transactions was essential to the prosecution. The government admitted still photos taken from the ATM surveillance tapes; the foundation was through a certificate under Rule 902(11). The defendant challenged, on confrontation grounds, the extraction of still photos and the certification. (As to the video surveillance itself, the court found that it was a business record and non-testimonial).

As to the extraction of still images, the court found that they were business records as well, as they were just a change in format. But the defendant argued that the process of extracting the still frames was for purposes of litigation and therefore testimonial. The court rejected this argument, finding that the surveillance photos themselves were not statements at all, and there was nothing to indicate the photos were somehow "enhanced in a manner that turned them into the testimony of the bank employee who pulled them." It concluded that "[i]n her role as photo processor, Moran was doing nothing but getting the clearest image; she made no assertion about what the image showed or who it might be. We cannot see how the photo itself or the person who pulled it was intending to assert anything." The court further found that the Rule 902(11) certificate was not testimonial as it merely authenticated records that were not themselves testimonial.

Database of purchases of controlled substances constitutes business records and is not testimonial: ***United States v. Ruan,*** 966 F.3d 1101 (11th Cir. 2020): The State of Alabama established a database of all controlled substances dispensed in the state; each doctor or pharmacist is required to report the patient's name, dosage, etc. Law enforcement has access to the database. At his trial for dispensing controlled substances without a legitimate medical reason, the defendant objected to admission of entries from the Alabama database. The court found that the entries were admissible as business records under Rule 803(6). The defendant contended that the records were testimonial, because the database assisted law enforcement in prosecuting violators of controlled substances laws. But the court noted that a statement is testimonial only when "its primary purpose is to establish or prove past events potentially relevant to later criminal prosecution . . . and when the statement is formal, akin to affidavits, depositions, prior testimony, or confessions." Under this narrow test, the database entries were not testimonial, first, "because they are business records." Second, even if they were not business records, the entries are not testimonial because "the fact that pharmacists may be aware when they input the data that law enforcement also has access to the database if needed during an investigation does not transform the data entry into the type of formal statement required for testimonial evidence." [Perhaps the better point is made in *Towns, supra*: controlled substances databases are primarily for purposes of regulation, deterrence, and prevention, as opposed to prosecution.]

As to the certification of the business record, the court found that the defendant's contention was "foreclosed by *Melendez-Diaz."* The court explained that in *Melendez-Diaz*, "the Supreme Court distinguished between authentication and creation of a record." The court "join[ed] other circuits in concluding that business records certifications are not testimonial."

Admission of a summary of non-testimonial records does not violate the Confrontation Clause: *United States v. Melgen,* 967 F.3d 1250 (11th Cir. 2020): In a trial on charges of Medicaid fraud, the government offered a summary chart comparing the defendant's billing to peer physicians. The billing records were not testimonial, but the defendant argued that he had a right under the Confrontation Clause to cross-examine those members of the prosecution team who prepared the chart, in order to challenge the criteria they used to make the exhibit. The court rejected this argument. The court noted that prosecutors "routinely make decisions about which evidence they believe is relevant to establishing a particular point --- decisions that may include, for example, which witnesses to call, or, as here, which summaries to enter into evidence." But this process of selection does not make prosecutors a witness against the defendant for purposes of the Confrontation Clause.

Autopsy reports prepared as part of law enforcement are found testimonial under *Melendez-Diaz: United States v. Ignasiak,* 667 F.3d 1217 (11th Cir. 2012): In a prosecution against a doctor for health care fraud and illegally dispensing controlled substances, the court held that autopsy reports of the defendant's former patients were testimonial under *Melendez-Diaz.* The court relied heavily on the fact that the autopsy reports were prepared by an arm of law enforcement. The court reasoned as follows:

> We think the autopsy records presented in this case were prepared "for use at trial." Under Florida law, the Medical Examiners Commission was created and exists within the Department of Law Enforcement. Fla. Stat. 406.02. Further, the Medical Examiners Commission itself must include one member who is a state attorney, one member who is a public defender, one member who is sheriff, and one member who is the attorney general or his designee, in addition to five other non-criminal justice members. Id. The medical examiner for each district "shall determine the cause of death" in a variety of circumstances and "shall, for that purpose, make or have performed such examinations, investigations, and autopsies as he or she shall deem necessary or as shall be requested by the state attorney." Fla. Stat. 406.11(1). Further, any person who becomes aware of a person dying under circumstances described in section 406.11 has a duty to report the death to the medical examiner. Failure to do so is a first degree misdemeanor.
>
> * * *
>
> In light of this statutory framework, and the testimony of Dr. Minyard, the autopsy reports in this case were testimonial: "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a

later trial." As such, even though not all Florida autopsy reports will be used in criminal trials, the reports in this case are testimonial and subject to the Confrontation Clause.

