

Evidence Problems and Materials
2011 On-Line Supplement

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This supplement contains Evidence Law problems, materials and cases. The additional information is intended to augment the existing *Evidence Problems and Materials (3rd Ed.)*. These materials have been arranged by chapter to correlate with the existing edition.

The restyled Federal Rules of Evidence, which are scheduled to go into effect in December 2011, are reprinted as part of this supplement as well. The Rules are located in a separate document. The restyling movement, in terms of its history and rationale, are described in a Memorandum reprinted at the end of this Supplement from the Chair of the Advisory Committee on Evidence Rules.

CHAPTER 1: INTRODUCTION TO EVIDENCE

CHAPTER OUTLINE

- I. What are the meanings of the term “evidence?”
- II. What is the context? The Process of a Lawsuit
 - A. Filing and Charging
 1. Criminal
 - i. Indictments (by grand juries)
 - ii. Informations (by prosecutors)
 2. Civil
 - i. Well-pleaded Complaints
 - ii. Answers
 - B. Pre-trial
 1. Motions
 - i. To Dismiss
 - ii. For extensions of time
 - iii. For Summary Judgment
 - iv. For Change of Venue
 - v. For Recusal of the Judge
 2. Discovery
 3. Negotiating
 - i. Plea Bargaining
 - ii. Settlements
 - C. Trial
 1. Voir Dire (“to tell the truth”)
 2. Opening Statements
 3. Case-in-chief
 4. Rebuttal Cases
 5. Closing Arguments
 - D. Post-trial
 1. Motions
 2. Release (criminal)

III. An Illustrative Suit: *United States v. Wayne Gillis*

MIXED PROBLEMS (following Problem #1-4)

Problem: The Pirate

Bob was accused of breaking into a neighbor's apartment carrying an old-fashioned but very sharp sword. Bob claimed he thought a woman was in distress in the apartment, based on what he had heard through the wall. In rebuttal, the neighbor was called to testify that he was watching a television movie including a woman crying. Is the neighbor's testimony admissible? Could the prosecution offer the published television schedule, indicating that the film was being televised at the time of the break-in? [Note: this problem is based on a true incident.]

CHAPTER 2: THE FUNCTIONS OF JUDGE, JURY AND ATTORNEYS AT TRIAL

CHAPTER OUTLINE

I. Judge

A. Rules on Evidence

1. Overruled
2. Sustained

B. Burden of Production

1. The initial burden of going forward that establishes a prima facie case of the elements.
 - i. Judge decides if the burden is met.
 - ii. If burden met, the case generally goes to the jury.
 - iii. If burden not met, the case is not submitted to a jury upon proper motion.

C. Appellate

1. De novo –
 - i. A review on questions of law
2. Abuse of discretion
 - i. For most evidentiary rules involving law and fact

II. Jury

- A. Determines whether burden of persuasion is met.

III. Attorneys

- A. Jury Selection (*voir dire*)
- B. Opening Statements
- C. Offering Proof: Case-in-Chief
- D. Objections to evidence
 1. Timely
 2. Specific grounds
- E. Ethics

1. How relevant to acceptable conduct?
2. The rules of professional conduct
3. Professionalism

The Jury's Role

"I'm no idealist to believe firmly in the integrity of our courts and in the jury system -- that is no ideal to me, it is a living, working reality. Gentlemen, a court is no better than each man of you sitting before me on this jury. A court is only as sound as its jury, and a jury is only as sound as the men who make it up." -- Harper Lee (author of *To Kill a Mockingbird*)

CHAPTER 3: RELEVANCE

CHAPTER OUTLINE

I. IMPORTANCE OF RELEVANCE

A. First hurdle of admissibility

1. Evidence must be relevant to be admissible
2. Irrelevant evidence is inadmissible

II. DEFINING RELEVANCE

A. Evidence relevant if:

1. **probative of** (making something more or less likely)
2. **a fact of consequence** to determination of case

B. Facts of Consequence

1. Elements of claim or defense,
2. Credibility (impeachment) of Witness or
3. Background information
 - i. e.g., witness' age or employment

III. DEFINING CONDITIONAL RELEVANCE

1. Relevance of evidence depends on missing evidence and
2. Counsel states the missing link will be provided later
 - i. e.g., X's testimony depends on missing evidence and, counsel promises to supply missing evidence through Y's testimony later.

Practical Tip: Facts of consequence can provide keywords, phrases or concepts for electronic discovery. There are two broad categories of e-discovery technologies:

linguistic and sociological. *See John Markoff, Armies of Expensive Lawyers Replaced by Cheaper Software, New York Times at A1 (3/5/11).* For example, in the context of the illustration, “Connecting Sadness to Suicide”, one might conduct a linguistic search all of Bruce’s emails or other documents for the keywords: sadness (and related terms, i.e., sadness, suicide, and accident in hope of better understanding the cause of Bruce’s death. Of course, opposing counsel might request that Bruce’s lawyer undertake the same search. Facts of consequence also help with a sociological e-discovery approach. This approach adds an inferential analysis to the search “by mimicking the deductive powers of a human Sherlock Holmes.” *Id.* A sociological approach does not rely on keywords but rather attempts to visualize a chain of events. For example, to uncover securities fraud, a sociological approach may look at the number of times an S.E.C. document was edited and the roles of the person involved in the editing. In a different context concerning corporate insider information being leaked to the press, a sociological approach to e-discovery might involve a search of executive communications with “call me” around the time the information was leaked. Someone with something to hide would want to talk directly with persons or the press.

Solomon 2: You are the attorney for one of the women. She testified that she is the biological mother. Before the conclusion of the trial, she told you that she is not the biological mother. What should you do? *See Model Rules of Professional Conduct 3.3 Candor toward the Tribunal.*

RPC 3.3 provides: “A lawyer shall not knowingly offer evidence that the lawyer *knows* to be false. If a lawyer...has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures.” Com’t 10 to RPC 3.3 states, “the advocate’s proper course is to remonstrate with the client confidentially, advise the client of the lawyer’s duty of candor to the tribunal, and seek the client’s cooperation with respect to the withdrawal or correction of the false statements or evidence.”

Problem # 3-7: Fire! (a.k.a. Burning Down the House)

2. ETHICAL CONSIDERATIONS: The Prosecutor hands Wanda a check for \$200 after the trial to cover the time she missed from work, parking expenses, and mileage. Is this permissible? *See Model Rules of Professional Conduct 3.4 (b) Fairness to Opposing Party and Counsel.*

Problem #3-18: Drugs 4 Sale II

Arnie, from the previous problem, also was charged with possession with the intent to distribute methamphetamine (“speed”). The prosecution offers the fact that Arnie purchased significant quantities of iodine, which is used in the production of methamphetamine.

2. ETHICAL CONSIDERATIONS: As we know from the above problem, Arnie

has very little money to pay for his defense. Being the generous attorney that you are, you offer to give him money to cover his rent. Is this permissible under Model Rules of Conduct 1.8(e) Conflict of Interest: Current Clients: Specific Rules? To help recover this money, you convince Arnie to allow you to have the literary rights to his story. You sense that once this case goes to trial it will get nationwide attention. He happily agrees. Is this permissible under Model Rules of Conduct 1.8(d) Conflict of Interest: Current Clients?

After Problem #3-25: Rodney Runner, add:

Problem: Garry, Baseball & Steroids

The defendant, Garry Yikes, is an outstanding baseball player. He is known for his hitting and is a perennial top fielder, despite nearing the end of a distinguished career. Garry is charged with using illegal steroids to improve his baseball performance. The prosecution offers Garry's prior conviction for marijuana use and the defendant objects, arguing that the evidence is irrelevant.

1. Is testimony about the prior conviction relevant? Explain.
2. Garry's former girlfriend then testifies about changes in his sexual performance, hair growth, anger, violence and baldness at or near the time of his alleged steroid use. Is this testimony relevant? More specifically, is it conditionally relevant?
3. The prosecution offers a neighbor of Gary's who lived across the street from him and who will testify that he saw Garry injecting himself one evening on his front door steps with another known steroid user. The defendant objects to neighbor's testimony as irrelevant because the neighbor has very poor eyesight. Is the evidence admissible under [Fed. R. Evid. 104](#) (b)'s conditional relevance standard?
4. The prosecution offers as evidence several needles found next to Garry's front door steps. Is this evidence conditionally relevant? Why?

Problem: 10 of 1700 Treated

After various cancer treatments proved to be ineffective, Beth receives experimental cancer treatment. She files a claim for the payment of these medical expenses with her insurance company. The insurance company refused to pay for the expenses because the procedures had not gained acceptance as being medically "necessary" for cancer treatment. In a subsequent trial, Beth offered the deposition testimony of two doctors concerning 10 successful cases of patients who had been similarly treated at the same facility to prove that the treatment is "necessary." The insurance company objects to the evidence, claiming the testimony is irrelevant and misleading.

1. Is the testimony admissible?
2. If the trial court admits the deposition testimony, the appellate court will apply what standard of review in assessing the trial court's decision to admit?

See Dallis v. Aetna Life Ins. Co., [768 F.2d 1303](#) (11th Cir. 1985).

Cases and Rules

[A] Add: DORTCH V. FOWLER

United States Court of Appeals, Sixth Circuit
588 F.3d 396 (2009)

RONALD LEE GILMAN, Circuit Judge.

This case arises out of a traffic accident involving a vehicle driven by Angela Dortch and a Con-Way Transportation Services, Inc. tractor-trailer driven by Loren Fowler. The accident left Fowler unhurt, but Dortch suffered permanently disabling injuries that caused her to lose all memory of the collision.

. . . . The trial boiled down to whether the accident occurred in Dortch's or Fowler's lane of travel. Central to that inquiry is whether either of the two gouges (one in each lane) was caused by the underlying accident. Con-Way presented persuasive evidence that the first gouge in Fowler's lane of travel was caused by the accident, and therefore Dortch was at fault for crossing over the dividing line and causing the accident. Dortch countered with her own expert who testified that the second gouge (in her lane) was caused by the underlying accident. In an effort to discredit Dortch's expert, Con-Way undertook an extensive search of past accident records in the hopes of finding some evidence of a past accident that might have caused the second gouge. It failed to find any such evidence to corroborate its theory.

Dortch now challenges the district court's evidentiary ruling precluding her from cross-examining Con-Way's witnesses about the absence of record evidence corroborating its theory that a previous accident caused the second gouge. We conclude that the district court abused its discretion in preventing Dortch from pursuing this line of questioning because it was relevant to a central issue at trial. Nonetheless, we find that the error was harmless.

The standard for relevancy is "extremely liberal" under the Federal Rules of Evidence. *See United States v. Whittington*, [455 F.3d 736, 738](#) (6th Cir.2006). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without

the evidence.” [Fed.R.Evid. 401](#). Just as positive evidence of a past accident that could have created the second gouge would have been admissible as tending to support Con-Way (had such evidence been found), the absence of any such evidence in the accident records makes it less likely that the second gouge predated the underlying accident in this case. Put another way, the absence of any past accident record is exactly what you would expect to find if Dortch’s theory that the gouge was caused by this accident is correct. Although it may not be very strong evidence, it is certainly some evidence in Dortch’s favor. She therefore should have been permitted to inquire about it under Rule 401.

Con-Way counters that “[e]vidence of this type could hardly establish that it was more probable than not that the [second] gouge preexisted the Dortch accident or who crossed the center line first.” This argument, however, mistakenly conflates the standard for evidentiary sufficiency with the Rule 401 standard for relevance. There is no doubt that Con-Way’s fruitless records search, standing alone, does not make it more probable than not that either party crossed the center line first. But a piece of evidence does not need to carry a party’s evidentiary burden in order to be relevant; it simply has to advance the ball. As one leading commentator has explained:

It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence. Even after the probative force of the evidence is spent, the proposition for which it is offered still can seem quite improbable. Thus, the common objection that the inference for which the fact is offered “does not necessarily follow” is untenable. It poses a standard of conclusiveness that very few single items of circumstantial evidence could ever meet. A brick is not a wall.

Edward W. Cleary et al., *McCormick on Evidence* § 185, at 542-43.

. . . . We note the importance of distinguishing the present case—where Con-Way searched the accident records and found nothing to corroborate its preexisting second-gouge theory—from a hypothetical case where nobody searched the accident records. If there had been no investigation and we knew nothing about the records of past accidents, then that fact would support neither party. It would be irrelevant under Rule 401. Here, we do know something about the accident records. We know they are extensive and document numerous past accidents on the roadway in question, yet reveal no evidence of a past accident that caused the second gouge. Because they do not corroborate Con-Way’s theory that the gouge was preexisting, the records provide some evidence for Dortch’s conclusion that the gouge was not preexisting.

Although we conclude that the trial court abused its discretion in precluding Dortch from inquiring about the absence of record evidence supporting Con-Way’s theory by ruling that the evidence was irrelevant, we find that the error was harmless.

. . . . In the present case, the fact that Con-Way could find no record of an incident creating the second gouge is of little probative value. The part of the highway where the accident occurred runs through the City of Louisville, a major metropolitan area, and is undoubtedly used by hundreds of thousands of vehicles a year, including large vehicles like tractor-trailers, snow plows, and construction equipment. Many, if not most, incidents that damage such well-used roadways likely go unreported.

Also, there was absolutely nothing preventing Dortch from presenting her own witness to speak to the record evidence. If the record evidence was really all that probative, Dortch could have put her own investigator on the stand to explain the lack of records supporting Con-Way's theory that the gouge was preexisting. That Dortch did not feel compelled or even think to take this approach speaks volumes about how unimportant she really believed this evidence to be. This was a multi-day trial with numerous experts and extensive testimony regarding the physical evidence. The absence of a record documenting a previous accident, while marginally relevant, has too little weight to raise any likelihood that it would have affected the jury's verdict. We therefore will not reverse the district court on this basis.

Questions

1. Do you agree with the court's conclusion that the research on the origin of the second gouge is relevant? Why?
2. What standard of review did the court use in this case? What does the appellate court's use of the standard tell you about relevance?

CHAPTER 4: RELEVANT BUT INADMISSIBLE EVIDENCE: THE EXCLUSION OF UNFAIRLY PREJUDICIAL EVIDENCE

CHAPTER OUTLINE

- I. Exclusion of relevant but unfairly prejudicial evidence [R.403]
 - A. Judges may exclude relevant evidence that is substantially more
 - B. prejudicial than probative if it:
 1. Is unfairly prejudicial
 2. Confuses the issues
 3. Misleads the fact finder
 4. Causes undue delay
 5. Wastes time
 6. Needlessly presents cumulative evidence, or
 7. Constitutes other unfair prejudice
 - C. Note: (i)-(vii) is a non-exclusive list.
- II. Rule 403 balancing test for excluding relevant evidence:
 - A. Weighted in favor of admissibility
 1. Excludes only evidence that is “substantially” more prejudicial than probative
 2. probative
 - B. Need for relevant evidence typically greater than potential harm
 - C. Judge must consider a limiting instruction (R. 105) before excluding evidence under Rule 403
- III. Common exclusions under Rule 403

- A. 1 Probability evidence of guilt in a criminal case
- B. Evidence of excessive violence
- C. Scientific evidence
- D. Similar occurrences, happenings, and events

Add after Problem #4-7: Lose Your Lunch:

Problem: More Lose Your Lunch - Terrorism

Defendant was charged with disclosing classified information regarding Navy ships to individuals who support jihad terrorism. At trial, the prosecution showed excerpts from several pro-jihadist videos that included an execution and a suicide bombing. The court only allowed the prosecution to show a minute of a video scene showing bloody bodies and also required the prosecution to delete a scene with a headless body. In addition, the court instructed the jury to view the videos “dispassionately” and to only consider them for the purpose of determining whether Defendant acted with knowledge and intent in disclosing the classified information. Did the court abuse its discretion in permitting the state to play excerpts from the videos? *See United States v. Abu-Jihaad*, [630 F.3d 102](#) (2nd Cir. 2010).

Add after Problem #4-13: Harassment:

Problem: Prior Shoplifters

Carl Customer sued Bull’s-Eye Corporation after he was stabbed by a shoplifter at one of the Bull’s-Eye stores. Sid the Security Guard was attempting to apprehend the shoplifter when an altercation ensued. Carl stepped in to help Sid and the shoplifter stabbed him. At trial, other incidents at the Bulls-Eye store were admitted into evidence. These incidents included other shoplifters who had been carrying weapons and another incident where a customer helped a security guard, just like Carl did. Bull’s-Eye objected to the admission of this evidence under Rule 403. How should a judge rule on this objection? *Therrien v. Target Corp.*, [617 F.3d 1242, 1255](#) (10th Cir. 2010).

Sprint/United Mgmt. Co. v. Mendelsohn
United States Supreme Court, 522 U.S. 379 (2008)

Justice THOMAS delivered the opinion of the Court.

In this age discrimination case, the District Court excluded testimony by nonparties alleging discrimination at the hands of supervisors of the defendant company who played no role in the adverse employment decision challenged by the plaintiff. The Court of Appeals, having concluded that the District Court improperly applied a *per se* rule excluding the evidence, engaged in its own analysis of the relevant factors under [Federal Rules of Evidence 401](#) and 403, and remanded with instructions to admit the

challenged testimony. We granted certiorari on the question whether the Federal Rules of Evidence required admission of the testimony. We conclude that such evidence is neither *per se* admissible nor *per se* inadmissible. Because it is not entirely clear whether the District Court applied a *per se* rule, we vacate the judgment of the Court of Appeals and remand for the District Court to conduct the relevant inquiry under the appropriate standard.

I

Respondent Ellen Mendelsohn was employed in the Business Development Strategy Group of petitioner Sprint/United Management Company (Sprint) from 1989 until 2002, when Sprint terminated her as a part of an ongoing company-wide reduction in force. She sued Sprint under the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, [29 U.S.C. § 621](#) *et seq.*, alleging disparate treatment based on her age.

In support of her claim, Mendelsohn sought to introduce testimony by five other former Sprint employees who claimed that their supervisors had discriminated against them because of age. . . .

. . .

None of the five witnesses worked in the Business Development Strategy Group with Mendelsohn, nor had any of them worked under the supervisors in her chain of command, which included James Fee, Mendelsohn's direct supervisor; Paul Reddick, Fee's direct manager and the decisionmaker in Mendelsohn's termination; and Bill Blessing, Reddick's supervisor and head of the Business Development Strategy Group. Neither did any of the proffered witnesses report hearing discriminatory remarks by Fee, Reddick, or Blessing.

Sprint moved *in limine* to exclude the testimony, arguing that it was irrelevant to the central issue in the case: whether Reddick terminated Mendelsohn because of her age. See [Fed. Rules Evid.401](#) , 402. Sprint claimed that the testimony would be relevant only if it came from employees who were "similarly situated" to Mendelsohn in that they had the same supervisors. Sprint also argued that, under Rule 403, the probative value of the evidence would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, and undue delay.

In a minute order, the District Court granted the motion, excluding, in relevant part, evidence of “discrimination against employees not similarly situated to plaintiff.” In clarifying that Mendelsohn could only “offer evidence of discrimination against Sprint employees who are similarly situated to her,” the court defined “ ‘[s]imilarly situated employees,’ for the purpose of this ruling, [as] requir[ing] proof that (1) Paul Ruddick [*sic*] was the decision-maker in any adverse employment action; and (2) temporal proximity.” Beyond that, the District Court provided no explanation of the basis for its ruling. As the trial proceeded, the judge orally clarified that the minute order was meant to exclude only testimony “that Sprint treated other people unfairly on the basis of age,” and would not bar testimony going to the “totally different” question “ whether the [reduction in force], which is [Sprint's] stated nondiscriminatory reason, is a pretext for age discrimination.”

The Court of Appeals for the Tenth Circuit treated the minute order as the application of a *per se* rule that evidence from employees with other supervisors is irrelevant to proving discrimination in an ADEA case. Specifically, it concluded that the District Court abused its discretion by relying on *Aramburu v. Boeing Co.*, [112 F.3d 1398](#) (C.A.10 1997). [466 F.3d 1223, 1227-1228](#) (C.A.10 2006). *Aramburu* held that “[s]imilarly situated employees,” for the purpose of showing disparate treatment in employee discipline, “are those who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline.” [112 F.3d, at 1404](#) (internal quotation marks omitted). The Court of Appeals viewed that case as inapposite because it addressed discriminatory discipline, not a company-wide policy of discrimination. The Court of Appeals then determined that the evidence was relevant and not unduly prejudicial, and reversed and remanded for a new trial. We granted certiorari, [551 U.S.](#), 127 S.Ct. 2937, (2007), to determine whether, in an employment discrimination action, the Federal Rules of Evidence require admission of testimony by nonparties alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff.