Note: The Court's test for testimoniality is broader than that used by the Supreme Court. The Supreme Court finds statements to be testimonial only when they are *primarily motivated* to be used in a criminal prosecution. The 11th Circuit's "reasonable anticipation" test would cover many more statements, and accordingly the court's decision in *Ignasiak* is subject to question.

State of Mind Statements

Statement admissible under the state of mind exception is not testimonial: *Horton v. Allen,* 370 F.3d 75 (1st Cir. 2004): Horton was convicted of drug-related murders. At his state trial, the government offered hearsay statements from Christian, Horton's accomplice. Christian had told a friend that he was broke; that he had asked a drug supplier to front him some drugs; that the drug supplier declined; and that he thought the drug supplier had a large amount of cash on him. These statements were offered under the state of mind exception to show the intent to murder and the motivation for murdering the drug supplier. The court held that Christian's statements were not "testimonial" within the meaning of *Crawford*. The court explained that the statements "were not ex parte in-court testimony or its equivalent; were not contained in formalized documents such as affidavits, depositions, or prior testimony transcripts; and were not made as part of a confession resulting from custodial examination. . . . In short, Christian did not make the statements under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial."

Testifying Declarant

Admission of prior consistent statements under Rule 801(d)(1)(B)(ii), even though testimonial, did not violate the Confrontation Clause: *United States v. Purcell,* 967 F.3d 159 (2nd Cir. 2020): The defendant was charged with promoting prostitution. One of the victims made accusatory statements to investigators. The victim testified at trial, and was cross-examined about inconsistent statements she had made. On redirect the trial court allowed the admission of the initial accusatory statements, as they helped to place the inconsistencies in context and properly rehabilitated the witness. The court found that the prior statements were properly admitted for their truth under Rule 801(d)(1)(B)(ii), which was added by a 2014 amendment. The defendant argued that admitting the prior consistent statements violated his right to confrontation because they were made to law enforcement and so were testimonial. But the court found no confrontation violation, explaining as follows:

> Royer's testimony regarding Wood's statements to the State College police did not implicate Purcell's Confrontation rights, irrespective of whether those statements were "testimonial," because Wood testified at trial. Purcell had a full opportunity to confront the declarant, Wood, and to cross-examine her regarding her out-of-court statements to the State College police.

Cross-examination sufficient to admit prior statements of the witness that were testimonial: *United States v. Acosta,* 475 F.3d 677 (5th Cir. 2007): The defendant's accomplice testified at his trial, after informing the court that he did not want to testify, apparently because of threats from the defendant. After answering questions about his own involvement in the crime, he refused on direct examination to answer several questions about the defendant's direct participation in the crime. At that point the government referenced statements made by the accomplice in his guilty plea. On cross-examination, the accomplice answered all questions; the questioning was designed to impeach the accomplice by showing that he had a motive to lie so that he could receive a more lenient sentence. The government then moved to admit the accomplice's statements made to qualify for a safety valve sentence reduction --- those statements directly implicated the defendant in the crime. The court found that statements made pursuant to a guilty plea and to obtain a safety valve reduction were clearly testimonial. However, the court found no error in admitting these statements, because the accomplice was at trial subject to cross-examination. The court noted that the accomplice admitted making the prior statements, and answered every question he was asked on cross-examination. While the cross-examination did not probe into the underlying facts of the crime or the accomplice's previous statements implicating the defendant, the court noted that "Acosta could have probed either of these subjects on cross-

examination." The accomplice was therefore found sufficiently subject to cross-examination to satisfy the Confrontation Clause. ***See also, United States v. Smith,*** 822 F.3d 755 (5th Cir. 2016) (defendant's accomplice gave testimonial statements to a police officer, but admission of those statements did not violate the right to confrontation because the accomplice testified at trial subject to cross-examination).

Certificate of non-existence of a record, while testimonial, did not violate the Confrontation Clause because the person who authored and signed the certificate testified and could have been cross-examined: *United States v. Arellano-Banuelos,* 927 F.3d 355 (5th Cir. 2019): In an illegal reentry prosecution, the government offered a certificate of the non-existence of a record permitting reentry. The defendant argued that the certificate was testimonial, and the court conceded that it had found such a certificate testimonial after *Melendez-Diaz,* in *United States v. Martinez-Rios,* 595 F.3d 581 (5th Cir. 2010), because the affidavit was prepared solely to prove a fact in a criminal prosecution. But the court held that the Confrontation Clause was not violated in this case because the person who authored and signed the certificate was presented at trial, and testified to the search process. The defendant did not cross-examine the witness, but the witness was available for cross-examination, which is all that the Constitution requires.

Crawford **inapplicable where hearsay statements are made by a declarant who testifies at trial: *United States v. Kappell,*** 418 F.3d 550 (6th Cir. 2005): In a child sex abuse prosecution, the victims testified and the trial court admitted a number of hearsay statements the victims made to social workers and others. The defendant claimed that the admission of hearsay violated his right to confrontation under *Crawford.* But the court held that *Crawford* by its terms is inapplicable if the hearsay declarant is subject to cross-examination at trial. The defendant complained that the victims were unresponsive or inarticulate at some points in their testimony, and therefore they were not subject to effective cross-examination. But the court found this claim foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). Under *Owens*, the Constitution requires only an opportunity for cross-examination, not cross-examination in whatever way the defendant might wish. The defendant's complaint was that his cross-examination would have been more effective if the victims had been older. "Under *Owens,* however, that is not enough to establish a Confrontation Clause violation."

Admission of testimonial statements does not violate the Confrontation Clause because declarant testified at trial --- even though the declarant did not recall making the statements: *Cookson v. Schwartz,* 556 F.3d 647 (7th Cir. 2009): In a child sex abuse prosecution, the trial court admitted the victim's hearsay statements accusing the defendant. These statements were testimonial. The victim then testified at trial, describing some incidents perpetrated by the defendant. But the victim could not remember making any of the hearsay statements that had previously been admitted into evidence. The court found no error in admitting the victim's testimonial hearsay, because the victim had been subjected to cross-examination at trial. The defendant argued that the victim was in effect unavailable because she lacked memory about the statements. But the court found this argument was foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). The court noted that the defendant in this case was better off than the defendant in *Owens* because the victim in this case "could remember the underlying events described in the hearsay statements." ***See also United States v. Al-Alawi,*** 873 F.3d 592 (7th Cir. 2017) (admission of the victim's videotaped statement to police, accusing the defendant of sexual abuse, did not violate the Confrontation Clause, because the victim testified at trial: "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.").

Grand jury testimony properly admitted even though the declarant professed a lack of memory about giving it: *United States v. Shaffers,* 22 F.4th 655 (7th Cir. 2022): The defendant was charged with felon-firearm possession after a gun was found in his car. Another person in the car testified at a grand jury that she didn't know there was a gun in the car, and that the gun was not hers. At trial, that witness professed no memory of the underlying event, nor of her grand jury testimony. The grand jury testimony was then admitted under Rule 801(d)(1)(A). The defendant argued that his right to confrontation was violated because he could not effectively cross-examine the witness who claimed her memory was impaired. But the court relied on *United States v. Owens,* 484 U.S. 554 (1988), for the proposition that cross-examination will be adequate when the declarant professes a lack of memory about a prior statement. In this case, defense counsel probed the memory loss and was able to suggest that the witness might be feigning a lack of memory, or her memory might have been affected by drug use. The court noted that at no time did the witness refuse to answer any question posed by defense counsel.

Witness's reference to statements made by a victim in a forensic report did not violate the Confrontation Clause because the declarant testified at trial: *United States v. Charbonneau,* 613 F.3d 860 (8th Cir. 2010): Appealing from child-sex-abuse convictions, the defendant argued that it was error for the trial court to allow the case agent to testify that he had conducted a forensic interview with one of the victims and that the victim identified the perpetrator.