II

The parties focus their dispute on whether the Court of Appeals correctly held that the evidence was relevant and not unduly prejudicial under Rules 401 and 403. We conclude, however, that the Court of Appeals should not have engaged in that inquiry. Rather, as explained below, we hold that the Court of Appeals erred in concluding that the District Court applied a *per se* rule. Given the circumstances of this case and the unclear basis of the District Court’s decision, the Court of Appeals should have remanded the case to the District Court for clarification.

A

In deference to a district court's familiarity with the details of the case and its greater experience in evidentiary matters, courts of appeals afford broad discretion to a district court's evidentiary rulings.

...

Here, however, the Court of Appeals did not accord the District Court the deference we have described as the “hallmark of abuse-of-discretion review.” *General Elec. Co. v. Joiner*, [522 U.S. 136](#) (1997). Instead, it reasoned that the District Court had “erroneous[ly] conclu[ded] that *Aramburu* controlled the fate of the evidence in this case.” [466 F.3d, at 1230, n. 4](#).

To be sure, Sprint in its motion *in limine* argued, with a citation to *Aramburu*'s categorical bar, that “[e]mployees may be similarly situated only if they had the same supervisor,” and the District Court's minute order mirrors that blanket language.

But the District Court's discussion of the evidence neither cited *Aramburu* nor gave any other indication that its decision relied on that case. The minute order included only two sentences discussing the admissibility of the evidence:

“Plaintiff may offer evidence of discrimination against Sprint employees who are similarly situated to her. ‘Similarly situated employees,’ for the purpose of this ruling, requires proof that (1) Paul Ruddick [*sic*] was the decision-maker in any adverse employment action; and (2) temporal proximity.”

Contrary to the Court of Appeals' conclusion, these sentences include no analysis suggesting that the District Court applied a *per se* rule excluding this type of evidence.

...

Mendelsohn additionally argued that the District Court must have meant to apply such a rule because that was the nature of the argument in Sprint's *in limine* motion. But the *in limine* motion did not suggest that the evidence is never admissible; it simply argued that

such evidence lacked sufficient probative value “in this case” to be relevant or outweigh prejudice and delay.

When a district court’s language is ambiguous, as it was here, it is improper for the court of appeals to presume that the lower court reached an incorrect legal conclusion. A remand directing the district court to clarify its order is generally permissible and would have been the better approach in this case.

B

In the Court of Appeals' view, the District Court excluded the evidence as *per se* irrelevant, and so had no occasion to reach the question whether such evidence, if relevant, should be excluded under Rule 403. The Court of Appeals, upon concluding that such evidence was not *per se* irrelevant, decided that it was relevant in the circumstances of this case and undertook its own balancing under Rule 403. But questions of relevance and prejudice are for the District Court to determine in the first instance....Rather than assess the relevance of the evidence itself and conduct its own balancing of its probative value and potential prejudicial effect, the Court of Appeals should have allowed the District Court to make these determinations in the first instance, explicitly and on the record.

We note that, had the District Court applied a *per se* rule excluding the evidence, the Court of Appeals would have been correct to conclude that it had abused its discretion. Relevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad *per se* rules. See Advisory Committee's Notes on Fed. Rule Evid. 401, 28 U.S.C. App., p. 864 (“Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case”). But, as we have discussed, there is no basis in the record for concluding that the District Court applied a blanket rule.

III

The question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. Applying Rule 403 to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry. Because Rules 401 and 403 do not make such evidence *per se*

admissible or *per se* inadmissible, and because the inquiry required by those Rules is within the province of the District Court in the first instance, we vacate the judgment of the Court of Appeals and remand the case with instructions to have the District Court clarify the basis for its evidentiary ruling under the applicable Rules.

It is so ordered.

CHAPTER 5: CHARACTER AND HABIT EVIDENCE

CHAPTER OUTLINE

- I. Character Evidence Defined
 - A. Consists of personality traits (e.g., peaceful, violent, honest) of a party or victim
 - B. Three forms [405 (a) and (b)]:
 1. opinion,
 2. reputation, and
 3. specific acts

- II. General Rule
 - A. Prohibited when offered to show propensity (e.g., once a thief always a thief)
 - B. Rationale: it distracts factfinder from specific facts of case and is unfairly prejudicial [404(a)]

- III. Exceptions (when character evidence is admissible)
 - A. Character is an essential element of case [405 (a)&(b)]
 1. E.g., in a defamation case or entrapment defense, party must prove character to win. Consequently, Plaintiff or Prosecution and Defendant can offer all three kinds of character evidence regarding plaintiff's pertinent trait.
 2. Accused offers character evidence first to show not guilty [404(a)(1)&(2)]
 - i. Only reputation or opinion evidence.
 - ii. Prosecution can respond in two ways:
 - a. On cross-examination; and
 - b. Rebuttal character witness
 3. Offered to impeach a witness by showing a witness' truthfulness or untruthfulness (but not to show propensity) [404 (a)(3)][see 600 series]
 4. To prove a relevant issue other than propensity, such as motive, opportunity, intent or common scheme or plan. [404(b)]

- IV. Habit [406] – Admissible

- A. Requires a regular responses to a repeated, specific stimulus. Means invariable conduct in reaction to specific circumstances (i) E.g., Defendant always stops each morning for espresso at the same time at the same coffee shop on the way to work.
-

Mixed Character Evidence Problems

Problem: Bad Cop, Good Cop

Austin was prosecuted for resisting arrest and assault on a police officer after being stopped and frisked while leaving a bar. Austin claimed he acted in self-defense. At trial, Austin offered Cheryl, a former friend of the officer, as a character witness to state the officer had a reputation in the community for exhibiting “excessively aggressive and violent tendencies.” Is Cheryl's testimony admissible? Why?

- a. *Mr. Assault*. Suppose the prosecution offers evidence that the accused, Austin, had committed four prior assaults on police officers. Admissible?

Mixed Other Acts Problems

1. *Huddler*. Jimmy Huddler was charged with robbing a convenience store just before it closed at midnight after bringing a can of sweet tea to the register and trying to pay for it with pennies. Huddler had been charged with a similar crime three years before in another jurisdiction, where he had brought a large can of sweet tea to the register just before closing and tried to pay with pennies, but was acquitted in that case by a jury at trial. Can the prior case be offered as evidence by the prosecution in its case-in-chief? If yes, how can it be offered?

2. *Beeched*. The defendant, Jim Beech, a substitute mail carrier, was prosecuted for allegedly possessing an 1890 silver dollar that he knew to be stolen from the mail. The defendant conceded possessing the silver dollar; the only issue in the case was whether he intended to return the coin.

The defendant claimed that he intended to return the silver dollar. The prosecution rebutted this claim at trial by offering evidence that the defendant also possessed two Sears credit cards at the time of his arrest. These cards had been mailed ten months earlier to customers on the defendant's route, but had never been delivered. If you were the judge, would you admit the prosecution's rebuttal evidence? Why? See, *United States v. Beechum*, [582 F.2d 898, 912](#) (5th Cir. 1978).

CHAPTER 6: OTHER EXCLUSIONS OF RELEVANT EVIDENCE

CHAPTER OUTLINE

- I. Rationales For Exclusion
 - A. Policy – to promote or deter conduct
 - B. Unfair Prejudice
- II. Scope of Exclusions
 - A. Partial
 - B. “Other Purposes”
- III. The Rules and their distinct exclusions
 - A. Different types
 - B. Distinctions:
 - 1. Triggers (rule prerequisites; when does the rule apply)
 - 2. Scope (how broad is the exclusion)
- IV. Rules
 - A. RULE 407 (partial exclusion for subsequent repairs/remediation)
 - B. RULE 408 (partial exclusion for settlement negotiations)
 - C. RULE 409 (partial exclusion for offers to pay for medical expenses)
 - D. RULE 410 (partial exclusion for plea bargaining in criminal cases)
 - E. RULE 411 (partial exclusion for the existence or lack of insurance)
 - F. RULE 412 (partial exclusion for history of sexual assault complainant)
 - G. RULE 413-415 (rules of inclusion)

Excluded Subsequent Remedial Measures

Problem # 6-4: Billy’s Shears

Billy purchased a pair of hedge shears from the local gardening store. He was injured while using the shears to trim the hedges in his backyard. He brought suit, claiming the shears had a design defect that caused the accident. Shortly after he filed suit, the defendant company changed the design of the shears. Is this change in design admissible at trial?

ETHICS: During the design defect litigation, in-house counsel for the gardening shears company learns that its VP for marketing authorized some false advertising about the shears. She informed the CEO who did a cost-benefit analysis and decided not to change the advertising. What actions, if any, should the attorney take? *See* MRPC 1.13.

Problem: WARNING: Road Narrows Ahead.

A construction company had a contract with the state to widen a section of highway. The company warned the highway department that an area of the highway was dangerous and that they had observed several cars going off the side of the road there. Neither placed signs to warn motorists of the dangerous road condition. After an accident occurred at this area, the injured party sued the construction company. At trial, the main issue is who had control of the highway – the state or the construction company? The plaintiff moved to admit into evidence that the construction company put up danger signs and smudge pots after the accident. How should the trial judge rule? *See Powers v. J.B. Michael & Co.*, [329 F.2d 674](#) (6th Cir. 1964).

CHAPTER 7: THE EXAMINATION AND IMPEACHMENT OF WITNESSES

CHAPTER OUTLINE:

I. THE EXAMINATION OF WITNESSES

A. Who is a witness?

1. Prerequisite: Rule 601 – Ability to understand the truth
2. General Methodology – questioning
3. Surrogate witness – hearsay declarant

B. Control over Witness Examination

1. Within judicial discretion
2. Some Cross-examination by right
3. Witnesses generally can be excluded from the courtroom when not testifying

C. Stages of Witness Examination

1. Direct Examination – proponent of witness questions
 - i. General form: non-leading questions
 - ii. Form objections include:
 - a. leading;
 - b. compound;
 - c. asked and answered;
 - d. argumentative
 - iii. If witness forgets, can refresh recollection (revive witness memory)
2. Cross-Examination – opponent of witness does questioning
 - i. General form: leading questions
 - ii. Objections include:
 - a. argumentative;
 - b. compound;
 - c. vague
3. Re-direct Examination – second opportunity for direct examination by proponent to clarify and respond to cross-examination

II. THE IMPEACHMENT OF WITNESSES

A. Attacking witness truth or accuracy

B. Two Stages

1. Intrinsically – from the witness’ mouth
 - i. Forms:
 - a. contradiction;
 - b. bias;
 - c. convictions;
 - d. untruthful prior acts;
 - e. testimonial capacities;
 - f. prior inconsistent statements (self-contradiction)
 - ii. Scope
 - a. Contradiction of facts
 - b. Bias – not neutral, perceived preference
 - c. Convictions – felonies or fraud-type crimes
 - d. Untruthful prior acts – no extrinsic proof
 - e. Testimonial capacities – interfering with witness accuracy
 - f. Prior inconsistent statements – two statements by a witness that are inconsistent with each other
2. Extrinsically – other evidence
 - i. Rule – must be non-collateral or important
 - ii. Forms
 - iii. Contours

III. THE REHABILITATION OF WITNESSES

A. Follows impeachment

B. Forms of rehabilitation

1. Prior Consistent Statements to Rebut
2. New witness testifying about character traits

IV. Other

BACKGROUND BOX: TRIAL TACTICS – WITNESS EXAMINATION

Attorneys use a variety of tactics when examining witnesses. On direct examination, it is usually the witness who is the star and who the attorney makes sure commands the spotlight. On cross-examination, it is generally the opposite – it is the attorney who is really testifying, through leading questions. On cross-examination, there is a tendency for new attorneys to constantly try to attack a witness, even when the witness could provide helpful information by corroborating some points of the examiner’s case. Also, new attorneys go for the ultimate grand slam – witness recantation or the like – that rarely occurs. Instead, the new attorney should try to end each examination on an up note, and then do the toughest thing – sit down.

Rehabilitation Problem

Problem # 7-31: Rehab

Maryanne was the star defense witness in a forfeiture action. The government claimed that a considerable amount of marijuana was found in the back seat of the defendant's car, justifying its forfeiture. Anticipating a ferocious cross-examination of Maryanne, the defense first called Maryanne's partner, Marcy, to testify that, in her opinion, Maryanne has an unimpeachable character for truthfulness and veracity.

1. The prosecution objects to Marcy's testimony. What ruling and why?

After Maryanne testified on direct examination, the prosecution zealously cross-examined her, suggesting that Maryanne recently fabricated her testimony to assist the defense case. On re-direct examination, the following occurred:

DEFENSE COUNSEL: When did you first learn of this incident?

A: Almost immediately after the forfeiture occurred.

DEFENSE COUNSEL: What did you do upon hearing about it?

A: I immediately told my friend Jillian the same exact thing that I just testified to on direct, that the hitchhiker had unloaded and then repacked his bag in the back seat before leaving the car.

PROSECUTOR: Objection!

2. What is the basis for the prosecutor's objection? Is Maryanne's prior statement admissible?

3. The defense then calls Samantha, who testifies that her colleague Marcy has a fantastic reputation for truthfulness at work, Mitchell and Moore, Inc., where both have been employed for 15 years. Is Samantha's testimony admissible?

4. Assume the judge permits Samantha to testify. In response to Samantha's testimony, the prosecution calls Billy, who also has worked at Mitchell and Moore, Inc., for years and will testify that in his opinion, Samantha is a fabricator, who plays fast and loose with the truth. Should Billy's testimony be allowed over a timely objection?

CHAPTER 8: THE COMPETENCY OF WITNESSES

CHAPTER OUTLINE:

I. WHO IS COMPETENT TO TESTIFY?

A. Gen. Rule: all witnesses competent to testify [R. 601]

1. Preference for more, not less, testimony
2. Different than the weight accorded witness testimony (impeachment)

II. WHAT LAW APPLIES?

- A. Federal courts apply state competency rules where state law supplies rule of decision in cases based on diversity jurisdiction because the case is essentially a state case in federal court and the competency rules are outcome determinative (*Erie*) (E.g., State Dead Man's Statutes, which prohibit witnesses testifying about communications or transactions with deceased or insane persons.)

III. REQUIREMENTS FOR WITNESS COMPETENCY

- A. Understanding what it means to tell the truth
- B. Testimony must be relevant
- C. Generally testimony must be based on personal knowledge [R. 602]
 - 1. Exceptions: for expert witnesses [R. 703] & admissions by party opponents [R. 801(d)(2)]

IV. EXCEPTIONS TO COMPETENCY

- A. Judges – cannot testify in proceeding they are presiding [R. 605]
 - 1. no objection necessary to preserve issue for appeal [R. 605]
- B. Jurors – cannot testify in trial that they are sitting [R. 605]
 - 1. objection is necessary to preserve issue on appeal
- C. Lawyers competent to testify under FRE
 - 1. Testifying lawyer may be disqualified as counsel [MR. 3.7]

V. SPECIAL COMPETENCY CASE

- A. Hypnotically Refreshed Testimony Generally Prohibited
 - 1. Exception: In some jurisdictions, if independent recollection
 - 2. Exception: In some jurisdictions, if sufficient indicia of reliability

Practical Tip: *Preserving Testimony*. Lawyers should consider the need to preserve testimony in the case of terminally ill or otherwise frail witnesses, for example by videotaping their depositions. The need to preserve testimony was reflected in the film, *The Rainmaker*, based on a John Grishman novel with the same title. In the film, rookie lawyer Rudy Baylor, played by Matt Damon, videotapes the deposition of his dying client for subsequent use at trial against the defendant, Great Northern Insurance Company. Sometimes lawyers use two videotape cameras, one to focus on the witness and the other on opposing counsel if there is some concern about opposing counsel's conduct.

Obligation of Truthfulness

Problem # 8-4: Honest Polly

Polly filed suit in Tax Court. At trial, she refused to swear or affirm on religious grounds. She did however agree to recite a statement that the testimony she was about to give was true and accurate to the best of her knowledge. She also agreed to add to that statement an acknowledgement that she would be subject to penalties for perjury. The Court prohibited her from testifying because of her refusal to swear or affirm. Polly appeals. What result? See *Ferguson v. C.I.R.*, [921 F.2d 588](#) (5th Cir. 1991).

Judicial Testimony

Problem: The Overzealous Judge – Surprise Testimony

Defendant, owner of a bar, was charged with selling liquor to minors. At trial the Defendant took the stand and testified that he had not sold liquor to minors. The judge asked the Defendant several questions while he was on the witness stand:

Q: Didn't you come see me a few weeks ago in my chambers?

Q: And you asked me to let you off? And don't you remember that I told you that if you told the truth I would consider it?

Q: And you told me that you wouldn't tell the truth about it?

Are the Judge's questions permissible? See *Terrell v. United States*, [6 F.2d 498](#) (4th Cir. 1925).

Juror as Witness

Problem: The Googling Juror

Sean Flynn performed a Google search after receiving a juror summons but before voir dire and being seated on the jury. At trial, the judge permitted evidence of prior lawsuits for the limited purpose of showing the defendant manufacturer had notice of the defect. During jury deliberations and contrary to the trial evidence, five fellow jurors learned of Sean's search that revealed no prior lawsuits against the defendant. The Plaintiff's filed a motion for a new trial claiming juror misconduct. May Sean's fellow jurors testify about Sean's statements at the hearing for a new trial? Should the motion be granted?

Gardner v. Galetka

568 F.3d 862 (10th Cir. 2009)

Ronnie Lee Gardner shot Michael Burdell, an attorney, after being handed a gun when he was being taken from prison to the state district court in Salt Lake City, for a hearing. Burdell had been standing inside the court's archives room. Burdell died and Gardner was convicted of first-degree murder. Between the preliminary hearing and the trial in the case, one of the eyewitnesses, Mr. Macri, underwent hypnosis, without notifying the

state. Macri had been standing behind a door in the archives room when Gardner entered. Macri left the room by going around the door. At the hearing, Macri testified that the gun went off at the same time that the door was closing behind him. At trial, and after hypnosis, Macri testified that “simultaneous doesn’t quite describe the motion.” *Gardner v. Galetka*, [568 F.3d 862, 892](#) (10th Cir. 2009). Gardner objected to Macri’s testimony, claiming that he was prejudiced. Macri’s testimony at the hearing, prior to hypnosis, supported Gardner’s theory that he shot the gun because he was startled by the door closing. The Tenth Circuit “ha[s] rejected the per se constitutional invalidity of hypnotically-refreshed testimony.” Instead, a court must consider “whether safeguards have been employed to insure reliability of the testimony to make it admissible.” Because Macri underwent hypnosis without the state’s knowledge, the state was unable to ensure that appropriate safeguards were in place. However, the court determined that the testimony went to a collateral issue because “[i]n both versions...the door had already started to close before Mr. Gardner fired the gun, and both supported Mr. Gardner’s startle theory...” *Id.* at [892](#) .

United States v. Boender

United States District Court, N.D. Illinois [2010 U.S. Dist. LEXIS 32367](#)

Robert M. Dow, Jr., District Judge:

On, March 18, 2010, a jury found Defendant guilty of five offenses under the laws of the United States. Of particular pertinence here was the jury’s determination that Defendant violated [18 U.S.C. § 666](#) (federal program bribery) by corruptly giving things of value to former Chicago Alderman Isaac Carothers (‘Carothers’). Unsurprisingly, Carothers was mentioned frequently by counsel and by witnesses at trial, though he had pled guilty to various charges prior to trial and was not called as a witness by either side during the trial.

After the jury rendered its verdict and was discharged, the Chicago Sun-Times published an article that included brief comments by two jurors. One juror’s comments were anonymously given and have not been singled out by Defendant. The other comments were made by Jennifer Melberg, Juror No. 26. The specific quotations of concern to Defendant were (1) “I was surprised Ald. Carothers wasn’t there” and (2) “I thought he would be part of the story because he was part of the story.” Def. Reply at 1; see also Natasha Korecki & Art Golab, *Boender Guilty on all Five Counts: ‘Difficult Decision’ Based on Evidence, Juror Says of Case of Bribing Alderman*, CHI. SUN-TIMES 4 (Mar. 19, 2010).

Defendant filed the instant motion based on Juror No. 26’s quotations, as well as the fact that accounts of the proceedings were published and broadcast daily during the trial. Defendant’s motion seeks an order that would allow his attorneys and investigators to communicate with jurors –not only or even necessarily Juror No. 26, but any juror who proves willing....

Courts generally are reluctant to pull back the curtain on juror deliberations....”[F]ull and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on decisions of laypeople would all be undermined by a barrage of post verdict scrutiny of juror conduct.” *Id.* The rule against juror testimony in an effort to impeach jury verdicts is well established....

At common law, however, there were exceptions to the general bar on juror testimony. Thus, although matters intrinsic to jury deliberations almost always were off limits, extraneous influences could be explored. For example, in *Mattox*, the Supreme Court concluded that a defendant was entitled to a new trial where a bailiff made statements regarding the defendant’s guilt and the jurors were presented with a newspaper article that similarly opined on the guilt of the defendant....