The court recognized that the statements by the victim may have been testimonial. But in this case the victim testified at trial. The court declared that "*Crawford* did not alter the principle that the Confrontation Clause is satisfied when the hearsay declarant, here the child victim, actually appears in court and testifies in person." ***See also United States v. Counts,*** 39 F.4th 539 (8th Cir. 2022): In a child sex-abuse prosecution, the victim's taped statement with a forensic investigator was admitted after the victim testified subject to cross-examination. Admission of the tape did not violate the Confrontation Clause because the victim testified and was cross-examined. The defendant complained that the tape was admitted after the victim completed his testimony. But the court found that nothing prevented the defendant from having the victim called to testify again once the tape was admitted.

Statements of interpreter do not violate the right to confrontation where the interpreter testified at trial: *United States v. Romo-Chavez*, 681 F.3d 955 (9th Cir. 2012): The court held that even if the translator of the defendant's statements could be thought to have served as a witness against the defendant, there was no confrontation violation because the translator testified at trial. "He may not have remembered the interview, but the Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. All the Confrontation Clause requires is the ability to cross-examine the witness about his faulty recollections."

Statements to police officers implicating the defendant in the conspiracy are testimonial, but no confrontation violation because the declarant testified: *United States v. Allen,* 425 F.3d 1231 (9th Cir. 2005): The court held that a statement made by a former coconspirator to a police officer, after he was arrested, identifying the defendant as a person recruited for the conspiracy, was testimonial. There was no error in admitting this statement, however, because the declarant testified at trial and was cross-examined. ***See also United States v. Lindsey,*** 634 F.3d 541 (9th Cir. 2011) ("Although Gibson's statements to Agent Arbuthnot qualify as testimonial statements, they do not offend the Confrontation Clause because Gibson himself testified at trial and was cross-examined by Lindsey's counsel.").

Admitting hearsay accusation did not violate the right to confrontation where the declarant testified and was subject to cross-examination about the statement: *United States v. Pursley*, 577 F.3d 1204 (10th Cir. 2009): A victim of a beating identified the defendant as his assailant to a federal marshal. That accusation was admitted at trial as an excited utterance. The victim testified at trial to the underlying event, and he also testified that he made the accusation,

but he did not testify on either direct or cross-examination *about* the statement. The defendant argued that admitting the hearsay statement violated his right to confrontation. The court assumed arguendo that the accusation was testimonial --- even though it had been admitted as an excited utterance. But even if it was testimonial hearsay, the defendant's confrontation rights were not violated because he had a full opportunity to cross-examine the victim about the statement. The court stated that the defendant's "failure to seize this opportunity demolishes his Sixth Amendment claim." The court observed that the defendant had a better opportunity to confront the victim "than defendants have had when testifying declarants have indicated that they cannot remember their out-of-court statements. Yet, courts have found no Confrontation Clause violation in that situation."

Statement to police admissible as past recollection recorded is testimonial but admission does not violate the right to confrontation: *United States v. Jones*, 601 F.3d 1247 (11th Cir. 2010): Affirming firearms convictions, the court held that the trial judge did not abuse discretion in admitting as past recollection recorded a videotaped police interview of a 16-year-old witness who sold a gun to the defendant and rode with him to an area out of town where she witnessed the defendant shoot a man. The court also rejected a Confrontation Clause challenge. Even though the videotaped statement was testimonial, the declarant testified at trial --- as is necessary to qualify a record under Rule 803(5) --- and was subject to unrestricted cross-examination.

Unavailability

Admitting a video deposition of a deported witness violated the Confrontation Clause because the government did not establish that the witness was unavailable: *United States v. Burden,* 934 F.3d 675 (D.C. Cir. 2019): In a trial for an arms control violation, the government offered a video deposition of a witness who was subsequently deported. The defendant had an opportunity to cross-examine the witness at the deposition, but the court nonetheless found a violation of the Confrontation Clause, because the government had not shown that the witness was unavailable to testify at the trial. The court stated that where "the government itself bears some of the responsibility for the difficulty of procuring the witness, the government will have to make greater exertions to satisfy the standard of good-faith and reasonable efforts that it would have if it had not played any role. Failing to factor the government's own contribution to the witness's absence into the Confrontation Clause analysis would warp the government's incentives." Satisfying the good-faith standards requires the government to make reasonable efforts to ensure the witness's presence *before* the witness is deported. Here, the government's efforts to procure the witness did not begin until after he was deported. The government "did not give [the witness] a subpoena, offer to permit and pay for him to remain in the U.S. or to return here from Thailand, obtain his commitment to appear, confirm his contact information, or take any other measures."

Admitting deposition testimony violated the defendant's right to confrontation because the government did not sufficiently establish unavailability: *United States v. Foster,* 910 F.2d 813 (5th Cir. 2018): Reversing a conviction for transporting aliens, the court found that admitting the videotaped depositions of the deported aliens violated the defendant's right to confrontation. Had the defendant's been unavailable, there would have been no confrontation violation, but the court found that the government had not made a "good faith and reasonable" effort to procure their presence for trial. The government deported the aliens, and while that may be consistent with good faith, the government "made no attempt to verify or confirm the authenticity or workability of the witnesses' contact information, or offer the option of remaining in the United States pending Foster's trial." More importantly "the government made no attempt to remain in contact with either witness."

Admitting deposition testimony did not violate the defendant's right to confrontation because the government made a reasonable effort to secure the presence of a foreign citizen after deportation: *United States v. Gaspar-Felipe,* 4 F.4th 330 (5th Cir. 2021): Affirming a

conviction for illegal reentry and transporting "illegal aliens," the court found no error in the admission of a deposition of a Guatemalan citizen who had been deported. The government informed the citizen at his deposition that he might have to testify at a future trial, the declarant gave verbal assurance under oath that he would return if summoned, the government issued formal trial subpoenas to him, and he was informed that all his expenses would be paid by the government. The court found that a one-month delay in reaching out to the declarant did not render its efforts to produce him unreasonable.

Admitting deposition testimony did not violate the defendant's right to confrontation where the declarant was properly found unavailable: ***United States v. Porter,*** 886 F.3d 562 (6th Cir. 2018): The defendant objected to the trial court's decision to allow a witness to be deposed. He argued that the witness was available to testify at trial. The court found that the trial court did not err in finding that the witness would not be available to testify at trial. The witness had stage IV cancer and was unable to get out of bed. The court noted that the doctor's letter to the court "was specific as to the nature of Miller's illness and very clearly opined that Miller's health would be jeopardized if she were required to testify at trial." The court concluded that "because Porter was able to, and did, cross-examine Miller at her deposition, and because the government sufficiently demonstrated he unavailability to testify at trial, no Confrontation Clause violation occurred."

Waiver

Waiver found where defense counsel's cross-examination opened the door for testimonial hearsay: ***United States v. Lopez-Medina,*** 596 F.3d 716 (10th Cir. 2010): In a drug trial, an officer testified about the investigation that led to the defendant. On cross-examination, defense counsel inquired into the information that the officer received from an informant --- presumably to discredit the basis for the police having targeted the defendant. The trial court then on redirect allowed the government to question the officer and elicit some of the accusations about the defendant that the informant's had made to the officer. The court found no error. It recognized that "a confidential informant's statements to a law enforcement officer are clearly testimonial." But the court concluded that the defendant "opened the door to further questioning of Officer Johnson regarding the information he received from the confidential informant. Where, as here, defense counsel purposefully and explicitly opens the door on a particular (and otherwise inadmissible) line of questioning, such conduct operates as a limited waiver allowing the government to introduce further evidence on that same topic." The court observed that a waiver would not be found if there was any indication that the defendant had disagreed with defense counsel's decision to open the door. But there was no indication of dissent in this case. ***Accord, United States v. Acosta,*** 475 F.3d 677 (5th Cir. 2007) (waiver found where defense counsel opened the door to testimonial hearsay). ***Contra, and undoubtedly wrong, United States v. Cromer,*** 389 F.3d 662, 679 (6th Cir. 2004) ("the mere fact that Cromer may have opened the door to the testimonial, out-of-court statement that violated his confrontation right is not sufficient to erase that violation").