Rule 606(b), like the common law rules that it followed, thus draws a distinction between matters intrinsic to juries' decision-making processes and “extraneous influences.” *United States v. Paneras*, [222 F.3d 406, 411](#) (7th Cir. 2000) (collapsing, as many courts have done, the language of the first and second exceptions to Rule 606(b)'s general bar). For example, while a juror is not competent under the Federal Rules of Evidence to testify about a jury-room squabble...allegations that a judge had prejudicial conversations with the jury...may be examined....

The issue raised by Defendant’s motion, however, is distinct from the intrinsic-extraneous taxonomy of Rule 606(b). The Court agrees with Defendant that “[j]uror exposure to press coverage” during trial or deliberations may fall on the admissible side of the Rule 606(b) line. But the question for purposes of deciding the instant motion is whether the quotations in the Chicago Sun-Times story merit further inquiry, including hailing a juror into court for purposes of further investigation....

In this instance, Defendant contends that juror interviews in this case likely “will yield admissible evidence under Rule 606(b) of the Federal Rule of Evidence.” He bases the contention on (1) Juror No. 26's statements as reported in the Chicago Sun-Times article and (2) the fact that there was extensive publicity of the proceedings during the trial. The latter basis is infirm and does not require extensive discussion. Therefore, the Court will consider only whether further investigation is warranted based on the Chicago Sun-Times article. Because the showing made by Defendant is “frail and ambiguous” (*King*, [576 F.2d at 438](#)), further inquiry is neither necessary nor appropriate.

The question remains whether a sufficient showing has been made with respect to Juror No. 26, based on the statements that she reportedly made to the Chicago Sun-Times....The modest expression of juror surprise to which Defendant points simply indicates that the juror anticipated (or perhaps even expected) that an individual who was mentioned frequently during the trial would be called as a witness. Yet, inquiry into a juror’s surprise at the evidence that is presented at trial and her thoughts about the evidence are flatly barred by hundreds of years of common law and the Federal Rules of Evidence, because they relate to juror mental processes....

In addition, there is no indication from Juror No. 26's statements that she (or any other juror) disregarded the Court's repeated instruction to avoid news coverage of the trial. Rather, the statements suggest that the juror was paying attention to the trial itself, in which Carothers-- as well as his house, his zoning efforts on behalf of Defendant, and his acceptance of nearly \$ 40,000 in home improvement work--was in one form or another the subject of testimony by nearly every witness who took the stand. The conclusion that Defendant's motion asks the Court to reach, which is that quotations in the article constitute a "colorable allegation of taint" (*Davis*, [15 F.3d at 1412](#)), simply is not warranted. Any such conclusion would depend on highly aggressive inference-making that the case law counsels against: indeed, the case law teaches that speculative nature of Defendant's showing is fatal to his request....

Other cases that have raised this issue in a manner that required the district court to conduct an investigation involved far more than intimations. For example, in *United States v. Thomas*, [463 F.2d 1061](#) (7th Cir. 1972), a juror contacted the defendant's wife claiming that something "very wrong" took place in the jury room. The "very wrong" conduct was that "several jurors had copies of a newspaper article about the case" from the Chicago Tribune. During deliberations, the juror claimed, those who voted to convict referred repeatedly to the article. In overturning the defendant's conviction, the Seventh Circuit held that "the district court, when presented with evidence indicating that a prejudicial news article was actually present in the jury room and, more importantly, that it was in fact used by some jurors to persuade others, was at the very minimum required to investigate further."

In so ruling, the Seventh Circuit repeated the Supreme Court's admonishment that each case should be considered according to its facts. In *Thomas*, the article in question was "prejudicial on its face." *Thomas*, [463 F.2d at 1064](#) . But here, Defendant is asking the Court both to infer that Juror No. 26 was exposed to news reports and that those (ethereal) news reports were prejudicial. Yet, Defendant has not even come forward with any evidence that there were news reports published during the trial that contained prejudicial information, much less that any juror saw any news reports during the trial, further weakening the already-insufficient basis for conducting further inquiry....

The Seventh Circuit has stated that "the risk that a juror will be subject to outside forces is a fact of life" (*Davis*, [15 F.3d at 1413](#)), but because Defendant has offered no evidence that juror exposure to "extraneous prejudicial information" was a reality in the life of this case, his motion for permission to communicate with jurors must be denied.

CHAPTER 9: OPINIONS AND EXPERT TESTIMONY

CHAPTER OUTLINE:

- I. Lay Witnesses [R. 701]
 - A. Requirements: first-hand knowledge; and
 - B. Testimony that must be helpful to the trier of fact
 - C. Opinion testimony is often prohibited
 - 1. Exceptions: rationally based, such as speed, time, distance or temperature estimations, a person's appearance or intoxication
- II. Expert Witnesses [R.702]
 - A. Opinion testimony is generally permitted if:
 - 1. Subject beyond common knowledge of lay person;
 - 2. Helpful to trier of fact; and
 - 3. Witness has expertise. Qualifying Experts [R. 702]
 - i. E.g., Profferor bears burden of showing knowledge, training, experience;
 - 4. Reliability of expert testimony [R. 702]
 - i. Sufficient facts or data
 - ii. Product of reliable principles and
 - iii. Principles reliably applied to facts of case
 - iv. *Daubert* standard — admitting novel scientific testimony
- III. Basis of Expert's Opinion [R. 703 & 704]
 - A. Facts or data reasonably relied on by experts in field
 - B. Testimony re inadmissible facts barred without court's permission
- IV. Expert may opine on ultimate issue in case [R. 704]
 - A. Exception: no opinion on defendant's mental state
- V. Expert may state opinion without first disclosing underlying facts [R. 705]
- VI. Court May Appoint Experts [R. 706]

Problem # 9-2: No Horn

Plaintiff, Betty B., sued defendant, Frances, after a minor car accident. Betty B. claimed that Frances negligently backed her car into Betty's car while both were in a parking lot. Frances denied the charge, and asserted at trial that she honked her horn as she backed up. Betty wishes to testify, "If Frances had honked the horn, I most certainly would have moved my car." Is Betty's testimony admissible?

ETHICS: Assume that Betty's contingency fee case against Frances settles. Betty's lawyer deposits the settlement check directly into his personal account. He forgets to notify Betty that the settlement check arrived and waits two weeks before deducting his fees and expenses. He then sends Betty a check for the balance without notifying her of his deductions. Are there any problems with the way Betty's lawyer handled the settlement check? *See* MRPC 1.5 & 1.15.

Problem # 9-5: The Peel

Flynn slipped and fell on a banana peel in Kal's General Store. Mintz, testifying as an eyewitness, states, "Yep, Flynn slipped on a banana peel that looked like it had been on the floor for hours. Flynn fell like a sack of bricks."

ETHICS: Outside counsel has regularly represented Kal's General Store for over six years. Kal's owner calls counsel after Flynn files suit. Counsel charges Kal's a reasonable hourly fee but does not tell the store in advance what the fee is and does not provide a written fee agreement. Is this proper? *See* MRPC 1.5.

Problem # 9-8: "Will the Real Expert Please Stand Up"

Dr. Will, a chiropractic physician, is asked to testify in a workers' compensation action. Dr. Will is asked to give an opinion about the prognosis regarding defendant's back injury. Which of the following facts are relevant to qualifying Dr. Will as an expert?

ETHICS: During the voir dire it comes out that Dr. Will is not really a chiropractic physician and that all of his credentials were made up. The attorney who hired Dr. Will as an expert did not look into his background before hiring him. Did the attorney violate any rules of ethics by failing to research Dr. Will's credentials? *See* MRPC 1.1.

Problem: Another Barry, Baseball & Steroids Moment

The prosecution alleges that Barry knowingly lied to a grand jury when he denied ever using steroids and is prosecuted for perjury. Dr. Don Drysdale, a government witness and the former long-standing head of the IAC Olympic Analytical Laboratory, is an anti-doping expert. Dr. Drysdale will testify that Barry's urine sample 8 years ago tested positive for: clomiphene, which is a female fertility drug used as a masking agent by some athletes taking steroids; the designer steroid THG; and synthetic testosterone. The defense objects to Dr. Drysdale's testimony on the following grounds: 1) it is irrelevant; 2) the urine analysis is not a proper subject for expert testimony and fails the *Daubert* test; 3) Dr. Drysdale is unreliable because he is a consultant on a book about baseball and illegal drugs; and 4) the testimony's prejudicial value substantially outweighs its probative value. Should the court sustain the defense objection?

CHAPTER 10: HEARSAY

CHAPTER FRAMEWORK:

- I. Rationale
 - A. Sir Walter Raleigh's Case
 - B. The jury can not assess the substitute for testimony with sufficient accuracy
 - C. Need indicia of reliability to constitute an exception

- D. Justified on other grounds
 - 1. Admissions by a Party-Opponent;
 - 2. Some prior statements of witnesses
- II. Definition
 - A. Out-of-Court: off the witness stand
 - B. Statement: an oral, written or non-verbal assertion
 - C. Declarant: human being (not other animals)
 - D. Offered for the truth of the statement (depends on how the proponent of the statement is offering the statement – for truth or that it was said)
- III. Statutory Not Hearsay Category
 - A. Special Prior Statements of a Witness
 - B. Witness testifies as a predicate condition
 - C. Types of statements
 - 1. Special inconsistent
 - 2. Special consistent
 - 3. Prior Identification
- IV. Hearsay Exceptions Category
 - A. Declarant’s Availability is Immaterial
 - B. Declarant Unavailable
 - 1. Means the declarant’s testimony is unavailable, not necessarily the declarant
- V. What Remains – Inadmissible Hearsay

CHAPTER 11: THE CONFRONTATION CLAUSE

CHAPTER OUTLINE

- I. The Right to Confrontation – the 6th Amendment
 - A. When does the clause apply?
 - 1. Applies directly to the federal government and to the states through the due process clause and its Incorporation Doctrine
 - 2. The Clause applies *only* to testimonial statements
 - i. A testimonial statement is when a declarant reasonably expects the statement to be used in a subsequent criminal trial.
 - a. Can be formal statements, like affidavits.
 - b. Can be informal statements, during informal interrogation, as well.
 - c. Primary purpose for statement must be for use at a later proceeding and *not* for meeting an on-going emergency.
 - d. Context-based analysis is used; many factors considered

3. Testimonial statements against a defendant are excluded from a criminal trial if defendant did not have a prior opportunity to cross-examine the declarant on the statement.
 - i. A substitute for the actual declarant is insufficient.
 - ii. Only the opportunity, not the actual examination, is required.
 - iii. opponent of the statement must not have had the prior opportunity to cross-examine
 - B. Analytical framework re testimonial evidence
 1. Is the statement testimonial?
 2. Is it offered at trial against an accused?
 3. Was there a prior opportunity to cross-examine the declarant?
- II. Waiver
- A. Express
 - B. Implied - Forfeiture by Wrongdoing

INTRODUCTION

The Sixth Amendment to the United States Constitution states, “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”

THE EXCLUSION OF HEARSAY AND THE CONFRONTATION CLAUSE

Over the past several decades, two distinctive threads of Confrontation Clause analysis developed. One thread involved the potential exclusion of hearsay statements offered by the prosecution against defendants in criminal cases. Another thread involved the use of a surrogate form of confrontation, other than face-to-face observation, mostly in cases involving child witnesses. Fairly recently, the hearsay statement thread was wrested from its moorings in *Crawford v. Washington*, [541 U.S. 36](#) (2004). In that case, Justice Scalia shuffled the entire analysis of when and how the Clause applied. In effect, *Crawford* rearranged the constitutional firmament into two categories: testimonial hearsay; and everything else.

The traditional approach applied to all hearsay. As advanced in *Ohio v. Roberts*, [448 U.S. 56](#) (1980), if the hearsay was within a “firmly rooted” exception, it was considered to have presumptive reliability. That analysis no longer governs.

The Post-*Crawford* Keys

Crawford v. Washington, [541 U.S. 36](#) (2004) creates a new structure for Confrontation Clause analysis. Lynchpins, or important components, now include whether the hearsay declarant is unavailable to testify and whether the nature of the hearsay statement is considered testimonial. Thus, the duality of analysis focuses on the declarant and the

nature of the statement, much like Rule 804. Further, subsequent cases have carved out an exception to Confrontation requirements, when the testimonial statements were not made with the primary purpose or understanding that the statements would be used later in a criminal investigation. *Davis v. Washington*; *Hammon v. Indiana*. One significant tributary of this exception involves statements made for the primary purpose of resolving an ongoing emergency. See, e.g., *Michigan v. Bryant*,

Unavailability

Crawford directs courts to assess whether the declarant is available to testify. If not, it imposes a requirement that the opponent must have had an opportunity to examine the declarant about the statement. The requirement of an opportunity means the opponent has a strategic choice – to examine or not – that need not be utilized.

Testimonial Hearsay

The new approach requires a determination of whether the hearsay is testimonial. No matter how firmly rooted, testimonial statements are only admissible if the defendant had a prior opportunity to cross-examine the now unavailable declarant.

Testimonial statements include affidavits, statements that are the product of custodial interrogation by police, depositions, courtroom testimony, and “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Crawford* (Scalia, J.)

Questions remain. After *Crawford*, what does “testimonial” really mean? As the case shows, that will be left to subsequent decisions. (See *Crawford*, at the end of the chapter.)

SIGNIFICANT CASES:

- a. *Crawford v. Washington*, 541 U.S. (2003)
- b. *Hammon v. Indiana*; *Davis v. Washington*, [547 U.S. 813](#) (2006)
- c. *Giles v. California*, [554 U.S. 353](#) (2008)
- d. *Melendez-Diaz v. Massachusetts*, [129 S. Ct. 2527](#) (2009)
- e. *Michigan v. Bryant*, [131 S.Ct. 1143](#) (2011)
- f. *Bullcoming v. New Mexico*, [131 S. Ct. 2705](#) (2011)

Hammon v. Indiana; Davis v. Washington

[547 U.S. 813](#) (2006)

Justice **SCALIA** delivered the opinion of the Court.

These cases require us to determine when statements made to law enforcement personnel during a 911 call or at a crime scene are “testimonial” and thus subject to the requirements of the Sixth Amendment’s Confrontation Clause.

I

A

The relevant statements in *Davis v. Washington*, No. 05–5224, were made to a 911 emergency operator on February 1, 2001. In the ensuing conversation, the operator ascertained that [the 911 caller] McCottry was involved in a domestic disturbance with her former boyfriend Adrian Davis, the petitioner in this case:

“911 Operator: Hello.

“Complainant: Hello.

“911 Operator: What's going on?

“Complainant: He's here jumpin' on me again.

“911 Operator: Listen to me carefully. Do you know his last name?

“Complainant: It's Davis.

“911 Operator: Davis? Okay, what's his first name?

“Complainant: Adrian

“Complainant: Martell. He's runnin' now.” App. in No. 05–5224, pp. 8–9.

. . . McCottry described the context of the assault, after which the operator told her that the police were on their way. . . .

The police arrived within four minutes of the 911 call and observed McCottry’s shaken state, the “fresh injuries on her forearm and her face,” and her “frantic efforts to gather her belongings and her children so that they could leave the residence.” [154 Wash.2d 291, 296](#), 111 P.3d 844, 847 (2005) (en banc).

The State charged Davis with felony violation of a domestic no-contact order. “The State’s only witnesses were the two police officers who responded to the 911 call. Both officers testified that McCottry exhibited injuries that appeared to be recent, but neither officer could testify as to the cause of the injuries.” McCottry presumably could have testified as to whether Davis was her assailant, but she did not appear. Over Davis’s objection, based on the Confrontation Clause of the Sixth Amendment, the trial court admitted the recording of her exchange with the 911 operator, and the jury convicted him.

The Washington Court of Appeals affirmed. The Supreme Court of Washington, with one dissenting justice, also affirmed, concluding that the portion of the 911 conversation in which McCottry identified Davis was not testimonial, and that if other portions of the conversation were testimonial, admitting them was harmless beyond a reasonable doubt. [154 Wash.2d, at 305](#) , [111 P.3d, at 851](#). We granted certiorari.

B

In *Hammon v. Indiana*, No. 05–5705, police responded late on the night of February 26, 2003, to a “reported domestic disturbance” at the home of Hershel and Amy Hammon. [829 N.E.2d 444, 446](#) (Ind. 2005). They found Amy alone on the front porch, appearing “‘somewhat frightened,’ ” but she told them that “‘nothing was the matter.’” . She gave them permission to enter the house, where an officer saw “a gas heating unit in the corner of the living room” that had “flames coming out of the ... partial glass front. Hershel, meanwhile, was in the kitchen. He told the police “that he and his wife had ‘been in an argument’ but ‘everything was fine now’ and the argument ‘never became physical.’” . By this point Amy had come back inside.. After hearing Amy's account, the officer “had her fill out and sign a battery affidavit.” Amy handwrote the following: “Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter.”

The State charged Hershel with domestic battery and with violating his probation. Amy was subpoenaed, but she did not appear at his subsequent bench trial. The State called the officer who had questioned Amy, and asked him to recount what Amy told him and to authenticate the affidavit. Hershel's counsel repeatedly objected to the admission of this evidence. Nonetheless, the trial court admitted the affidavit as a “present sense impression,” and Amy's statements as “excited utterances” that “are expressly permitted in these kinds of cases even if the declarant is not available to testify,” The officer thus testified that Amy

“informed me that she and Hershel had been in an argument. That he became irrate [sic] over the fact of their daughter going to a boyfriend's house. The argument became ... physical after being verbal....

“She informed me Mr. Hammon had pushed her onto the ground, had shoved her head into the broken glass of the heater and that he had punched her in the chest twice I believe.” [App. in No. 05-5705], at 17–18.

The trial judge found Hershel guilty on both charges, and the Indiana Court of Appeals affirmed in relevant part. The Indiana Supreme Court also affirmed, concluding that Amy's statement was admissible for state-law purposes as an excited utterance, that “a ‘testimonial’ statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings,” where “the motivations of the questioner and declarant are the central concerns,” and that Amy's oral statement was not “testimonial” under these standards. It also concluded that, although the affidavit was

testimonial and thus wrongly admitted, it was harmless beyond a reasonable doubt, largely because the trial was to the bench. We granted certiorari.

II

The Confrontation Clause of the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” In *Crawford v. Washington*, we held that this provision bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” A critical portion of this holding, and the portion central to resolution of the two cases now before us, is the phrase “testimonial statements.” Only statements of this sort cause the declarant to be a “witness” within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.

Our opinion in *Crawford* set forth “[v]arious formulations” of the core class of “testimonial” statements, but found it unnecessary to endorse any of them, because “some statements qualify under any definition.” Among those, we said, were “[s]tatements taken by police officers in the course of interrogations. Questioning that generated the deponent’s statement in *Crawford*—which was made and recorded while she was in police custody, after having been given *Miranda* warnings as a possible suspect herself—“qualifies under any conceivable definition” of an “interrogation.” We therefore did not define that term, except to say that “[w]e use [it] ... in its colloquial, rather than any technical legal, sense,” and that “one can imagine various definitions ..., and we need not select among them in this case.” The character of the statements in the present cases is not as clear, and these cases require us to determine more precisely which police interrogations produce testimony.

Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

III

A

In *Crawford*, it sufficed for resolution of the case before us to determine that “even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that

class.” Moreover, as we have just described, the facts of that case spared us the need to define what we meant by “interrogations.” The *Davis* case today does not permit us this luxury of indecision. The inquiries of a police operator in the course of a 911 call are an interrogation in one sense, but not in a sense that “qualifies under any conceivable definition.” We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay; and, if so, whether the recording of a 911 call qualifies.

The answer to the first question was suggested in *Crawford*, even if not explicitly held:

“The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’ 1 N. Webster, *An American Dictionary of the English Language* (1828). ‘Testimony,’ in turn, is typically ‘a solemn declaration or affirmation made for the purpose of establishing or proving some fact.’ An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” [541 U.S., at 51](#) .

A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its “core,” but its perimeter.

We are not aware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not clearly involve testimony as thus defined. Well into the 20th century, our own Confrontation Clause jurisprudence was carefully applied only in the testimonial context. See, e.g., *Reynolds v. United States*, [98 U.S. 145, 158](#) (1879) (testimony at prior trial was subject to the Confrontation Clause, but petitioner had forfeited that right by procuring witness’s absence)....

Even our later cases, conforming to the reasoning of *Ohio v. Roberts*, never in practice dispensed with the Confrontation Clause requirements of unavailability and prior cross-examination in cases that involved testimonial hearsay, see *Crawford*, [541 U.S., at 57–59](#) (citing cases), with one arguable exception, see *id.*, at [58, n. 8](#), (discussing *White v. Illinois*, [502 U.S. 346](#)). Where our cases did dispense with those requirements—even under the *Roberts* approach—the statements at issue were clearly nontestimonial. See, e.g., *Bourjaily v. United States*, [483 U.S. 171, 181–184](#) (1987) (statements made unwittingly to a Government informant); *Dutton v. Evans*, [400 U.S. 74, 87–89](#) (1970) (plurality opinion) (statements from one prisoner to another).