U.S. Department of Justice

950 Pennsylvania Ave, N.W.
Washington, D.C. 20530

April 14, 2023

Hon. Patrick Schiltz
United States District Judge
United States Courthouse
300 South Fourth Street, Room 14E
Minneapolis, MN 55415

Re: Proposed Federal Rule of Evidence 611(e)

Dear Judge Schiltz:

At the mini-conference that the Advisory Committee held in Phoenix to discuss proposed Rule 611(e), Judge Bates expressed interest in the Department's views about the impact of juror questioning on criminal trials. Specifically, he was concerned that juror questions could alert prosecutors to deficiencies in their case, giving them the opportunity to adjust their presentation accordingly. I posed this question to the litigating criminal components at the Department, as well as to the Criminal Chiefs in the U.S. Attorney Offices nationwide. I also inquired more generally about their experiences with juror questioning, both positive and negative. Below is a short summary of the responses I received, as well our best response to Judge Bates' specific inquiry.

In the majority of districts, juror questioning remains rare. Some circuits (Second, Third, Eleventh) have no experience with the practice, and others have just a few judges who have allowed it or have experimented with it.[1] Nevertheless, numerous U.S. Attorney offices have had experience with juror questioning, either because of those judges who have permitted it, or from prior state court or military experience. Not surprisingly, the reaction to the practice is mixed, although the majority of our prosecutors disfavor it. The most common concerns from those opposing juror questioning are:

- Delay from screening questions at sidebar and handling objections;
- The risk that a juror blames one side or the other if their particular question is not approved;
- Disruption to the trial flow and loss of control from questions that are either premature and thus interrupt the flow of the presentation, or from questions that raise issues answerable only by a witness already excused.

[1] Attached is a chart summarizing the approximate number of judges within districts that permit or have permitted juror questioning. The chart does not include retired judges, nor judges who have permitted the practice one time or only on an experimental basis.

- Juror questions that are tangential, call for inadmissible hearsay, or were the subject of a pretrial motion in limine. While the court would screen for those issues, jurors are left not understanding the legal rationale.

Prosecutors who favor the practice, or have had positive experiences, most often cited the following perceived benefits:

- Juror satisfaction and positive engagement with the process;
- Juror attentiveness;
- Getting potential insight into jurors' thinking;
- The ability to make adjustments mid-trial, albeit with some – but not undue – delay.[2]

Most prosecutors did not perceive an advantage to one side or the other from juror questioning and felt it could assist either side. Some thought that prosecutors had more to gain (or lose), since they had the burden of proof. Nevertheless, by including proposed subsection 611(e)(2)(A) – which would be an indispensable part of any rule on this topic – that aspect of juror questioning is unavoidable. Whether or not a juror question is approved and asked in open court, each side's counsel will hear every question that a juror submits and either side can make any adjustment to the presentation of evidence that counsel deem appropriate.

No respondent to my inquires, however, found that the possibility of mid-trial adjustments in response to juror questioning created an "unfair" advantage for prosecutors. In assessing what is "unfair," we considered the issue through the lens of due process. Due process requires that any criminal conviction be based on proof of each element of the offense beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 364 (1970), with the prosecution having the ultimate burden of persuasion, *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993). But that does not mean that every fact on which the jury relies as proof of guilt must affirmatively come from the government. The Constitution permits states to assign to the defendant the burden of establishing affirmative defenses, *Patterson v. New York*, 432 U.S. 197, 210 (1977), or contesting facts that might otherwise be inferred, *Ruan v. United States*, 142 S. Ct. 2370, 2380 (2022). And it is not uncommon for testimony or other evidence establishing guilt to be elicited by judges (*e.g.*, Fed. R. Evid. 614); co-defendants (*e.g.*, *Zafiro v. United States*, 506 U.S. 534, 540 (1993)); or defendants themselves (*e.g.*, *United States v. Brown*, 53 F.3d 312, 314-15 (11th Cir. 1995)). As long as such evidence is not presented in a manner that contravenes other constitutional guarantees—such as the right to an impartial adjudicator, the right to confront witnesses, or the right against compelled self-incrimination—it may be relied upon to prove guilt beyond a reasonable doubt.