Most of the American cases applying the Confrontation Clause or its state constitutional or common-law counterparts involved testimonial statements of the most formal sort—sworn testimony in prior judicial proceedings or formal depositions under oath—which invites the argument that the scope of the Clause is limited to that very formal category. But the English cases that were the progenitors of the Confrontation Clause did not limit the exclusionary rule to prior court testimony and formal depositions, see *Crawford, supra*, at [52](#), and [n. 3](#). In any event, we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking

policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case—English or early American, state or federal—can be cited, that is it.

The question before us in *Davis*, then, is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements. When we said in [Crawford, supra, at 53](#), that “interrogations by law enforcement officers fall squarely within [the] class” of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in [Crawford](#), “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” (The solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood.). A 911 call, on the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to “establis[h] or prov[e]” some past fact, but to describe current circumstances requiring police assistance.

The difference between the interrogation in *Davis* and the one in [Crawford](#) is apparent on the face of things. In *Davis*, McCottry was speaking about events *as they were actually happening*, rather than “describ [ing] past events,” [Lilly v. Virginia, 527 U.S. 116 \(1999\)](#) (plurality opinion). Sylvia Crawford's interrogation, on the other hand, took place hours after the events she described had occurred. Moreover, any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency. Although one *might* call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against bona fide physical threat. Third, the nature of what was asked and answered in *Davis*, again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in [Crawford](#)) what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. See, e.g., [Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty., 542 U.S. 177, 186 \(2004\)](#). And finally, the difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

We conclude from all this that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*. What she said was not “a weaker substitute for live testimony” at trial, [United States v. Inadi, 475 U.S. 387, 394 \(1986\)](#), like Lord Cobham's statements in *Raleigh's Case*, 2 How. St.

Tr. 1 (1603), or Jane Dingler's *ex parte* statements against her husband in *King v. Dingler*, 2 Leach 561, 168 Eng. Rep. 383 (1791), or Sylvia Crawford's statement in *Crawford*. In each of those cases, the *ex parte* actors and the evidentiary products of the *ex parte* communication aligned perfectly with their courtroom analogues. McCottry's emergency statement does not. No "witness" goes into court to proclaim an emergency and seek help.

Davis seeks to cast McCottry in the unlikely role of a witness by pointing to English cases. None of them involves statements made during an ongoing emergency. In *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), for example, a young rape victim, "immediately on her coming home, told all the circumstances of the injury" to her mother. *Id.*, at 200, 168 Eng. Rep., at 202. The case would be helpful to Davis if the relevant statement had been the girl's screams for aid as she was being chased by her assailant. But by the time the victim got home, her story was an account of past events.

This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme Court put it, "evolve into testimonial statements," [829 N.E.2d, at 457](#), once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the "structured police questioning" that occurred in *Crawford*. This presents no great problem. Just as, for Fifth Amendment purposes, "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect," *New York v. Quarles*, 467 U.S. 649, 658–659 (1984), trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through *in limine* procedure, they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence. Davis's jury did not hear the *complete* 911 call, although it may well have heard some testimonial portions. We were asked to classify only McCottry's early statements identifying Davis as her assailant, and we agree with the Washington Supreme Court that they were not testimonial. That court also concluded that, even if later parts of the call were testimonial, their admission was harmless beyond a reasonable doubt. Davis does not challenge that holding, and we therefore assume it to be correct.

B

Determining the testimonial or nontestimonial character of the statements that were the product of the interrogation in *Hammon* is a much easier task, since they were not much different from the statements we found to be testimonial in *Crawford*. It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct—as, indeed, the testifying officer expressly

acknowledged, There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) “what is happening,” but rather “what happened.” Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime—which is, of course, precisely what the officer *should* have done.

It is true that the *Crawford* interrogation was more formal. It followed a *Miranda* warning, was tape-recorded, and took place at the station house. While these features certainly strengthened the statements’ testimonial aspect—made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events—none was essential to the point. It was formal enough that Amy’s interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his “investigat[ion].” What we called the “striking resemblance” of the *Crawford* statement to civil-law *ex parte* examinations, is shared by Amy’s statement here. Both declarants were actively separated from the defendant—officers forcibly prevented Hershel from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial. Although we necessarily reject the Indiana Supreme Court’s implication that virtually any “initial inquiries” at the crime scene will not be testimonial, we do not hold the opposite—that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that “[o]fficers called to investigate ... need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.” *Hibel*, 542 U.S., at 186. Such exigencies may *often* mean that “initial inquiries” produce nontestimonial statements. But in cases like this one, where Amy’s statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were “initial inquiries” is immaterial.

IV

Respondents in both cases, joined by a number of their *amici*, contend that the nature of the offenses charged in these two cases—domestic violence—requires greater flexibility in the use of testimonial evidence. This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free. Cf. *Kyllo v. United States*, 533 U.S. 27 (2001) (suppressing evidence from an illegal search). But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving

their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: that “the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds.” [541 U.S., at 62](#). That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

We have determined that, absent a finding of forfeiture by wrongdoing, the Sixth Amendment operates to exclude Amy Hammon's affidavit. The Indiana courts may (if they are asked) determine on remand whether such a claim of forfeiture is properly raised and, if so, whether it is meritorious.

We affirm the judgment of the Supreme Court of Washington. We reverse the judgment of the Supreme Court of Indiana, and remand the case to that court for proceedings not inconsistent with this opinion.

It is so ordered.

Justice [THOMAS](#), concurring in the judgment in part and dissenting in part.

In *Crawford v. Washington*, [541 U.S. 36](#) (2004), we abandoned the general reliability inquiry we had long employed to judge the admissibility of hearsay evidence under the Confrontation Clause, describing that inquiry as “*inherently*, and therefore *permanently*, unpredictable.” Today, a mere two years after the Court decided *Crawford*, it adopts an equally unpredictable test, under which district courts are charged with divining the “primary purpose” of police interrogations. Besides being difficult for courts to apply, this test characterizes as “testimonial,” and therefore inadmissible, evidence that bears little resemblance to what we have recognized as the evidence targeted by the Confrontation Clause. Because neither of the cases before the Court today would implicate the Confrontation Clause under an appropriately targeted standard, I concur only in the judgment in *Davis v. Washington*, and dissent from the Court's resolution of *Hammon v. Indiana*.

B

Neither the 911 call at issue in *Davis* nor the police questioning at issue in *Hammon* is testimonial under the appropriate framework. Neither the call nor the questioning is itself a formalized dialogue. Nor do any circumstances surrounding the taking of the statements render those statements sufficiently formal to resemble the Marian examinations; the statements were neither Mirandized nor custodial, nor accompanied by any similar indicia of formality. Finally, there is no suggestion that the prosecution attempted to offer the women’s hearsay evidence at trial in order to evade confrontation. See [829 N.E.2d 444, 447](#) (Ind.2005) (prosecution subpoenaed Amy Hammon to testify, but she was not present); [154 Wash.2d 291, 296, 111 P.3d 844, 847](#) (2005) (en banc) (State was unable to locate Michelle McCottry at the time of trial). Accordingly, the statements at issue in both cases are nontestimonial and admissible under the Confrontation Clause.

II

Because the standard adopted by the Court today is neither workable nor a targeted attempt to reach the abuses forbidden by the Clause, I concur only in the judgment in *Davis v. Washington*, No. 05–5224, and respectfully dissent from the Court's resolution of *Hammon v. Indiana*, No. 05–5705.

[C] **Giles v. California**

[554 U.S. 353](#) (2008)

In *Giles*, the Supreme Court decided on the standard governing when the Confrontation right would be forfeited by wrongdoing. *Giles* was convicted of murder after the trial court permitted prosecutors to introduce hearsay statements made by the victim to a police officer who was responding to a domestic violence alert. At issue before the Supreme Court was whether the unconfrosted testimony of the victim was properly admitted or whether the forfeiture exception applied only when there was an intentional act to prevent the witness from testifying or simply an intentional criminal act that does not permit the witness to testify. The Supreme Court, led again by Justice Scalia, adopted the former approach because it was established at the founding of the Amendment, that there must be conduct designed to prevent subsequent testimony. As applied to *Giles*, the intentionality of the criminal act does not suffice to show there was a design to prevent testimony at a subsequent time. Because the intent of the defendant was not considered in determining whether there was such a design, whether intent existed was a matter to be considered by the court below on remand.

[D] **Melendez-Diaz v. Massachusetts**

[129 S. Ct. 2527](#) (2009)

SCALIA, J., delivered the opinion of the Court, in which STEVENS, SOUTER, THOMAS, and GINSBURG, JJ., joined. THOMAS, J., filed a concurring opinion. KENNEDY, J., filed a dissenting opinion, in which ROBERTS, C.J., and BREYER and ALITO, JJ., joined.

Justice SCALIA delivered the opinion of the Court.

The Massachusetts courts in this case admitted into evidence affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine. The question presented is whether those affidavits are “testimonial,” rendering the affiants “witnesses” subject to the defendant's right of confrontation under the Sixth Amendment.

I

In 2001, Boston police officers [arrested several men in a drug sting], one of whom was petitioner Luis Melendez-Diaz. The officers placed all three men in a police cruiser.

During the short drive to the police station, the officers observed their passengers fidgeting and making furtive movements in the back of the car. After depositing the men at the station, they searched the police cruiser and found a plastic bag containing 19 smaller plastic bags hidden in the partition between the front and back seats. They submitted the seized evidence to a state laboratory required by law to conduct chemical analysis upon police request.

Melendez-Diaz was charged with distributing cocaine and with trafficking in cocaine in an amount between 14 and 28 grams. At trial, the prosecution placed into evidence the bags seized from Wright and from the police cruiser. It also submitted three “certificates of analysis” showing the results of the forensic analysis performed on the seized substances. The certificates reported the weight of the seized bags and stated that the bags “[h]a[ve] been examined with the following results: 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, as required under Massachusetts law. [Mass. Gen. Laws, ch. 111, § 13.](#)

Petitioner objected to the admission of the certificates, asserting that our Confrontation Clause decision in *Ohio v. Roberts* required the analysts to testify in person. The objection was overruled, and the certificates were admitted pursuant to state law as “prima facie evidence of the composition, quality, and the net weight of the narcotic ... analyzed.” The jury found Melendez-Diaz guilty. He appealed, contending, among other things, that admission of the certificates violated his Sixth Amendment right to be confronted with the witnesses against him. We granted certiorari.

II

The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” In *Crawford*, after reviewing the Clause’s historical underpinnings, we held that it guarantees a defendant’s right to confront those “who ‘bear testimony’ ” against him. . A witness’s testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.

Our opinion described the class of testimonial statements covered by the Confrontation Clause as follows:

“Various formulations of this core class of testimonial statements exist: *ex parte*

in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”

There is little doubt that the documents at issue in this case fall within the “core class of testimonial statements” thus described. Our description of that category mentions affidavits twice. See also *White v. Illinois*, [502 U.S. 346, 365](#) (1992) (THOMAS, J., concurring in part and concurring in judgment) (“[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions”). The documents at issue here, while denominated by Massachusetts law “certificates,” are quite plainly affidavits: “declaration [s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.” *Black’s Law Dictionary* 62 (8th ed. 2004). They are incontrovertibly a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford, supra*, at 51. The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine—the precise testimony the analysts would be expected to provide if called at trial. The “certificates” are functionally identical to live, in-court testimony, doing “precisely what a witness does on direct examination.” *Davis v. Washington*, [547 U.S. 813, 830](#) (2006).

Here, moreover, not only were the affidavits “ ‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,’ ” but under Massachusetts law the *sole purpose* of the affidavits was to provide “prima facie evidence of the composition, quality, and the net weight” of the analyzed substance, [Mass. Gen. Laws, ch. 111, § 13](#). We 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.

In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were “witnesses” for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to “‘be confronted with’” the analysts at trial.

III

Respondent and the dissent advance a potpourri of analytic arguments in an effort to avoid this rather straightforward application of our holding in *Crawford*. Before addressing them, however, we must assure the reader of the falsity of the dissent's

opening alarm that we are “sweep[ing] away an accepted rule governing the admission of scientific evidence” that has been “established for at least 90 years” and “extends across at least 35 States and six Federal Courts of Appeals.”

The vast majority of the state-court cases the dissent cites in support of this claim come not from the last 90 years, but from the last 30, and not surprisingly nearly all of them rely on our decision in *Ohio v. Roberts*, [448 U.S. 56](#) (1980), or its since-rejected theory that unopposed testimony was admissible as long as it bore indicia of reliability. As for the six Federal Courts of Appeals cases cited by the dissent, five of them postdated and expressly relied on *Roberts*.

A review of cases that predate the *Roberts* era yields a mixed picture. As the dissent notes, three state supreme court decisions from the early 20th century denied confrontation with respect to certificates of analysis regarding a substance's alcohol content. But other state courts in the same era reached the opposite conclusion. This much is entirely clear: In faithfully applying *Crawford* to the facts of this case, we are not overruling 90 years of settled jurisprudence. It is the dissent that seeks to overturn precedent by resurrecting *Roberts* a mere five years after it was rejected in *Crawford*. We turn now to the various legal arguments raised by respondent and the dissent.

A

Respondent first argues that the analysts are not subject to confrontation because they are not “accusatory” witnesses, in that they do not directly accuse petitioner of wrongdoing; rather, their testimony is inculpatory only when taken together with other evidence linking petitioner to the contraband. This finds no support in the text of the Sixth Amendment or in our case law.

The Sixth Amendment guarantees a defendant the right “to be confronted with the witnesses *against him*.” (Emphasis added.) To the extent the analysts were witnesses (a question resolved above), they certainly provided testimony *against* petitioner, proving one fact necessary for his conviction—that the substance he possessed was cocaine. The contrast between the text of the Confrontation Clause and the text of the adjacent Compulsory Process Clause confirms this analysis. While the Confrontation Clause guarantees a defendant the right to be confronted with the witnesses “against him,” the Compulsory Process Clause guarantees a defendant the right to call witnesses “in his favor.” [U.S. Const., Amdt. 6](#). The text of the 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.

It is often, indeed perhaps usually, the case that an adverse witness's testimony, taken alone, will not suffice to convict. Yet respondent fails to cite a single case in which such testimony was admitted absent a defendant's opportunity to cross-examine. Unsurprisingly, since such a holding would be contrary to longstanding case law. In

Kirby v. United States, [174 U.S. 47](#) (1899), the Court considered Kirby's conviction for receiving stolen property, the evidence for which consisted, in part, of the records of conviction of three individuals who were found guilty of stealing the relevant property. Though this evidence proved only that the property was stolen, and not that Kirby received it, the Court nevertheless ruled that admission of the records violated Kirby's rights under the Confrontation Clause. See also *King v. Turner*, 1 Mood. 347, 168 Eng. Rep. 1298 (1832) (confession by one defendant to having stolen certain goods could not be used as evidence against another defendant accused of receiving the stolen property).

B

Respondent and the dissent argue that the analysts should not be subject to confrontation because they are not “conventional” (or “typical” or “ordinary”) witnesses of the sort whose *ex parte* testimony was most notoriously used at the trial of Sir Walter Raleigh. It is true, as the Court recognized in *Crawford*, that *ex parte* examinations of the sort used at Raleigh's trial have “long been thought a paradigmatic confrontation violation.” [541 U.S. at 52](#). But the paradigmatic case identifies the core of the right to confrontation, not its limits.

The dissent first contends that a “conventional witness recalls events observed in the past, while an analyst's report contains near-contemporaneous observations of the test.” It is doubtful that the analyst's reports in this case could be characterized as reporting “near-contemporaneous observations”; the affidavits were completed almost a week after the tests were performed. (the tests were performed on November 28, 2001, and the affidavits sworn on December 4, 2001). But regardless, the dissent misunderstands the role that “near-contemporaneity” has played in our case law. The dissent notes that that factor was given “substantial weight” in *Davis*, but in fact that decision *disproves* the dissent's position. There the Court considered the admissibility of statements made to police officers responding to a report of a domestic disturbance. By the time officers arrived the assault had ended, but the victim's statements-written and oral-were sufficiently close in time to the alleged assault that the trial court admitted her affidavit as a “present sense impression.” *Davis*, [547 U.S., at 820](#). Though the witness's statements in *Davis* were “near-contemporaneous” to the events she reported, we nevertheless held that they could *not* be admitted absent an opportunity to confront the witness.

A second reason the dissent contends that the analysts are not “conventional witnesses” (and thus not subject to confrontation) is that they “observe[d] neither the crime nor any human action related to it.” The dissent provides no authority for this particular limitation of the type of witnesses subject to confrontation. Nor is it conceivable that all witnesses who fit this description would be outside the scope of the Confrontation Clause. For example, is a police officer's investigative report describing the crime scene admissible absent an opportunity to examine the officer? The dissent's novel exception from coverage of the Confrontation Clause would exempt all expert witnesses—a hardly “unconventional” class of witnesses.

A third respect in which the dissent asserts that the analysts are not “conventional” witnesses and thus not subject to confrontation is that their statements were not provided in response to interrogation. As we have explained, “[t]he Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.” Respondent and the dissent cite no authority, and we are aware of none, holding that a person who volunteers his testimony is any less a “‘witness against’ the defendant,” than one who is responding to interrogation. In any event, the analysts’ affidavits in this case *were* presented in response to a police request. See [Mass. Gen. Laws, ch. 111, §§ 12-13](#). If an affidavit submitted in response to a police officer’s request to “write down what happened” suffices to trigger the Sixth Amendment’s protection (as it apparently does, see [Davis, 547 U.S., at 819-820](#) (THOMAS, J., concurring in judgment in part and dissenting in part)), then the analysts’ testimony should be subject to confrontation as well.

Respondent and the dissent may be right that there are other ways-and in some cases better ways-to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.

Nor is it evident that what respondent calls “neutral scientific testing” is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, “[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency.” National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward 6-1* (Prepublication Copy Feb. 2009) (hereinafter National Academy Report). And “[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.” *Id.*, at S-17. A forensic analyst responding to a request from a law enforcement official may feel pressure-or have an incentive-to alter the evidence in a manner favorable to the prosecution.

Confrontation is one means of assuring accurate forensic analysis. While it is true, as the dissent notes, that an honest analyst will not alter his testimony when forced to confront the defendant, the same cannot be said of the fraudulent analyst. This case is illustrative. The affidavits submitted by the analysts contained only the bare-bones statement that “[t]he substance was found to contain: Cocaine.” At the time of trial, petitioner did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed. While we still do not know the precise tests used by the analysts, we are told that the laboratories use “methodology recommended by the Scientific Working Group for the Analysis of Seized Drugs.” At least some of that methodology requires the exercise of judgment and presents a risk of

error that might be explored on cross-examination. See 2 P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 23.03[c] (4th ed.2007) (identifying four “critical errors” that analysts may commit in interpreting the results of the commonly used gas chromatography/mass spectrometry analysis).

The same is true of many of the other types of forensic evidence commonly used in criminal prosecutions. “[T]here is wide variability across forensic science disciplines with regard to techniques, methodologies, reliability, types and numbers of potential errors, research, general acceptability, and published material.” National Academy Report S-5.

D

Respondent argues that the analysts’ affidavits are admissible without confrontation because they are “akin to the types of official and business records admissible at common law.” But the affidavits do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless.

Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See [Fed. Rule Evid. 803\(6\)](#). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. Our decision in *Palmer v. Hoffman*, [318 U.S. 109](#) (1943), made that distinction clear. There we held that an accident report provided by an employee of a railroad company did not qualify as a business record because, although kept in the regular course of the railroad’s operations, it was “calculated for use essentially in the court, not in the business.” The analysts’ certificates-like police reports generated by law enforcement officials-do not qualify as business or public records for precisely the same reason. See [Rule 803\(8\)](#) (defining public records as “excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel”).

Respondent seeks to rebut this limitation by noting that at common law the results of a coroner’s inquest were admissible without an opportunity for confrontation. But as we have previously noted, whatever the status of coroner’s reports at common law in England, they were not accorded any special status in American practice. See [Crawford](#), [541 U.S.](#), at 47, n. 2.

E

Respondent asserts that we should find no Confrontation Clause violation in this case because petitioner had the ability to subpoena the analysts. But that power-whether pursuant to state law or the Compulsory Process Clause-is no substitute for the right of confrontation. Unlike the Confrontation Clause, those provisions are of no use to the defendant when the witness is unavailable or simply refuses to appear. See, e.g., [Davis](#), [547 U.S.](#), at 820 (“[The witness] was subpoenaed, but she did not appear at ... trial”). Converting the prosecution’s duty under the Confrontation Clause into the defendant’s

privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.