Accordingly, testimony elicited in response to juror questions neither relieves the government of its burden of persuasion nor waters down the constitutional requirement of proof beyond a reasonable doubt. As prosecutors noted, questions posed by jurors could

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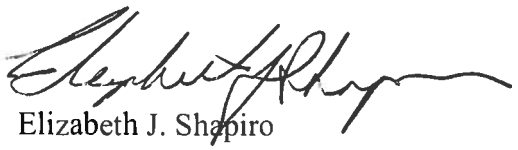
[2] Attached, and in celebration of the nascent baseball season, is a *Washington Post* article detailing one high profile trial in the District of Columbia that included juror questioning.

provide the litigants with a window into jurors' thinking and allow them to tailor their presentations accordingly, or it could lead them astray. As long as the district court serves as gatekeeper to ensure that juror questions are appropriate, it seems unlikely that the practice would unfairly aid the prosecution (either in individual cases or generally), or otherwise risk turning the jury into an inquisitorial body.

Concern for advantaging the prosecution in criminal cases, therefore, should not be determinative of whether to adopt proposed rule 611(e). Were the rule to be adopted, it should apply to both criminal and civil trials. The Department, nevertheless, remains concerned about the unintended consequence of the rule promoting juror questioning. We recognize that proposed Rule 611(e) is not intended to promote (or hinder) the practice of juror questioning, and that its objective is to provide a procedural floor for those judges who do use it. To the extent that the unintended consequence is a *perception* of endorsing the practice, however, the Department's current preference would be to include these procedural safeguards in a bench book-type publication and not in the Federal Rules. We remain open-minded about a rule, however, and look forward to our committee's continuing discussion.

Sincerely,



Elizabeth J. Shapiro

cc: Marshall Miller
Prof. Daniel Capra
Prof. Liesa Richter
Judge John D. Bates

Circuit	Approx. No. of Judges Permitting Juror Questioning
DC Circuit	2
First Circuit Maine & Rhode Island (0) Massachusetts (1) New Hampshire (1)	2
Second Circuit	0
Third Circuit	0
Fourth Circuit EDVA (1) WDVA (0) EDNC (0) WDNC (0) NDWV (0) SDWV (0) MDNC (1) DMD (0)	1
Fifth Circuit EDLA (1)	1
Sixth Circuit	0
Seventh Circuit SDIN (3) NDIN (1) CDIL (1) EDWI (0) WDWI (0) SDIL (0) NDIL (2)	7

Eighth Circuit	0
Ninth Circuit	21
AK (7)	
AZ (13)	
EDCA (0)	
SDCA (0)	
MT (0)	
NV (1)	
OR (0)	
Tenth Circuit	12
WDOK (0)	
NDOK (0)	
EDOK (0)	
Utah (0)	
Kansas (1)	
Colorado (1)	
New Mexico (10)	
Wyoming (0)	
Eleventh Circuit	0

The Washington Post

Local

Roger Clemens trial: Jurors come with questions, and get to ask them

By Del Quentin Wilber and
Ann E. Marimow
May 14, 2012

Jurors wondered whether key evidence might have been planted and if a former drug dealer regretted having "destroyed people's lives." And at least one wanted more testimony about a heated discussion that wasn't fully explored in court.

Those are the types of questions that might pop into the head of a juror during any criminal trial. And that is usually where those questions remain, locked away until jurors are finally permitted to discuss the case during their deliberations.

But in the perjury prosecution of Roger Clemens, jurors have been asking those very questions in court — providing a rare and real-time window into the thought process of the 15 District residents sitting in judgment of one of baseball's biggest legends. The questions, reviewed by the presiding federal judge before being posed to witnesses, have revealed that at least some jurors seem skeptical of the prosecution and want to know more about off-limits testimony.

The federal judge, Reggie B. Walton, has long advocated engaging jurors more directly in trials by letting them ask questions, and he has told fellow judges that the practice ensures jurors are attentive and properly understand key testimony.

Walton, who has lectured on the topic at the National Judicial College, permitted such questions during another big trial — that of I. Lewis "Scooter" Libby in 2007, a decision that was later hailed as a "terrific idea" by the case's initially doubtful prosecutor.

In federal court, judges have the authority to allow jurors to query witnesses, though the practice remains uncommon. In recent years, the procedure has gained traction in academic circles and has been occurring with more frequency in state courts, legal experts say.