F

Finally, respondent asks us to relax the requirements of the Confrontation Clause to accommodate the “necessities of trial and the adversary process.” It is not clear whence we would derive the authority to do so.....

Perhaps the best indication that the sky will not fall after today's decision is that it has not done so already. Many States have already adopted the constitutional rule we announce today, while many others permit the defendant to assert (or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution's intent to use a forensic analyst's report. Despite these widespread practices, there is no evidence that the criminal justice system has ground to a halt in the States that, one way or another, empower a defendant to insist upon the analyst's appearance at trial. Indeed, in Massachusetts itself, a defendant may subpoena the analyst to appear at trial, and yet there is no indication that obstructionist defendants are abusing the privilege.

This case involves little more than the application of our holding in *Crawford v. Washington*. The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error. We therefore reverse the judgment of the Appeals Court of Massachusetts and remand the case for further proceedings not inconsistent with this opinion. *It is so ordered.*

Justice THOMAS, concurring.

I write separately to note that I continue to adhere to my position that “the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” *White v. Illinois*, 502 U.S. 346, 365 (1992). I join the Court's opinion in this case because the documents at issue in this case “are quite plainly affidavits.” As such, they “fall within the core class of testimonial statements” governed by the Confrontation Clause.

Justice KENNEDY, with whom THE CHIEF JUSTICE, Justice BREYER, and Justice ALITO join, dissenting.

The Court sweeps away an accepted rule governing the admission of scientific evidence. Until today, scientific analysis could be introduced into evidence without

testimony from the “analyst” who produced it. This rule has been established for at least 90 years. It extends across at least 35 States and six Federal Courts of Appeals. Yet the Court undoes it based on two recent opinions that say nothing about forensic analysts: *Crawford v. Washington* (2004) and *Davis v. Washington* (2006).

It is remarkable that the Court so confidently disregards a century of jurisprudence. We learn now that we have misinterpreted the Confrontation Clause—hardly an arcane or seldom-used provision of the Constitution—for the first 218 years of its existence. The immediate systemic concern is that the Court makes no attempt to acknowledge the real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses—“witnesses” being the word the Framers used in the Confrontation Clause.

Crawford and *Davis* dealt with ordinary witnesses—women who had seen, and in two cases been the victim of, the crime in question. Those cases stand for the proposition that formal statements made by a conventional witness—one who has personal knowledge of some aspect of the defendant's guilt—may not be admitted without the witness appearing at trial to meet the accused face to face. But *Crawford* and *Davis* do not say—indeed, could not have said, because the facts were not before the Court—that anyone who makes a testimonial statement is a witness for purposes of the Confrontation Clause, even when that person has, in fact, witnessed nothing to give them personal knowledge of the defendant's guilt.

Because *Crawford* and *Davis* concerned typical witnesses, the Court should have done the sensible thing and limited its holding to witnesses as so defined. Indeed, as Justice THOMAS warned in his opinion in *Davis*, the Court's approach has become “disconnected from history and unnecessary to prevent abuse.” The Court's reliance on the word “testimonial” is of little help, of course, for that word does not appear in the text of the Clause.

The Court dictates to the States, as a matter of constitutional law, an as-yet-undefined set of rules governing what kinds of evidence may be admitted without in-court testimony. Indeed, under today's opinion the States bear an even more onerous burden than they did before *Crawford*. Then, the States at least had the guidance of the hearsay rule and could rest assured that “where the evidence f[ell] within a firmly rooted hearsay exception,” the Confrontation Clause did not bar its admission. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (overruled by *Crawford*). Now, without guidance from any established body of law, the States can only guess what future rules this Court will distill from the sparse constitutional text. See, e.g., *Mendez*, *Crawford v. Washington : A Critique*, 57 *Stan. L. Rev.* 569, 586-593 (2004) (discussing unanswered questions regarding testimonial statements).

The Court's opinion suggests this will be a body of formalistic and wooden rules, divorced from precedent, common sense, and the underlying purpose of the Clause. Its ruling has vast potential to disrupt criminal procedures that already give ample protections against the misuse of scientific evidence. For these reasons, as more fully explained below, the Court's opinion elicits my respectful dissent.

I

A

The Court says that, before the results of a scientific test may be introduced into evidence, the defendant has the right to confront the “analyst.” One must assume that this term, though it appears nowhere in the Confrontation Clause, nevertheless has some constitutional substance that now must be elaborated in future cases. There is no accepted definition of analyst, and there is no established precedent to define that term.

Consider how many people play a role in a routine test for the presence of illegal drugs. One person prepares a sample of the drug, places it in a testing machine, and retrieves the machine's printout-often, a graph showing the frequencies of radiation absorbed by the sample or the masses of the sample's molecular fragments. See 2 P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 23.03 (4th ed. 2007) (describing common methods of identifying drugs, including infrared spectrophotometry, nuclear magnetic resonance, gas chromatography, and mass spectrometry). A second person interprets the graph the machine prints out-perhaps by comparing that printout with published, standardized graphs of known drugs. Meanwhile, a third person-perhaps an independent contractor-has calibrated the machine and, having done so, has certified that the machine is in good working order. Finally, a fourth person-perhaps the laboratory's director-certifies that his subordinates followed established procedures.

It is not at all evident which of these four persons is the analyst to be confronted under the rule the Court announces today. If all are witnesses who must appear for in-court confrontation, then the Court has, for all practical purposes, forbidden the use of scientific tests in criminal trials. As discussed further below, requiring even one of these individuals to testify threatens to disrupt if not end many prosecutions where guilt is clear but a newly found formalism now holds sway.Today's decision demonstrates that even in the narrow category of scientific tests that identify a drug, the Court cannot define with any clarity who the analyst is. Outside this narrow category, the range of other scientific tests that may be affected by the Court's new confrontation right is staggering.

[For example,] the defense has the right to call its own witnesses to show that the chain of custody is not secure. But that does not mean it can demand that, in the prosecution's case in chief, each person who is in the chain of custody-and who had an undoubted opportunity to taint or tamper with the evidence-must be called by the prosecution under the Confrontation Clause. And the same is true with lab technicians. The Confrontation Clause is simply not needed for these matters. Where, as here, the defendant does not even dispute the accuracy of the analyst's work, confrontation adds nothing.

C

For the sake of these negligible benefits, the Court threatens to disrupt forensic investigations across the country and to put prosecutions nationwide at risk of dismissal based on erratic, all-too-frequent instances when a particular laboratory technician, now

invested by the Court's new constitutional designation as the analyst, simply does not or cannot appear.

The Court's holding is a windfall to defendants, one that is unjustified by any demonstrated deficiency in trials, any well-understood historical requirement, or any established constitutional precedent. [Consequently, I respectfully dissent.]

[E] Bullcoming v. New Mexico

[131 S. Ct. 2705](#) (June 23, 2011)

GINSBURG, J., delivered the opinion of the Court, except as to Part IV and footnote 6. **SCALIA**, J., joined that opinion in full, **SOTOMAYOR** and **KAGAN**, JJ., joined as to all but Part IV, and **THOMAS**, J., joined as to all but Part IV and footnote 6. **SOTOMAYOR**, J., filed an opinion concurring in part. **KENNEDY**, J., filed a dissenting opinion, in which **ROBERTS**, C. J., and **BREYER** and **ALITO**, JJ., joined.

Justice **GINSBURG** delivered the opinion of the Court, except as to Part IV and footnote

In *Melendez–Díaz v. Massachusetts*, [557 U.S. ___](#), 129 S. Ct. 2527 (2009), this Court held that a forensic laboratory report stating that a suspect substance was cocaine ranked as testimonial for purposes of the Sixth Amendment's Confrontation Clause. The report had been created specifically to serve as evidence in a criminal proceeding. Absent stipulation, the Court ruled, the prosecution may not introduce such a report without offering a live witness competent to testify to the truth of the statements made in the report.

In the case before us, petitioner Donald Bullcoming was arrested on charges of driving while intoxicated (DWI). Principal evidence against Bullcoming was a forensic laboratory report certifying that Bullcoming's blood-alcohol concentration was well above the threshold for aggravated DWI. At trial, the prosecution did not call as a witness the analyst who signed the certification. Instead, the State called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample. The New Mexico Supreme Court determined that, although the blood-alcohol analysis was “testimonial,” the Confrontation Clause did not require the certifying analyst's in-court testimony. Instead, New Mexico's high court held, live testimony of another analyst satisfied the constitutional requirements.

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.

I
A

In August 2005, a vehicle driven by petitioner Donald Bullcoming rear-ended a pick-up truck at an intersection in Farmington, New Mexico. When the truck driver exited his vehicle and approached Bullcoming to exchange insurance information, he noticed that Bullcoming's eyes were bloodshot. Smelling alcohol on Bullcoming's breath, the truck driver told his wife to call the police. Bullcoming left the scene before the police arrived, but was soon apprehended by an officer who observed his performance of field sobriety tests. Upon failing the tests, Bullcoming was arrested for driving a vehicle while "under the influence of intoxicating liquor" (DWI), in violation of [N.M. Stat. Ann. § 66-8-102 \(2004\)](#).

Because Bullcoming refused to take a breath test, the police obtained a warrant authorizing a blood-alcohol analysis. Pursuant to the warrant, a sample of Bullcoming's blood was drawn at a local hospital. To determine Bullcoming's blood-alcohol concentration (BAC), the police sent the sample to the New Mexico Department of Health, Scientific Laboratory Division (SLD). In a standard SLD form titled "Report of Blood Alcohol Analysis," participants in the testing were identified, and the forensic analyst certified his finding.

SLD's report contained in the top block "information ... filled in by [the] arresting officer." This information included the "reason [the] suspect [was] stopped" (the officer checked "Accident"), and the date ("8.14.05") and time ("18:25 PM") the blood sample was drawn. The arresting officer also affirmed that he had arrested Bullcoming and witnessed the blood draw. The next two blocks contained certifications by the nurse who drew Bullcoming's blood and the SLD intake employee who received the blood sample sent to the laboratory.

Following these segments, the report presented the "certificate of analyst," completed and signed by Curtis Caylor, the SLD forensic analyst assigned to test Bullcoming's blood sample. Caylor recorded that the BAC in Bullcoming's sample was 0.21 grams per hundred milliliters, an inordinately high level. Caylor also affirmed that "[t]he seal of th[e] sample was received intact and broken in the laboratory," that "the statements in [the analyst's block of the report] are correct," and that he had "followed the procedures set out on the reverse of th[e] report." Those "procedures" instructed analysts, *inter alia*, to "retai[n] the sample container and the raw data from the analysis," and to "not[e] any circumstance or condition which might affect the integrity of the sample or otherwise affect the validity of the analysis." Finally, in a block headed "certificate of reviewer," the SLD examiner who reviewed Caylor's analysis certified that Caylor was qualified to conduct the BAC test, and that the "established procedure" for handling and analyzing Bullcoming's sample "ha[d] been followed."

SLD analysts use gas chromatograph machines to determine BAC levels. Operation of the machines requires specialized knowledge and training. Several steps are involved in the gas chromatograph process, and human error can occur at each step.

Caylor's report that Bullcoming's BAC was 0.21 supported a prosecution for aggravated DWI, the threshold for which is a BAC of 0.16 grams per hundred milliliters, § 66–8–102(D)(1). The State accordingly charged Bullcoming with this more serious crime.

B

The case was tried to a jury in November 2005, after our decision in *Crawford v. Washington* but before *Melendez–Diaz*. On the day of trial, the State announced that it would not be calling SLD analyst Curtis Caylor as a witness because he had “very recently [been] put on unpaid leave” for a reason not revealed. A startled defense counsel objected. The prosecution, she complained, had never disclosed, until trial commenced, that the witness “out there ... [was] not the analyst [of Bullcoming's sample].” Counsel stated that, “had [she] known that the analyst [who tested Bullcoming's blood] was not available,” her opening, indeed, her entire defense “may very well have been dramatically different.” The State, however, proposed to introduce Caylor's finding as a “business record” during the testimony of Gerasimos Razatos, an SLD scientist who had neither observed nor reviewed Caylor's analysis.

Bullcoming's counsel opposed the State's proposal. Without Caylor's testimony, defense counsel maintained, introduction of the analyst's finding would violate Bullcoming's Sixth Amendment right “to be confronted with the witnesses against him.” The trial court overruled the objection, and admitted the SLD report as a business record. The jury convicted Bullcoming of aggravated DWI, and the New Mexico Court of Appeals upheld the conviction, concluding that “the blood alcohol report in the present case was non-testimonial and prepared routinely with guarantees of trustworthiness.” 2008–NMCA–097, ¶ 17, [144 N.M. 546](#), 189 P.3d 679, 685.

C

While Bullcoming's appeal was pending before the New Mexico Supreme Court, this Court decided *Melendez–Diaz*. In that case, “[t]he Massachusetts courts [had] admitted into evidence affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine.” [557 U.S., at ___](#), 129 S.Ct., at 2530. Those affidavits, the Court held, were “‘testimonial,’ rendering the affiants ‘witnesses’ subject to the defendant's right of confrontation under the Sixth Amendment.” In light of *Melendez–Diaz*, the New Mexico Supreme Court acknowledged that the blood-alcohol report introduced at Bullcoming's trial qualified as testimonial evidence. Like the affidavits in *Melendez–Diaz*, the court observed, the report was “functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination.” 226 P.3d, at 8 (quoting *Melendez–Diaz*, [557 U.S., at ___](#), 129 S.Ct., at 2532). Nevertheless, for two reasons, the court held that admission of the report did not

violate the Confrontation Clause.

First, the court said certifying analyst Caylor “was a mere scrivener,” who “simply transcribed the results generated by the gas chromatograph machine.” Second, SLD analyst Razatos, although he did not participate in testing Bullcoming's blood, “qualified as an expert witness with respect to the gas chromatograph machine.” “Razatos provided live, in-court testimony,” the court stated, “and, thus, was available for cross-examination regarding the operation of the ... machine, the results of [Bullcoming's] BAC test, and the SLD's established laboratory procedures.” . Razatos' testimony was crucial, the court explained, because Bullcoming could not cross-examine the machine or the written report. But “[Bullcoming's] right of confrontation was preserved,” the court concluded, because Razatos was a qualified analyst, able to serve as a surrogate for Caylor.

We granted certiorari to address this question: Does the Confrontation Clause permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification. Our answer is in line with controlling precedent: As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness. Because the New Mexico Supreme Court permitted the testimonial statement of one witness, *i.e.*, Caylor, to enter into evidence through the in-court testimony of a second person, *i.e.*, Razatos, we reverse that court's judgment.

II

The Sixth Amendment's Confrontation Clause confers upon the accused “[i]n all criminal prosecutions, ... the right ... to be confronted with the witnesses against him.” In a pathmarking 2004 decision, *Crawford v. Washington*, we overruled *Ohio v. Roberts*, [448 U.S. 56](#) (1980), which had interpreted the Confrontation Clause to allow admission of absent witnesses' testimonial statements based on a judicial determination of reliability. Rejecting *Roberts*' “amorphous notions of ‘reliability,’” *Crawford* held that fidelity to the Confrontation Clause permitted admission of “[t]estimonial statements of witnesses absent from trial ... only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” [541 U.S., at 59](#) . See *Michigan v. Bryant*, [562 U.S. _____](#), [131 S.Ct. 1143, 1153](#), (2011) (“[F]or testimonial evidence to be admissible, the Sixth Amendment ‘demands what the common law required: unavailability [of the witness] and a prior opportunity for cross-examination.’” (quoting *Crawford*, [541 U.S., at 68](#))). *Melendez-Diaz*, relying on *Crawford*'s rationale, refused to create a “forensic evidence” exception to this rule. An analyst's certification prepared in connection with a criminal investigation or prosecution, the Court held, is “testimonial,” and therefore within the compass of the Confrontation Clause. The State in the instant case never asserted that the analyst who signed the certification, Curtis Caylor, was unavailable. The record showed only that Caylor was placed on unpaid leave for an

undisclosed reason. Nor did Bullcoming have an opportunity to cross-examine Caylor. *Crawford* and *Melendez-Diaz*, therefore, weigh heavily in Bullcoming's favor. The New Mexico Supreme Court, however, although recognizing that the SLD report was testimonial for purposes of the Confrontation Clause, considered SLD analyst Razatos an adequate substitute for Caylor. We explain first why Razatos' appearance did not meet the Confrontation Clause requirement. We next address the State's argument that the SLD report ranks as "nontestimonial," and therefore "[was] not subject to the Confrontation Clause" in the first place.

A

The New Mexico Supreme Court held surrogate testimony adequate to satisfy the Confrontation Clause in this case because analyst Caylor "simply transcribed the resul[t] generated by the gas chromatograph machine," presenting no interpretation and exercising no independent judgment. Bullcoming's "true 'accuser,'" the court said, was the machine, while testing analyst Caylor's role was that of "mere scrivener." Caylor's certification, however, reported more than a machine-generated number.

Caylor certified that he received Bullcoming's blood sample intact with the seal unbroken, that he checked to make sure that the forensic report number and the sample number "correspond[ed]," and that he performed on Bullcoming's sample a particular test, adhering to a precise protocol. He further represented, by leaving the "[r]emarks" section of the report blank, that no "circumstance or condition ... affect[ed] the integrity of the sample or ... the validity of the analysis." These representations, relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination.

The potential ramifications of the New Mexico Supreme Court's reasoning, furthermore, raise red flags. Most witnesses, after all, testify to their observations of factual conditions or events, *e.g.*, "the light was green," "the hour was noon." Such witnesses may record, on the spot, what they observed. Suppose a police report recorded an objective fact—Bullcoming's counsel posited the address above the front door of a house or the read-out of a radar gun. Could an officer other than the one who saw the number on the house or gun present the information in court—so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures? As our precedent makes plain, the answer is emphatically "No." See *Davis v. Washington*, 547 U.S. 813, 826 (2006) (Confrontation Clause may not be "evaded by having a note-taking police [officer] recite the ... testimony of the declarant" (emphasis deleted));

The New Mexico Supreme Court stated that the number registered by the gas chromatograph machine called for no interpretation or exercise of independent judgment on Caylor's part. We have already explained that Caylor certified to more than a machine-generated number. In any event, the comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar. Accordingly, the analysts who write reports that the prosecution introduces must be made

available for confrontation even if they possess “the scientific acumen of Mme. Curie and the veracity of Mother Teresa.”

B

Recognizing that admission of the blood-alcohol analysis depended on “live, in-court testimony [by] a qualified analyst,” the New Mexico Supreme Court believed that Razatos could substitute for Caylor because Razatos “qualified as an expert witness with respect to the gas chromatograph machine and the SLD’s laboratory procedures,” But surrogate testimony of the kind Razatos was equipped to give could not convey what Caylor knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst’s part. Significant here, Razatos had no knowledge of the reason why Caylor had been placed on unpaid leave. With Caylor on the stand, Bullcoming’s counsel could have asked questions designed to reveal whether incompetence, evasiveness, or dishonesty accounted for Caylor’s removal from his work station. Notable in this regard, the State never asserted that Caylor was “unavailable”; the prosecution conveyed only that Caylor was on uncompensated leave. Nor did the State assert that Razatos had any “independent opinion” concerning Bullcoming’s BAC.

More fundamentally, as this Court stressed in *Crawford*, “[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.” Nor is it “the role of courts to extrapolate from the words of the [Confrontation Clause] to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts’ views) those underlying values.” *Giles v. California*, 554 U.S. 353, 375 (2008). Accordingly, the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another’s testimonial statements provides a fair enough opportunity for cross-examination.

A recent decision involving another Sixth Amendment right—the right to counsel—is instructive. In *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), the Government argued that illegitimately denying a defendant his counsel of choice did not violate the Sixth Amendment where “substitute counsel’s performance” did not demonstrably prejudice the defendant. This Court rejected the Government’s argument. “[T]rue enough,” the Court explained, “the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair.” If a “particular guarantee” of the Sixth Amendment is violated, no substitute procedure can cure the violation, and “[n]o additional showing of prejudice is required to make the violation ‘complete.’ ” If representation by substitute counsel does not satisfy the Sixth Amendment, neither does the opportunity to confront a substitute witness.

In short, when the State elected to introduce Caylor’s certification, Caylor became a witness Bullcoming had the right to confront. Our precedent cannot sensibly be read any other way. See *Melendez-Diaz*.

III

We turn, finally, to the State's contention that the SLD's blood-alcohol analysis reports are nontestimonial in character, therefore no Confrontation Clause question even arises in this case. *Melendez-Diaz* left no room for that argument.... A document created solely for an “evidentiary purpose,” *Melendez-Diaz* clarified, made in aid of a police investigation, ranks as testimonial. 557 U.S., at —, 129 S.Ct., at 2532 (forensic reports available for use at trial are “testimonial statements” and certifying analyst is a “ ‘witness’ for purposes of the Sixth Amendment”).

IV

The State and its *amici* urge that unbending application of the Confrontation Clause to forensic evidence would impose an undue burden on the prosecution. This argument, also advanced in the dissent, largely repeats a refrain rehearsed and rejected in *Melendez-Diaz*. The constitutional requirement, we reiterate, “may not [be] disregard[ed] ... at our convenience and the predictions of dire consequences, we again observe are dubious.

For the reasons stated, the judgment of the New Mexico Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice **KENNEDY**, with whom THE CHIEF JUSTICE, Justice BREYER, and Justice ALITO join, dissenting.

[In] *Melendez-Diaz v. Massachusetts*, [the Court] held [a] report inadmissible because no one was present at trial to testify to its contents. Whether or not one agrees with the reasoning and the result in *Melendez-Diaz*, the Court today takes the new and serious misstep of extending that holding to instances like this one. Here a knowledgeable representative of the laboratory was present to testify and to explain the lab's processes and the details of the report; but because he was not the analyst who filled out part of the form and transcribed onto it the test result from a machine printout, the Court finds a confrontation violation. Some of the principal objections to the Court's underlying theory have been set out earlier and need not be repeated here. See (KENNEDY, J., dissenting). Additional reasons, applicable to the extension of that doctrine and to the new ruling in this case, are now explained in support of this respectful dissent.

I

Before today, the Court had not held that the Confrontation Clause bars admission of scientific findings when an employee of the testing laboratory authenticates the findings, testifies to the laboratory's methods and practices, and is cross-examined at trial. Far from replacing live testimony with “systematic” and “extrajudicial” examinations,

Davis v. Washington, [547 U.S. 813, 835, 836](#), (2006) (THOMAS, J., concurring in judgment in part and dissenting in part), these procedures are fully consistent with the Confrontation Clause and with well-established principles for ensuring that criminal trials are conducted in full accord with requirements of fairness and reliability and with the confrontation guarantee. They do not “resemble Marian proceedings.” *Id.*, at 837, 126 S.Ct. 2266.

The procedures followed here, but now invalidated by the Court, make live testimony rather than the “solemnity” of a document the primary reason to credit the laboratory's scientific results. Unlike *Melendez-Diaz*, where the jury was asked to credit a laboratory's findings based solely on documents that were “quite plainly affidavits,” here the signature, heading, or legend on the document were routine authentication elements for a report that would be assessed and explained by in-court testimony subject to full cross-examination. The only sworn statement at issue was that of the witness who was present and who testified.

The record reveals that the certifying analyst's role here was no greater than that of anyone else in the chain of custody. (laboratory employee's testimony agreeing that “once the material is prepared and placed in the machine, you don't need any particular expertise to record the results”). The information contained in the report was the result of a scientific process comprising multiple participants' acts, each with its own evidentiary significance. These acts included receipt of the sample at the laboratory; recording its receipt; storing it; placing the sample into the testing device; transposing the printout of the results of the test onto the report; and review of the results. see also Brief for State of New Mexico Dept. of Health Scientific Laboratory Division as *Amicus Curiae* 4 (hereinafter New Mexico Scientific Laboratory Brief) (“Each blood sample has original testing work by ... as many as seve[n] analysts....”); (indicating that this case involved three laboratory analysts who, respectively, received, analyzed, and reviewed analysis of the sample); cf. Brief for State of Indiana et al. as *Amici Curiae* in *Briscoe v. Virginia*, O.T.2009, No. 07–11191, p. 10 (hereinafter Indiana Brief) (explaining that DNA analysis can involve the combined efforts of up to 40 analysts).

In the New Mexico scientific laboratory where the blood sample was processed, analyses are run in batches involving 40–60 samples. Each sample is identified by a computer-generated number that is not linked back to the file containing the name of the person from whom the sample came until after all testing is completed. See New Mexico Scientific Laboratory Brief 26. The analysis is mechanically performed by the gas chromatograph, which may operate—as in this case—after all the laboratory employees leave for the day. See *id.*, at 17. And whatever the result, it is reported to both law enforcement and the defense. See *id.*, at 36.

In these circumstances, requiring the State to call the technician who filled out a form and recorded the results of a test is a hollow formality. The defense remains free to challenge any and all forensic evidence. It may call and examine the technician who performed a test. And it may call other expert witnesses to explain that tests are not always reliable or that the technician might have made a mistake. The jury can then

decide whether to credit the test, as it did here. The States, furthermore, can assess the progress of scientific testing and enact or adopt statutes and rules to ensure that only reliable evidence is admitted. Rejecting these common sense arguments and the concept that reliability is a legitimate concern, the Court today takes a different course. It once more assumes for itself a central role in mandating detailed evidentiary rules, thereby extending and confirming *Melendez–Diaz*'s “vast potential to disrupt criminal procedures.”).

II

The protections in the Confrontation Clause, and indeed the Sixth Amendment in general, are designed to ensure a fair trial with reliable evidence. But the *Crawford v. Washington*, line of cases has treated the reliability of evidence as a reason to exclude it. Today, for example, the Court bars admission of a lab report because it “is formalized in a signed document.” The Court's unconventional and unstated premise is that the State—by acting to ensure a statement's reliability—makes the statement more formal and therefore less likely to be admitted. Park, *Is Confrontation the Bottom Line?* 19 Regent U.L. Rev. 459, 461 (2007). That is so, the Court insists, because reliability does not animate the Confrontation Clause....

The persistent ambiguities in the Court's approach are symptomatic of a rule not amenable to sensible applications. Procedures involving multiple participants illustrate the problem. In *Melendez–Diaz* the Court insisted that its opinion did not require everyone in the chain of custody to testify but then qualified that “what testimony *is* introduced must ... be introduced live.” This could mean that a statement that evidence remained in law-enforcement custody is admissible if the statement's maker appears in court. If so, an intern at police headquarters could review the evidence log, declare that chain of custody was retained, and so testify. The rule could also be that the intern's statement—which draws on statements in the evidence log—is inadmissible unless every officer who signed the log appears at trial. That rule, if applied to this case, would have conditioned admissibility of the report on the testimony of three or more identified witnesses. In other instances, 7 or even 40 witnesses could be required. The court has thus—in its fidelity to *Melendez–Diaz*—boxed itself into a choice of evils: render the Confrontation Clause pro forma or construe it so that its dictates are unworkable.

III

Crawford itself does not compel today's conclusion. It is true, as *Crawford* confirmed, that the Confrontation Clause seeks in part to bar the government from replicating trial procedures outside of public view. *Crawford* explained that the basic purpose of the Clause was to address the sort of abuses exemplified at the notorious treason trial of Sir Walter Raleigh.

A rule that bars testimony of that sort, however, provides neither cause nor necessity to impose a constitutional bar on the admission of impartial lab reports like the instant one, reports prepared by experienced technicians in laboratories that follow

professional norms and scientific protocols....

In the meantime, New Mexico's experience exemplifies the problems ahead. From 2008 to 2010, subpoenas requiring New Mexico analysts to testify in impaired-driving cases rose 71%, to 1,600—or 8 or 9 every workday. New Mexico Scientific Laboratory Brief 2. In a State that is the Nation's fifth largest by area and that employs just 10 total analysts, each analyst in blood alcohol cases recently received 200 subpoenas per year, [id.](#), at 33 . The analysts now must travel great distances on most working days. The result has been, in the laboratory's words, “chaotic.” [Id.](#), at 5 . And if the defense raises an objection and the analyst is tied up in another court proceeding; or on leave; or absent; or delayed in transit; or no longer employed; or ill; or no longer living, the defense gets a windfall. As a result, good defense attorneys will object in ever-greater numbers to a prosecution failure or inability to produce laboratory analysts at trial. The concomitant increases in subpoenas will further impede the state laboratory's ability to keep pace with its obligations. Scarce state resources could be committed to other urgent needs in the criminal justice system.

Seven years after its initiation, it bears remembering that the *Crawford* approach was not preordained. This Court's missteps have produced an interpretation of the word “witness” at odds with its meaning elsewhere in the Constitution, including elsewhere in the Sixth Amendment, see Amar, [Sixth Amendment First Principles](#), 84 *Geo. L.J.* 641, 647, 691–696 (1996), and at odds with the sound administration of justice. It is time to return to solid ground. A proper place to begin that return is to decline to extend [Melendez–Diaz](#) to bar the reliable, commonsense evidentiary framework the State sought to follow in this case.

Justice SOTOMAYOR and Justice KAGAN join all but Part IV of this opinion. Justice THOMAS joins all but Part IV and footnote 6.

[F] **Michigan v. Bryant**

[131 S.Ct. 1143](#) (2011)

Justice [SOTOMAYOR](#) delivered the opinion of the Court.

At respondent Richard Bryant's trial, the court admitted statements that the victim, Anthony Covington, made to police officers who discovered him mortally wounded in a gas station parking lot. A jury convicted Bryant of, *inter alia*, second-degree murder. [483 Mich. 132, 137, 768 N.W.2d 65, 67–68](#) (2009). On appeal, the Supreme Court of Michigan held that the Sixth Amendment's Confrontation Clause ... rendered Covington's statements inadmissible testimonial hearsay, and the court reversed Bryant's conviction. We granted the State's petition for a writ of certiorari.... We hold that the circumstances of the interaction between Covington and the police objectively indicate that the “primary purpose of the interrogation” was “to enable police assistance to meet an ongoing emergency.” [Davis, 547 U.S., at 822](#). Therefore, Covington's identification

and description of the shooter and the location of the shooting were not testimonial statements, and their admission at Bryant's trial did not violate the Confrontation Clause. We vacate the judgment of the Supreme Court of Michigan and remand.

I

Around 3:25 a.m. on April 29, 2001, Detroit, Michigan police officers responded to a radio dispatch indicating that a man had been shot. At the scene, they found the victim, Anthony Covington, lying on the ground next to his car in a gas station parking lot. Covington had a gunshot wound to his abdomen, appeared to be in great pain, and spoke with difficulty.

The police asked him “what had happened, who had shot him, and where the shooting had occurred.” Covington stated that “Rick” shot him at around 3 a.m. He also indicated that he had a conversation with Bryant, whom he recognized based on his voice, through the back door of Bryant's house. Covington explained that when he turned to leave, he was shot through the door and then drove to the gas station, where police found him.

Covington's conversation with the police ended within 5 to 10 minutes when emergency medical services arrived. Covington was transported to a hospital and died within hours. The police left the gas station after speaking with Covington, called for backup, and traveled to Bryant's house. They did not find Bryant there but did find blood and a bullet on the back porch and an apparent bullet hole in the back door. Police also found Covington's wallet and identification outside the house.

At trial, which occurred prior to our decisions in *Crawford*, 541 U.S. 36 and *Davis*, 547 U.S. 813, , the police officers who spoke with Covington at the gas station testified about what Covington had told them. The jury returned a guilty verdict on charges of second-degree murder, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony.

Bryant appealed, and the Michigan Court of Appeals affirmed his conviction. Bryant then appealed to the Supreme Court of Michigan, [which] eventually remanded the case to the Court of Appeals for reconsideration in light of our 2006 decision in *Davis*. On remand, the Court of Appeals again affirmed. Bryant again appealed to the Supreme Court of Michigan, which reversed his conviction. 483 Mich. 132, 768 N.W.2d 65.... The court concluded that the circumstances “clearly indicate that the ‘primary purpose’ of the questioning was to establish the facts of an event that had *already* occurred; the ‘primary purpose’ was not to enable police assistance to meet an ongoing emergency.” The court distinguished the facts of this case from those in *Davis*, where we held a declarant's statements in a 911 call to be nontestimonial. It instead analogized this case to *Hammon v. Indiana*, which we decided jointly with *Davis* and in which we found testimonial a declarant's statements to police just after an assault. See 547 U.S., at 829–832.

The majority's opinion provoked two dissents.... Justice Corrigan's dissent explained that the time and space between “the onset of an emergency and statements about that emergency clearly must be considered in context.” [\[483 Mich. At, 16 1 , 768 N.W.2d, at 80.](#)

II

The Confrontation Clause of the Sixth Amendment states: “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” The Fourteenth Amendment renders the Clause binding on the States. [Pointer v. Texas, 380 U.S. 400, 403](#) (1965). In [Ohio v. Roberts, 448 U.S. 56, 66](#) (1980), we explained that the confrontation right does not bar admission of statements of an unavailable witness if the statements “bea[r] adequate ‘indicia of reliability.’ ” We held that reliability can be established if “the evidence falls within a firmly rooted hearsay exception,” or if it does not fall within such an exception, then if it bears “particularized guarantees of trustworthiness.”

Nearly a quarter century later, we decided [Crawford v. Washington, 541 U.S. 36](#) . [We overruled] [Ohio v. Roberts](#). [Crawford](#) examined the common-law history of the confrontation right and explained that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.” We defined “testimony” as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” [541 U.S., at 51](#). We noted that “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” We therefore limited the Confrontation Clause's reach to testimonial statements and held that in order for testimonial evidence to be admissible, the Sixth Amendment “demands what the common law required: unavailability and a prior opportunity for cross-examination.” [Id., at 68](#). Although “leav[ing] for another day any effort to spell out a comprehensive definition of ‘testimonial,’ ” [Crawford](#) noted that “at a minimum” it includes “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and ... police interrogations.”

In 2006, the Court in [Davis v. Washington](#) and [Hammon v. Indiana](#), took a further step to “determine more precisely which police interrogations produce testimony” and therefore implicate a Confrontation Clause bar. We explained that when [Crawford](#) said that “ ‘interrogations by law enforcement officers fall squarely within [the] class’ of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. [Davis, 547 U.S., at 826](#).

We thus made clear in [Davis](#) that not all those questioned by the police are witnesses and not all “interrogations by law enforcement officers,” are subject to the Confrontation Clause.

When, as in [Davis](#), the primary purpose of an interrogation is to respond to an

“ongoing emergency,” its purpose is not to create a record for trial and thus is not within the scope of the Clause. But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.

Deciding this case also requires further explanation of the “ongoing emergency” circumstance addressed in *Davis*. Because *Davis* and *Hammon* arose in the domestic violence context, that was the situation “we had immediately in mind (for that was the case before us).” We now face a new context: a nondomestic dispute, involving a victim found in a public location, suffering from a fatal gunshot wound, and a perpetrator whose location was unknown at the time the police located the victim.

III

To determine whether the “primary purpose” of an interrogation is “to enable police assistance to meet an ongoing emergency,” *Davis*, 547 U.S., at 822, which would render the resulting statements nontestimonial, we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.

A

The Michigan Supreme Court correctly understood that this inquiry is objective. *Davis* uses the word “objective” or “objectively” no fewer than eight times in describing the relevant inquiry.

An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the “primary purpose of the interrogation.” The circumstances in which an encounter occurs—*e.g.*, at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards—are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, 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, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.

B

As our recent Confrontation Clause cases have explained, the existence of an “ongoing emergency” at the time of an encounter between an individual and the police is among the most important circumstances informing the “primary purpose” of an interrogation. The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than “prov[ing] past events potentially relevant to later criminal

prosecution.” *Davis*, 547 U.S., at 822. Rather, it focuses them on “end[ing] a threatening situation.” Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination.

This logic is not unlike that justifying the excited utterance exception in hearsay law. Statements “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition,” Fed. Rule Evid. 803(2); see also Mich. Rule Evid. 803(2) (2010), are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood. See *Idaho v. Wright*, 497 U.S. 805, 820, (1990) (“The basis for the ‘excited utterance’ exception ... is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation ...”). An ongoing emergency has a similar effect of focusing an individual’s attention on responding to the emergency.

First, the Michigan Supreme Court repeatedly and incorrectly asserted that *Davis* “defined” “ongoing emergency.” In fact, *Davis* did not even define the extent of the emergency in that case. The Michigan Supreme Court erroneously read *Davis* as deciding that “the statements made after the defendant stopped assaulting the victim and left the premises did *not* occur during an ‘ongoing emergency.’” We explicitly explained in *Davis*, however, that we were asked to review only the testimonial nature of Michelle McCottry’s initial statements during the 911 call; we therefore merely *assumed* the correctness of the Washington Supreme Court’s holding that admission of her other statements was harmless, without deciding whether those subsequent statements were also made for the primary purpose of resolving an ongoing emergency.

Second, by assuming that *Davis* defined the outer bounds of “ongoing emergency,” the Michigan Supreme Court failed to appreciate that whether an emergency exists and is ongoing is a highly context-dependent inquiry. *Davis* and *Hammon* involved domestic violence, a known and identified perpetrator, and, in *Hammon*, a neutralized threat. Because *Davis* and *Hammon* were domestic violence cases, we focused only on the threat to the victims and assessed the ongoing emergency from the perspective of whether there was a continuing threat *to them*.

Domestic violence cases like *Davis* and *Hammon* often have a narrower zone of potential victims than cases involving threats to public safety. An assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue.

The Michigan Supreme Court also did not appreciate that the duration and scope of an emergency may depend in part on the type of weapon employed. The court relied on *Davis* and *Hammon*, in which the assailants used their fists, as controlling the scope of the emergency here, which involved the use of a gun.

The Michigan Supreme Court's failure to focus on the context-dependent nature of our *Davis* decision also led it to conclude that the medical condition of a declarant is irrelevant. [But the] medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one. The victim's medical state also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.

[N]one of this suggests that an emergency is ongoing in every place or even just surrounding the victim for the entire time that the perpetrator of a violent crime is on the loose. As we recognized in *Davis*, “a conversation which begins as an interrogation to determine the need for emergency assistance” can “evolve into testimonial statements.” 547 U.S., at 828. This evolution may occur if, for example, a declarant provides police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency or that what appeared to be a public threat is actually a private dispute. It could also occur if a perpetrator is disarmed, surrenders, is apprehended, or, as in *Davis*, flees with little prospect of posing a threat to the public. Trial courts can determine in the first instance when any transition from nontestimonial to testimonial occurs, and exclude “the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence.” *Id.*, at 829.

Finally, [as] *Davis* made clear, whether an ongoing emergency exists is simply one factor—albeit an important factor—that informs the ultimate inquiry regarding the “primary purpose” of an interrogation. Another factor the Michigan Supreme Court did not sufficiently account for is the importance of *informality* in an encounter between a victim and police. Formality is not the sole touchstone of our primary purpose inquiry because, although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to “establish or prove past events potentially relevant to later criminal prosecution,” informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent. The court below, however, too readily dismissed the informality of the circumstances in this case in a single brief footnote and in fact seems to have suggested that the encounter in this case was formal. As we explain further below, the questioning in this case occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion. All of those facts make this case distinguishable from the formal station-house interrogation in *Crawford*.

C

In addition to the circumstances in which an encounter occurs, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation.

Davis requires a combined inquiry that accounts for both the declarant and the

interrogator. In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers. To give an extreme example, if the police say to a victim, “Tell us who did this to you so that we can arrest and prosecute them,” the victim’s response that “Rick did it,” appears purely accusatory because by virtue of the phrasing of the question, the victim necessarily has prosecution in mind when she answers.

The combined approach also ameliorates problems that could arise from looking solely to one participant. Predominant among these is the problem of mixed motives on the part of both interrogators and declarants. Police officers in our society function as both first responders and criminal investigators. Their dual responsibilities may mean that they act with different motives simultaneously or in quick succession. See *New York v. Quarles*, 467 U.S. 649, 656 (1984).

Victims are also likely to have mixed motives when they make statements to the police. During an ongoing emergency, a victim is most likely to want the threat to her and to other potential victims to end, but that does not necessarily mean that the victim wants or envisions prosecution of the assailant. A victim may want the attacker to be incapacitated temporarily or rehabilitated. Alternatively, a severely injured victim may have no purpose at all in answering questions posed; the answers may be simply reflexive.... Taking into account a victim’s injuries does not transform this objective inquiry into a subjective one. The inquiry is still objective because it focuses on the understanding and purpose of a reasonable victim in the circumstances of the actual victim—circumstances that prominently include the victim’s physical state.

The dissent suggests, (opinion of SCALIA, J.), that we intend to give controlling weight to the “intentions of the police.” That is a misreading of our opinion. At trial, the declarant’s statements, not the interrogator’s questions, will be introduced to “establis[h] the truth of the matter asserted,” and must therefore pass the Sixth Amendment test. In determining whether a declarant’s statements are testimonial, courts should look to all of the relevant circumstances. Even Justice SCALIA concedes that the interrogator is relevant to this evaluation, and we agree that “[t]he identity of an interrogator, and the content and tenor of his questions,” can illuminate the “primary purpose of the interrogation.” The dissent, (opinion of SCALIA, J.), criticizes the complexity of our approach, but we, at least, are unwilling to sacrifice accuracy for simplicity. Simpler is not always better, and courts making a “primary purpose” assessment should not be unjustifiably restrained from consulting all relevant information, including the statements and actions of interrogators.