"The old view of jurors is that they are blank slates," said Shari Seidman Diamond, a professor at the Northwestern University School of Law. "But they are decision-makers, trying to figure out what is going on. They are trying things out. Questions help them process. This has all kinds of benefits."

In the Clemens trial, the questioning has worked this way:

After each witness has finished testifying, Walton asks the jury if it has any questions. The 12 jurors and three alternates — one juror has already been excused, for sleeping — represent a broad cross-section of District residents. Among them are a Giant food clerk, a retired political science professor, a former ANC commissioner, a WMATA security officer and a Treasury Department official.

Sometimes jurors submit questions on note cards, sometimes they don't. Walton then discusses the questions with prosecutors and defense lawyers during a private discussion at the bench, where either side can object to the query. Walton does not pose a question if he feels it is not legally permissible.

This account is based on transcripts of those private bench conferences:

So far, the jurors' questions indicate that some seem uneasy with aspects of the government's case. After federal agent Jeff Novitzky testified two weeks ago, for example, a juror asked about the authenticity of evidence that Clemens's former strength coach, Brian McNamee, turned over to authorities in 2008. The strength coach claims to have injected Clemens with steroids and human growth hormone (HGH) and saved syringes and cotton balls in a crumpled beer can. Prosecutors say scientists have linked Clemens's DNA and steroids to one syringe found in the can.

"Could this evidence be planted evidence?" one juror wanted to know.

"McNamee had access to [Clemens's] blood, plus using cotton balls with tissues to wipe it clean, correct?" the juror continued.

"He also had access to needles, is that correct?"

"Is this evidence really conclusive?"

After reading the questions to prosecutors and defense lawyers, Walton said "that's for them to decide," meaning the jurors.

"I am not sure any of those questions are appropriate for this particular witness," said Assistant U.S. Attorney Steven Durham.

Walton sided with Durham and did not ask the questions.

Jurors also wanted to hear more from Andy Pettitte, a former teammate and close friend of Clemens's who had been considered a key prosecution witness. The left-handed pitcher, who is making a comeback this season after having retired, told jurors that Clemens confided in him during a workout in 1999 or 2000 that he had taken HGH. But on cross-examination, he agreed with a defense attorney that there was a "fifty-fifty" chance he had misheard what Clemens had told him.

During questioning by a prosecutor, Pettitte briefly mentioned that he approached McNamee after Clemens's revelation and the strength coach got upset. A prosecutor quickly stopped Pettitte from going any further because such testimony would violate hearsay rules.

A juror clearly picked up on the exchange and wanted to know, "When you talked with McNamee about HGH, he got upset. Can you speak about that incident?"

Walton did not ask the question, telling attorneys that he did not "understand the rationale how somehow McNamee's reaction to what Pettitte tells him helps the jury."

McNamee took the stand on Monday, and jurors could get the chance to ask the star prosecution witness questions by as early as Tuesday or Wednesday.

Last week, jurors sought clarity from the trial's most colorful witness, Kirk Radomski, a former steroid supplier who testified in a thick Bronx accent that he sold the drugs to many ballplayers and to McNamee. Jurors wanted to know about a torn address label, among other matters.

In 2008, three years after federal agents raided his home, Radomski found several mailing slips and photographs in an envelope under a television in his bedroom that had been missed in the original search. One of those slips, which was torn and did not include tracking numbers, was addressed to "B. McNamee" at Clemens' home in the Houston area. Radomski testified that the label belonged to a package of HGH and needles that he sent to McNamee.

A juror wanted to ask Radomski a follow-up question about how he had discovered the labels. And another wanted to know if Radomski had turned over other such slips to authorities in recent years. Walton chose to pose both queries to the former dealer.

Other jurors wanted to know if it was "common for strength and conditioning coaches to deliver steroids or HGH to athletes," whether Radomski had discussed the case with prosecutors during a recess and how he felt about having "destroyed people's lives by your actions."

And, finally, a juror wanted to ask Radomski if he and McNamee had ever discussed Clemens. Michael Attanasio, one of Clemens's attorneys, told Walton that he thought he had already asked that very question.

"I thought he said no," Walton said.

"He did."

"That's why questions are good," Walton said, "because sometimes jurors don't hear it."

News researcher Lucy Schakleford contributed to this report.

Comments

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