Objectively ascertaining the primary purpose of the interrogation by examining the statements and actions of all participants is also the approach most consistent with our past holdings. *E.g.*, *Davis*, 547 U.S., at 822–823, n. 1, (noting that “volunteered testimony” is still testimony and remains subject to the requirements of the Confrontation Clause).

As we suggested in *Davis*, when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the “primary purpose of the interrogation” by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs. As the context of this case brings into sharp relief, the existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.

We first examine the circumstances in which the interrogation occurred. The parties disagree over whether there was an emergency when the police arrived at the gas station....

The record reveals little about the motive for the shooting. What Covington did tell the officers was that he fled Bryant's back porch, indicating that he perceived an ongoing threat. The police did not know, and Covington did not tell them, whether the threat was limited to him. The potential scope of the dispute and therefore the emergency in this case thus stretches more broadly than those at issue in *Davis* and *Hammon* and encompasses a threat potentially to the police and the public.

This is also the first of our post-*Crawford* Confrontation Clause cases to involve a gun. The physical separation that was sufficient to end the emergency in *Hammon* was not necessarily sufficient to end the threat in this case; Covington was shot through the back door of Bryant's house. Bryant's argument that there was no ongoing emergency because “[n]o shots were being fired,” surely construes ongoing emergency too narrowly.

At bottom, there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded Covington within a few blocks and a few minutes of the location where the police found Covington.

This is not to suggest that the emergency continued until Bryant was arrested in California a year after the shooting. We need not decide precisely when the emergency ended because Covington's encounter with the police and all of the statements he made during that interaction occurred within the first few minutes of the police officers' arrival and well before they secured the scene of the shooting—the shooter's last known location.

We reiterate, moreover, that the existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry; rather, the ultimate inquiry is whether the “primary purpose of the interrogation [was] to enable police assistance to meet [the] ongoing emergency.” We turn now to that inquiry, as informed by the circumstances of the ongoing emergency just described. The circumstances of the encounter provide important context for understanding Covington's statements to the police. When the police arrived at Covington's side, their first question to him was “What happened?” Covington's response was either “Rick shot me” or “I was shot,” followed very quickly by an identification of “Rick” as the shooter. In response to further questions, Covington

explained that the shooting occurred through the back door of Bryant's house and provided a physical description of the shooter. When he made the statements, Covington was lying in a gas station parking lot bleeding from a mortal gunshot wound to his abdomen. His answers to the police officers' questions were punctuated with questions about when emergency medical services would arrive. (suppression hearing testimony of Officer Brown). He was obviously in considerable pain and had difficulty breathing and talking. (testimony of Officer McCallister, [and] Officer Stuglin). From this description of his condition and report of his statements, we cannot say that a person in Covington's 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. As discussed above, they did not know why, where, or when the shooting had occurred. Nor did they know the location of the shooter or anything else about the circumstances in which the crime occurred. The questions they asked—"what had happened, who had shot him, and where the shooting occurred,"—were the exact type of questions necessary to allow the police to " 'assess the situation, the threat to their own safety, and possible danger to the potential victim' " and to the public, including to allow them to ascertain "whether they would be encountering a violent felon," *Davis*, 547 U.S., at 827. In other words, they solicited the information necessary to enable them "to meet an ongoing emergency exception."

Nothing in Covington's responses indicated to the police that, contrary to their expectation upon responding to a call reporting a shooting, there was no emergency or that a prior emergency had ended. Covington did indicate that he had been shot at another location about 25 minutes earlier, but he did not know the location of the shooter at the time the police arrived and, as far as we can tell from the record, he gave no indication that the shooter, having shot at him twice, would be satisfied that Covington was only wounded. In fact, Covington did not indicate any possible motive for the shooting, and thereby gave no reason to think that the shooter would not shoot again if he arrived on the scene. As we noted in *Davis*, "initial inquiries" may "often ... produce nontestimonial statements. The initial inquiries in this case resulted in the type of nontestimonial statements we contemplated in *Davis*."

Finally, we consider the informality of the situation and the interrogation. This situation is more similar, though not identical, to the informal, harried 911 call in *Davis* than to the structured, station-house interview in *Crawford*. As the officers' trial testimony reflects, the situation was fluid and somewhat confused: the officers arrived at different times; apparently each, upon arrival, asked Covington "what happened?"; and, contrary to the dissent's portrayal, (opinion of SCALIA, J.), they did not conduct a structured interrogation. (testimony of Officer McCallister) (explaining duplicate questioning, especially as to "what happened?"); *id.*, at 101–102 (testimony of Sgt. Wenturine) (same); *id.*, at 126–127 (testimony of Officer Stuglin) (same). The informality suggests that the interrogators' primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted Covington to or focused him on the possible future prosecutorial

use of his statements.

Because the circumstances of the encounter as well as the statements and actions of Covington and the police objectively indicate that the “primary purpose of the interrogation” was “to enable police assistance to meet an ongoing emergency,” Covington's identification and description of the shooter and the location of the shooting were not testimonial hearsay. The Confrontation Clause did not bar their admission at Bryant's trial.

* * *

For the foregoing reasons, we hold that Covington's statements were not testimonial and that their admission at Bryant's trial did not violate the Confrontation Clause. We leave for the Michigan courts to decide on remand whether the statements' admission was otherwise permitted by state hearsay rules. The judgment of the Supreme Court of Michigan is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice KAGAN took no part in the consideration or decision of this case.

Justice THOMAS, concurring in the judgment.

I agree with the Court that the admission of Covington's out-of-court statements did not violate the Confrontation Clause, but I reach this conclusion because Covington's questioning by police lacked sufficient formality and solemnity for his statements to be considered “testimonial.”

In determining whether Covington's statements to police implicate the Confrontation Clause, the Court evaluates the “primary purpose” of the interrogation. The majority's analysis which relies on, what the police knew when they arrived at the scene, the specific questions they asked, the particular information Covington conveyed, the weapon involved, and Covington's medical condition illustrates the uncertainty that this test creates for law enforcement and the lower courts. I have criticized the primary-purpose test as “an exercise in fiction” that is “disconnected from history” and “yields no predictable results.”

Rather than attempting to reconstruct the “primary purpose” of the participants, I would consider the extent to which the interrogation resembles those historical practices that the Confrontation Clause addressed. This interrogation bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate. Covington thus did not “bea[r] testimony” against Bryant, and the introduction of his statements at trial did not implicate the Confrontation Clause. I concur in the judgment.

Justice SCALIA, dissenting.

Today's tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose—is so transparently false that professing to believe it demeans this institution. But reaching a patently incorrect conclusion on the facts is a relatively benign judicial mischief; it affects, after all, only the case at hand. In its vain attempt to make the incredible plausible, however—or perhaps as an intended second goal—today's opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles. Instead of clarifying the law, the Court makes itself the obfuscator of last resort. Because I continue to adhere to the Confrontation Clause that the People adopted, as described in *Crawford v. Washington*, I dissent.

I

A

The Confrontation Clause of the Sixth Amendment, made binding on the States by the Fourteenth Amendment, provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” In *Crawford*, we held that this provision guarantees a defendant his common-law right to confront those “who ‘bear testimony’ ” against him. A witness must deliver his testimony against the defendant in person, or the prosecution must prove that the witness is unavailable to appear at trial and that the defendant has had a prior opportunity for cross-examination.

A statement is testimonial “when the circumstances objectively indicate ... that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”

Crawford and *Davis* did not address whose perspective matters—the declarant's, the interrogator's, or both—when assessing “the primary purpose of [an] interrogation.” In those cases the statements were testimonial from any perspective. I think the same is true here, but because the Court picks a perspective so will I: The declarant's intent is what counts. In-court testimony is more than a narrative of past events; it is a solemn declaration made in the course of a criminal trial. For an out-of-court statement to qualify as testimonial, the declarant must intend the statement to be a solemn declaration rather than an unconsidered or offhand remark; and he must make the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused. That is what distinguishes a narrative told to a friend over dinner from a statement to the police. The hidden purpose of an interrogator cannot substitute for the declarant's intentional solemnity or his understanding of how his words may be used.

A declarant-focused inquiry is also the only inquiry that would work in every fact pattern implicating the Confrontation Clause. The Clause applies to volunteered testimony as well as statements solicited through police interrogation. An inquiry into an officer's purposes would make no sense when a declarant blurts out “Rick shot me” as

soon as the officer arrives on the scene. I see no reason to adopt a different test—one that accounts for an officer's intent—when the officer asks “what happened” before the declarant makes his accusation. (This does not mean the interrogator is irrelevant. The identity of an interrogator, and the content and tenor of his questions, can bear upon whether a declarant intends to make a solemn statement, and envisions its use at a criminal trial. But none of this means that the interrogator's purpose matters.)

The Court claims one affirmative virtue for its focus on the purposes of both the declarant and the police: It “ameliorates problems that ... arise” when declarants have “mixed motives.” I am at a loss to know how. Sorting out the primary purpose of a declarant with mixed motives is sometimes difficult. But adding in the mixed motives of the police only compounds the problem. Now courts will have to sort through two sets of mixed motives to determine the primary purpose of an interrogation. And the Court's solution creates a mixed-motive problem where (under the proper theory) it does not exist—viz., where the police and the declarant each have one motive, but those motives conflict. The Court does not provide an answer to this glaringly obvious problem, probably because it does not have one.

The only virtue of the Court's approach (if it can be misnamed a virtue) is that it leaves judges free to reach the “fairest” result under the totality of the circumstances.... Unfortunately, under this malleable approach “the guarantee of confrontation is no guarantee at all.” *Giles v. California*, 554 U.S. 353, 375(2008) (plurality).

B

Looking to the declarant's purpose (as we should), this is an absurdly easy case. Roughly 25 minutes after Anthony Covington had been shot, Detroit police responded to a 911 call reporting that a gunshot victim had appeared at a neighborhood gas station. They quickly arrived at the scene, and in less than 10 minutes five different Detroit police officers questioned Covington about the shooting. Each asked him a similar battery of questions: “what happened” and when, , “who shot the victim,” and “where” did the shooting take place. After Covington would answer, they would ask follow-up questions, such as “how tall is” the shooter. The battery relented when the paramedics arrived and began tending to Covington's wounds.

From Covington's perspective, his statements had little value except to ensure the arrest and eventual prosecution of Richard Bryant. He knew the “threatening situation,” *Davis*, 547 U.S., at 832, had ended six blocks away and 25 minutes earlier when he fled from Bryant's back porch. Bryant had not confronted him face-to-face before he was mortally wounded, instead shooting him through a door. Even if Bryant had pursued him (unlikely), and after seeing that Covington had ended up at the gas station was unable to confront him there before the police arrived (doubly unlikely), it was entirely beyond imagination that Bryant would again open fire while Covington was surrounded by five armed police officers. And Covington knew the shooting was the work of a drug dealer, not a spree killer who might randomly threaten others.

Covington's knowledge that he had nothing to fear differs significantly from Michelle McCottry's state of mind during her “frantic” statements to a 911 operator at issue in *Davis*, 547 U.S., at 827. Her “call was plainly a call for help against a bona fide physical threat” describing “events *as they were actually happening*.” She did not have the luxuries of police protection and of time and space separating her from immediate danger that Covington enjoyed when he made his statements.

C

Worse still for the repute of today's opinion, this is an absurdly easy case even if one (erroneously) takes the interrogating officers' purpose into account. The five officers interrogated Covington primarily to investigate past criminal events. None—absolutely none—of their actions indicated that they perceived an imminent threat. They did not draw their weapons, and indeed did not immediately search the gas station for potential shooters. To the contrary, all five testified that they questioned Covington *before conducting any investigation at the scene*. Would this have made any sense if they feared the presence of a shooter? Most tellingly, none of the officers started his interrogation by asking what would have been the obvious first question if any hint of such a fear existed: Where is the shooter?

But do not rely solely on my word about the officers' primary purpose. Listen to Sergeant Wenturine, who candidly admitted that he interrogated Covington because he “ha[d] a man here that [he] believe[d][was] dying [so he was] gonna find out who did this, period.” In short, he needed to interrogate Covington to solve a crime. Wenturine never mentioned an interest in ending an ongoing emergency.

At the very least, the officers' intentions *turned* investigative during their 10-minute encounter with Covington, and the conversation “evolve[d] into testimonial statements.” *Davis*, 547 U.S., at 828. The fifth officer to arrive at the scene did not need to run straight to Covington and ask a battery of questions “to determine the need for emergency assistance.” He could have asked his fellow officers, who presumably had a better sense of that than Covington—and a better sense of what he could do to assist. No, the value of asking the same battery of questions a fifth time was to ensure that Covington told a consistent story and to see if any new details helpful to the investigation and eventual prosecution would emerge. Having the testimony of five officers to recount Covington's consistent story undoubtedly helped obtain Bryant's conviction. (Which came, I may note, after the first jury could not reach a verdict.

D

The Court's distorted view creates an expansive exception to the Confrontation Clause for violent crimes. Because Bryant posed a continuing threat to public safety in the Court's imagination, the emergency persisted for confrontation purposes at least until the police learned his “motive for and location after the shooting.” It may have persisted in this case until the police “secured the scene of the shooting” two-and-a-half hours later.

II

A

But today’s decision is not only a gross distortion of the facts. It is a gross distortion of the law—a revisionist narrative in which reliability continues to guide our Confrontation Clause jurisprudence, at least where emergencies and faux emergencies are concerned.

According to today’s opinion, the *Davis* inquiry into whether a declarant spoke to end an ongoing emergency or rather to “prove past events potentially relevant to later criminal prosecution,” is *not* aimed at answering whether the declarant acted as a witness. Instead, the *Davis* inquiry probes the *reliability* of a declarant’s statements, “[i]mplicit[ly]” importing the excited-utterances hearsay exception into the Constitution. A statement during an ongoing emergency is sufficiently reliable, the Court says, “because the prospect of fabrication ... is presumably significantly diminished,” so it “does not [need] to be subject to the crucible of cross-examination.”

Compare that with the holding of *Crawford*: “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” Today’s opinion adopts, for emergencies and faux emergencies at least, the discredited logic of *White v. Illinois*, 502 U.S. 346, 355–356(1992), and *Idaho v. Wright*, 497 U.S. 805, 819–820(1990). *White* is, of course, the decision that both *Crawford* and *Davis* found most incompatible with the text and history of the Confrontation Clause. See *Davis, supra*, at 825.; *Crawford, supra*, at 58, n. 8 (This is not to say that that “reliability” logic can actually justify today’s result: Twenty-five minutes is plenty of time for a shooting victim to reflect and fabricate a false story.)

The Court announces that in future cases it will look to “standard rules of hearsay, designed to identify some statements as reliable,” when deciding whether a statement is testimonial. *Ohio v. Roberts*, 448 U.S. 56 (1980) said something remarkably similar: An out-of-court statement is admissible if it “falls within a firmly rooted hearsay exception” or otherwise “bears adequate ‘indicia of reliability.’” We tried that approach to the Confrontation Clause for nearly 25 years before *Crawford* rejected it as an unworkable standard unmoored from the text and the historical roots of the Confrontation Clause. The arguments in Raleigh’s infamous 17th-century treason trial contained full debate about the reliability of Lord Cobham’s *ex parte* accusations, see *Raleigh’s Case*, 2 How. St. Tr. 1, 14, ... (1603); that case remains the canonical example of a Confrontation Clause violation, not because Raleigh should have won the debate but because he should have been allowed cross-examination.

The Sixth Amendment also generally admits business records into evidence, but not because the records are reliable or because hearsay law says so. It admits them “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” weaker substitutes for

live testimony. Moreover, the scope of the exemption from confrontation and that of the hearsay exceptions also are not always coextensive. The reliability logic of the business-record exception would extend to records maintained by neutral parties providing litigation-support services, such as evidence testing. The Confrontation Clause is not so forgiving. Business records prepared specifically for use at a criminal trial are testimonial and require confrontation.

Is it possible that the Court does not recognize the contradiction between its focus on reliable statements and *Crawford*'s focus on testimonial ones? Does it not realize that the two cannot coexist? Or does it intend, by following today's illogical roadmap, to resurrect *Roberts* by a thousand unprincipled distinctions without ever explicitly overruling *Crawford*? After all, honestly overruling *Crawford* would destroy the illusion of judicial minimalism and restraint. And it would force the Court to explain how the Justices' preference comports with the meaning of the Confrontation Clause that the People adopted—or to confess that only the Justices' preference really matters.

B

The Court recedes from *Crawford* in a second significant way. It requires judges to conduct “open-ended balancing tests” and “amorphous, if not entirely subjective,” inquiries into the totality of the circumstances bearing upon reliability. Where the prosecution cries “emergency,” the admissibility of a statement now turns on “a highly context-dependent inquiry,” into the type of weapon the defendant wielded, the type of crime the defendant committed, the medical condition of the declarant, if the declarant is injured, whether paramedics have arrived on the scene, whether the encounter takes place in an “exposed public area,” whether the encounter appears disorganized, whether the declarant is capable of forming a purpose, whether the police have secured the scene of the crime, the formality of the statement, and finally, whether the statement strikes us as reliable. This is no better than the nine-factor balancing test we rejected in *Crawford*, 541 U.S., at 63. I do not look forward to resolving conflicts in the future over whether knives and poison are more like guns or fists for Confrontation Clause purposes, or whether rape and armed robbery are more like murder or domestic violence.

I would add, however, this observation. In *Crawford v. Washington*, this Court noted that, in the law we inherited from England, there was a well-established exception to the confrontation requirement: The cloak protecting the accused against admission of out-of-court testimonial statements was removed for dying declarations. This historic exception, we recalled in *Giles v. California*, 554 U.S. 353, 358 (2008), applied to statements made by a person about to die and aware that death was imminent. Were the issue properly tendered here, I would take up the question whether the exception for dying declarations survives our recent Confrontation Clause decisions. The Michigan Supreme Court, however, held, as a matter of state law, that the prosecutor had abandoned the issue. The matter, therefore, is not one the Court can address in this case.

CHAPTER 12: PRIVILEGES

CHAPTER OUTLINE

- I. Rationales
 - A. Policy broader than the contours of the specific case
 - B. Relationships preserved
 - C. Real meaning: non-disclosure
- II. Sources
 - A. Constitution
 - B. Statute
 - C. Common Law
- III. What Law Applies?
 - A. Federal Question Jurisdiction cases – federal common law
 - B. Federal Diversity Jurisdiction cases – state law (see Erie)
- IV. Types
 - A. Attorney-Client
 - B. Marital
 - C. Clergy-Penitent
 - D. Psychotherapist-Patient
 - E. Accountant-Client
 - F. Other – state-based, by statute
- V. Exceptions
 - A. Policy
- VI. Waiver
 - A. Express – say so
 - B. Implied – by conduct (e.g., raise insanity defense, waive psychotherapist-patient privilege)

Problem # 12-1: Privilege Logs

In keeping with jurisdiction practice, the Court in *Carvahlo v. Bessemer* asked the parties to file privilege logs by a certain time regarding allegedly privileged information. The defense submitted some privilege claims, but forgot to include Dr. Permbutton, who had testified in a previous trial on similar, but not identical, issues. At trial, opposing counsel called Dr. Permbutton to testify. The defense objected, claiming privilege. Who wins?

Practical Tip: Create a privilege log — a list (or electronic folder) of important communications that you feel are privileged from disclosure — at the start of representation. Courts generally require a pre-trial log of documents that are claimed to

be privileged. *See 8 Fed. Prac. & Proc. Civ.* § 2016.1 (3d. ed.) *Privileged Matter – Assertion of Privilege.*

Problem: Zen Master

A grand jury issues a subpoena for the Zen Company's documents, including emails, during the past year. Zen's CEO consults with its outside corporate counsel, Attorney Jones, about subpoena compliance. Because of that consultation and unbeknownst to Jones, the CEO determines that the government is interested in several emails and she does not prevent their deletion. The government learns of the CEO's inaction and charges her with obstruction of justice. The grand jury then subpoenas Jones to disclose the contents of his consultation with the CEO concerning the original subpoena for Zen's documents. Zen's CEO objects and claims the attorney-client privilege prevents Jones' disclosure.

1. What result?

2. Assume the government argues that the crime-fraud exception to the privilege applies, warranting disclosure of the contents of the consultation. What kind of evidentiary showing must the government make before the court will review privileged communications to determine whether the exception applies?

3. Assume the Zen company terminates the CEO and decides that the better strategy is to cooperate with the government and waives the attorney-client privilege. The former CEO objects to disclosing the substance of her consultation with Jones. Although Zen retained and paid Jones, the CEO claims the company cannot waive the privilege because Jones represented her individually and not Zen. What result?

Schipp v. General Motors Corporation
[457 F.Supp.2d 917](#) (E.D. Ark. 2006)

General Motors issued three subpoenas duces tecum to obtain documents prepared by Ann Kennedy's insurance carrier during the investigation of the accident at issue in this action. Specifically, GM sought to discover a recorded statement of Kennedy taken on July 26, 2002; a summary of that recorded statement prepared on July 27, 2002; an investigation report of the insurance adjuster prepared on August 13, 2002; and witness statements obtained by Kennedy's insurance carrier. Kennedy has objected. GM has moved to compel. GM asks for an award of the reasonable expenses incurred in making this motion, including reasonable attorney's fees, pursuant to Rule 37(a)(4) of the Federal Rules of Civil Procedure.

Kennedy gave a statement to her insurer on July 26, 2002, two days after the accident. She argues that this statement is protected by the attorney-client privilege. In diversity cases, federal courts follow state law on questions of privilege....Arkansas has

not ruled on whether a communication between an insurer and its insured may be protected by the attorney-client privilege. Many states [-] and what appears to be a majority [-] have held, depending on varying factors, that such a communication may be protected by the privilege.

The courts have looked at a number of factors to determine whether a statement given by an insured to his insurer is privileged. Those factors include: 1) whether the insurance contract obligates the insurance company to defend claims,...2) whether the relationship between the insurer and the attorney exists at the time of the communication between the insurer and the insured,... 3) whether the insurer is advised of the confidential information at the direction of an attorney,... and 4) whether the communication is made for the dominant purpose of litigation....

A number of jurisdictions have held that statements between an insured and insurer are not privileged....

Although the Supreme Court of Arkansas has not decided this issue, its decisions make clear two relevant aspects of the attorney-client privilege in Arkansas. First, “[t]he burden of showing that a privilege applies is upon the party asserting it.”... Thus, the burden is on Kennedy to show that her statement is privileged. Second, “[t]he purpose of the attorney-client privilege is to promote ‘full and frank communication’ between attorneys and clients, and that, in turn, promotes the observance of law and administration of justice.”... It should be noted that other states have cited the same purpose in recognizing a statement between an insured and an insurer as protected by the attorney-client privilege.

It should be noted that other states have cited the same purpose in recognizing a statement between an insured and an insurer as protected by the attorney-client privilege....In *Courteau*, a hospital’s insurance carrier hired an attorney to investigate the circumstances surrounding a potential claim....The attorney then “immediately requested statements from employees involved who were potential defendants.”...The Supreme Court of Arkansas held that the hospital employees and physicians were “clients” of the hospital’s attorney, and the communications between them were therefore privileged in spite of the fact that some of those communications were “relayed through corporate channels.”....

Perhaps more illuminating is *Holt*, where an automobile accident caused five deaths, the insurance carrier hired attorneys to represent the insured, and the attorneys in turn hired an expert to prepare an accident reconstruction report....A prosecuting attorney then issued a subpoena duces tecum to the accident reconstructionist to obtain a complete copy of the report....The court held, however, that the report, as well as all communications between the attorneys, the reconstructionist, and the insured, were “protected by attorney-client privilege”In reaching its conclusion, the court applied Arkansas Rule of Evidence 502, which states in pertinent part:

(2) A representative of the client is *one having authority to obtain professional legal services*, or to act on advice rendered pursuant thereto, on behalf of the client.....

(b) General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) *between himself* or his representative *and* his lawyer or *his lawyer's representative*, (2) between his lawyer and the lawyer's representative ..., [or] (4) between representatives of the client or *between the client and a representative of the client*

Although the matter is not free from doubt, this Court believes that on the facts of this case the Supreme Court of Arkansas would find that Kennedy's recorded statement to her insurer is protected by the attorney-client privilege. It should have been obvious when Kennedy gave her recorded statement that claims would be made against her and that she would call upon her insurer to defend those claims. Although the policy is not in the record, the Court assumes that it is a standard automobile liability policy pursuant to which the insurer selects and compensates defense counsel and pursuant to which the insured must cooperate with the insurer. Kennedy was entitled to expect that her insurance carrier would engage a lawyer to represent her, which means that she was entitled to view her insurer as her representative for purposes of obtaining legal services. Kennedy's statement to her insurer was a step in the process of obtaining legal representation pursuant to the insurance contract. GM's motion compelling discovery of Kennedy's recorded statement is denied.

GM also seeks to discover other insurance claims files, including the summary of Kennedy's recorded statement prepared on July 27, 2002, and the investigation report of the insurance adjuster, prepared on August 13, 2002. Kennedy asserts that these files are work product prepared in anticipation of litigation and therefore protected from discovery. See [Fed.R.Civ.P. 26](#) (b)(3). "The work product privilege operates to ensure that an opponent cannot secure materials that an adversary has prepared in anticipation of litigation."....In a diversity case, the Court applies federal law to resolve work product claims....The Eighth Circuit has ruled that "the party seeking protection must show the materials were prepared in anticipation of litigation, i.e., because of the prospect of litigation," *id.*, as "the work product rule does not come into play merely because there is a remote prospect of future litigation"....

GM argues that "unless and until an insurance company can demonstrate that it reasonably considered a claim to be more likely than not headed for litigation, the natural inference is that the documents in its claims file that predate this realization were prepared in the ordinary course of business" *S.D. Warren Co. v. Eastern Elec. Corp.*, [201 F.R.D. 280, 285](#) (D.Me. 2001). Here, it was obvious on the night of the accident that claims would be asserted against Kennedy. It is undisputed that Kennedy's vehicle crossed the median of an interstate highway and crashed into oncoming traffic. As a result, one person was killed and two others were injured. A reasonable person would expect litigation to ensue. Documents prepared afterwards would have been created in anticipation of litigation. Those documents are therefore protected by the work-product doctrine....

Documents covered by the work-product doctrine can nevertheless be discovered if a party shows a "substantial need" of the documents and an inability to obtain a substantial equivalent of the documents or information without "undue

hardship.”...However, a “party ... does not demonstrate substantial need when it merely seeks corroborative evidence.” ...GM has had the opportunity to depose each eye witness of the accident, including Ann Kennedy, in addition to any person with knowledge of the accident. GM’s desire to obtain “immediate factual observations unmarred by the passage of time” does not rise to the level of substantial need imposed by Rule 26. In short, documents prepared by Kennedy’s insurer, on the facts of this case, are protected by the work-product doctrine because they were prepared in anticipation of litigation and because GM has failed to demonstrate a substantial need for them.

GM’s motion to compel production of Kennedy’s statement is denied. GM’s motion to compel production of the insurer’s claim file is denied except as to verbatim statements of persons other than Kennedy. Kennedy must produce all verbatim, non-party witness statements within five business days after entry of this Order. GM’s request to be reimbursed for the reasonable expenses in making this motion, including reasonable attorneys’ fees, is denied....

CHAPTER 13: AUTHENTICATION, IDENTIFICATION AND THE BEST EVIDENCE RULE

United States v. Lanson

[639 F.3d 1293](#) (11th Cir. 2011)

Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation:

Keith Joseph Lanson appeals his conviction by a jury for attempting to persuade, entice, or coerce a minor to engage in sexual activity, in violation of [18 U.S.C. § 2422 \(b\)](#). The issues raised concern the sufficiency of the evidence, the failure to suppress evidence, and the spoliation of evidence. For the following reasons, we affirm.

I.

On September 8, 2005, Detective George Clifton, a member of the Miami-Dade Police Department's Sexual Crimes Bureau, signed online using the undercover persona "Tom." Detective Clifton created an AOL profile for "Tom" that described him as a male living with his girlfriend and his girlfriend's 14-year-old daughter.

"Tom" entered an internet chat room entitled "Florida Couples." Lanson, under the username "SlingerHD," was a participant in this chat room. Lanson and Detective Clifton then communicated by instant message for approximately 30 minutes.

At the beginning of their text conversation, Lanson asked, "she play too?" Detective Clifton replied, "yes." Lanson stated that he had "never crossed into that

situation yet." Lanzon asked Detective Clifton to describe the 14-year-old daughter's appearance, and indicated his interest in meeting her. Detective Clifton asked what Lanzon wanted to do with the 14-year-old, and Lanzon responded, "[I] love oral," "hot passionate sex," and "totally satisfying a female." Detective Clifton and Lanzon arranged to speak again later.

Later that day, Lanzon contacted Detective Clifton, resulting in an hour and 20 minute text conversation. Lanzon typed that he had "been thinking" about "Tom" and his girlfriend's daughter, and reaffirmed his interest in meeting her. They proceeded to discuss a time to meet. Detective Clifton mentioned that "being that she is 14," he would either have to "get her out of school or wait for school to let out." Lanzon responded "days are good, early evenings are good too." Lanzon assured Detective Clifton he was "serious." Detective Clifton then told Lanzon that he must use condoms, and that the 14-year-old liked colored condoms. The two discussed what Lanzon wanted the girl to wear and what sexual techniques would "make her happy." Lanzon said, "you know what we are doing isn[']t right, fun but not right." Detective Clifton responded, "yes, I know" and told Lanzon, "[I] will go my way and you will go yours" with "no hard feeling" if he felt uncomfortable. Lanzon assured him he did not want to back out of the arrangement.

During their third and final conversation, Lanzon again contacted Detective Clifton and asked whether he had spoken with his girlfriend's daughter. Detective Clifton replied, "she is okay with everything." Lanzon said he would prefer to meet them that day around noon, and asked where they could meet. Detective Clifton suggested a bookstore in Aventura, Florida, where they could have a cup of coffee and then "take care of business." Lanzon said, "sounds perfect," and asked where they would go after the bookstore. Detective Clifton replied that they would go to a "hotel on the beach" located ten minutes from the bookstore. The two described to each other what they would be wearing, and Lanzon asked what kind of candy the girl liked. Detective Clifton responded, "she loves peppermint." Lanzon asked for directions to the bookstore, and said he would follow Detective Clifton to the hotel.

Detective Clifton saved these online conversations by copying the instant message communications and pasting them into a Microsoft Word document. He then saved the Word document to a floppy disc, where the conversations could be printed in hard copy form as transcripts. Detective Clifton did not save any of the instant message conversations in their original format to his computer's hard drive, but he compared the actual instant message "chat screens" to the word processing document he had created to ensure that they exactly matched and that he had accurately recorded the conversations in their entirety.

On September 9, 2005, Lanzon drove to the designated bookstore and parked his truck near the bookstore. When he entered the bookstore, he approached the two undercover officers posing as "Tom" and the 14-year-old girl. He was promptly arrested. The officers sought his consent to search his truck, but he refused. The officers then used Lanzon's keys to enter and search the truck, seizing multi-colored condoms, mint-flavored lubricant, and a receipt for the purchase of those items. In the official incident report, the officers' actions were characterized as an inventory search.

In July 2007, Lanzon was indicted for a violation of [18 U.S.C. § 2422 \(b\)](#), which provides:

Whoever, using . . . any facility or means of interstate or foreign commerce . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be . . . imprisoned.

Lanzon moved to suppress the evidence seized from his truck, arguing that the officers violated the criteria established by the Miami-Dade County Code relating to inventory searches. Following an evidentiary hearing, the court determined that the officers had probable cause to conduct the warrantless search of Lanzon's truck pursuant to the automobile exception.

Lanzon also moved to exclude the instant message transcripts, arguing that Detective Clifton deliberately destroyed the original instant message conversations. In the alternative, Lanzon requested a jury instruction on spoliation of evidence. At the evidentiary hearing, Lanzon called a forensic expert who examined Detective Clifton's computer. The expert testified that he recovered only a remnant of the Word document containing the pasted versions of the original conversations. The expert explained that, because Detective Clifton did not save the document directly to his computer's hard drive, there was no metadata for the document. Without metadata, it could not be determined whether Detective Clifton altered the original instant message conversations. Detective Clifton testified that he preserved the conversation in the standard method he learned at the police department. He chose to save the transcripts on floppy disc, rather than the hard drive, to conserve computer memory. The district court denied Lanzon's motion to exclude and reserved a ruling on the spoliation instruction.

Lanzon was tried and convicted before a jury in 2009.

The district court sentenced Lanzon to 60 months imprisonment and a lifetime of supervised release.

II

C

[On appeal,] Lanzon . . . contends that Detective Clifton failed to preserve computer evidence and the instant message transcripts should not have been admitted at trial. We review the district court's evidentiary rulings for abuse of discretion. *United States v. Merrill*, [513 F.3d 1293, 1301](#) (11th Cir. 2008). Factual findings underlying an evidentiary ruling are reviewed for clear error. *United States v. Dickerson*, [248 F.3d 1036, 1046](#) (11th Cir. 2001).

Lanzon makes four arguments regarding the failure to preserve computer evidence. First, he argues that the destruction of the original files and admission of the transcripts violated his due process rights because the originals were destroyed in bad faith. The loss of evidence by the government is a denial of due process only when the

defendant shows that "the evidence was likely to significantly contribute to his defense." *United States v. Revolorio-Ramo*, [468 F.3d 771, 774](#) (11th Cir. 2006). The defendant must also show that the loss of evidence was a result of bad faith on the part of the government or police. *Id.*

Lanzon has not provided evidence of bad faith on the part of Detective Clifton. He alleges that Detective Clifton deliberately destroyed and failed to preserve evidence when he transferred the instant message conversations to Word documents, but fails to support this contention with evidence. In response, Detective Clifton testified that he preserved the conversation in the standard method he learned at the police department and that he compared the actual instant message "chat screens" to the word processing document he had created to ensure that they exactly matched and that he had accurately recorded the conversations in their entirety. He further testified that his preservation method was intended to conserve hard drive memory on his computer. He also testified about his methods for saving the conversations in their entirety without any editing, and he was found to be credible. Lanzon offered no evidence showing that the transcripts were edited or altered.

Second, Lanzon argues that the admission of the transcripts violated the authentication requirement of [Federal Rule of Evidence \("FRE"\) 901](#) (a) because the detective transferred the instant messages to a Microsoft Word document, preventing authentication and leading to possible manipulation and error. Pursuant to [FRE 901](#) (a), a document submitted as evidence must be properly authenticated "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evidence may be authenticated through the testimony of a witness with knowledge. [FRE 901](#) (b)(1). The proponent need only present enough evidence "to make out a prima facie case that the proffered evidence is what it purports to be." *United States v. Caldwell*, [776 F.2d 989, 1002](#) (11th Cir. 1985). "A district court has discretion to determine authenticity, and that determination should not be disturbed on appeal absent a showing that there is no competent evidence in the record to support it." *United States v. Siddiqui*, [235 F.3d 1318, 1322](#) (11th Cir. 2000).

The district court did not abuse its discretion by admitting the transcripts, or clearly err in accepting as fact Detective Clifton's authenticating testimony. Detective Clifton testified that he participated in the online chats and the transcripts were accurate copies of those conversations. His testimony was sufficient "competent evidence" to authenticate the transcripts. *Siddiqui*, [235 F.3d at 1322](#) ; *Caldwell*, [776 F.2d at 1002](#) . We have held that transcripts were properly admitted even when a person who was involved with creating them testified about their authenticity and more steps were involved in their creation than there were in the present case. *See United States v. Puentes*, [50 F.3d 1567, 1577](#) (11th Cir. 1995) ("The inspector testified that he heard every conversation that was contained in the transcripts; that the conversations were then written out in longhand; that the longhand transcription was then compared to the recorded conversation; and, finally, that the longhand transcript was then dictated to a secretary and the typewritten product compared to the longhand transcription.").

Third, Lanzon contends the transcripts violated the best evidence rules in [FRE 1001-1004](#) because the originals were destroyed by Detective Clifton in bad faith and

the transcripts were not the equivalent of photocopies. The best evidence rule requires the proponent to produce the original to prove the contents of a writing, recording, or photograph. [FRE 1001](#); *United States v. Howard*, [953 F.2d 610, 612 n.1](#) (11th Cir. 1992). An original is not required if it is lost or destroyed, except when lost or destroyed through bad faith, or if it is otherwise unobtainable. [FRE 1004](#) (1)-(2). A duplicate is admissible to the same extent as an original, "unless (1) a genuine question is raised as to the authenticity of the original, or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." [FRE 1003](#). A "duplicate" includes a "counterpart produced by the same impression as the original . . . or by mechanical or electronic re-recording . . . or by other equivalent techniques which accurately reproduces the original." [FRE 1001](#) (4).

The district court did not abuse its discretion in rejecting Lanzon's best evidence objection because there was no showing of bad faith. Accordingly, the transcripts were admissible under Rule 1004 because they contain evidence of the conversations and the originals were not destroyed in bad faith. It is therefore immaterial whether the transcripts are duplicates within the meaning of the rules.

Fourth, Lanzon argues the admission of the transcripts violated the rule of completeness in [FRE 106](#) because Detective Clifton failed to include the entire chat transcript, and included only the edited portion that supported his case. The rule of completeness provides that when "a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." [FRE 106](#). [FRE 106](#) "does not automatically make the entire document admissible." *United States v. Simms*, [385 F.3d 1347, 1359](#) (11th Cir. 2004). Rather, "[i]t is consistently held that the rule permits introduction only of additional material that is relevant and is necessary to qualify, explain, or place into context the portion already introduced." *Id.*

The district court did not abuse its discretion by failing to admit the alleged additional parts of the instant message transcripts. There is no indication that additional parts of the conversation exist. Lanzon also does not suggest how additional material would "qualify, explain, or place into context" the portion admitted into evidence. *See id.*

AFFIRMED

MIXED EVIDENCE QUESTIONS (ACROSS THE CHAPTERS)

1. Jones was in an auto accident with Smith while driving into an intersection. Jones suffered memory loss after the accident and was hypnotized. After being hypnotized, Jones said, "I remember; the traffic light was green when I went through it; and the driver of the blue Camaro, who I now know was Smith, was

- looking down when he hit me.” Jones offers the hypnotist to testify as to this statement at trial in Jones v. Smith. Which of the following is true?
- a. The evidence will be properly allowed if the hypnotist is qualified.
 - b. The evidence will be allowed if an “other acts” limiting instruction is given by the judge.
 - c. The evidence will be excluded as inadmissible hearsay.
 - d. The evidence will be excluded as improper character evidence.
2. Alice was charged with murder of her ex-boyfriend, Sam. After a mistrial where prosecutorial misconduct prevented a retrial, her current boyfriend, Peter, was tried for the same murder. At trial, Peter calls Stella, Alice’s best friend, to testify that Alice said to her after her mistrial, “I killed Sam in self-defense.” Alice’s statement to Stella is:
- a. Admissible as a statement against interest.
 - b. Admissible as an admission.
 - c. Inadmissible hearsay.
 - d. Inadmissible because it is irrelevant.
3. Amy testified for Jane in her tort action against Carol. Carol subsequently offered a new witness, Zippy, who will testify that Amy has a poor reputation for truthfulness in the community. This evidence is:
- a. Admissible to prove that Amy has a weak case-in-chief.
 - b. Admissible as extrinsic impeachment evidence.
 - c. Inadmissible because it is collateral evidence.
 - d. Inadmissible because it is hearsay without any recognized exception.
4. Jason was robbed by Andy. As he lay near death, he said, “Andy robbed me; he took all my money and then shot me.” Jason ended up in a coma. The prosecution wants to offer Jason’s statement in evidence. This statement is:
- a. Admissible as a dying declaration.
 - b. Admissible as a present sense impression.
 - c. Inadmissible because it is not a dying declaration.
 - d. Inadmissible as a violation of the Confrontation Clause.
5. Betty testified for Charlie in a breach of contract action. Betty said she forgot what time she arrived at the meeting where the contract was signed. To refresh her recollection, Charlie offers Betty his statement, saying “Betty arrived just after I did, around 4 p.m.” This statement:
- a. Can be used by Betty to refresh her recollection.
 - b. Can refresh Betty’s recollection and be offered in evidence by Charlie as non-hearsay.
 - c. Cannot be used either to refresh Betty’s memory or as substantive evidence because Betty did not make the statement, Charlie did.
 - d. Can be used to refresh Betty’s recollection and only read to the jury, not shown to them.

6. After Paul knocked over Sally while walking very quickly at the mall, he said, “I am so sorry; I was preoccupied and should have been looking where I was going. Let me pay for whatever the doctors charge you to mend that bruised knee. If Sally sues Paul and offers Paul’s statement at trial,
- a. The entire statement will be admissible as an admission by a party opponent.
 - b. The entire statement will be excluded as a matter of public policy.
 - c. The offer to pay for the charges by the doctors will be excluded.
 - d. Only the statement that Paul was sorry and preoccupied will be excluded.

RESTYLED FEDERAL RULES OF EVIDENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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EVIDENCE RULES

MEMORANDUM

**TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure**
**FROM: Judge Robert L. Hinkle, Chair
Advisory Committee on Evidence Rules**
RE: Report of the Advisory Committee on Evidence Rules
DATE: May 10, 2010

Introduction

The Advisory Committee on Evidence Rules met on April 22-23 at Fordham Law School in New York. The meeting produced one action item for the Standing Committee to consider at the June 2010 meeting.

As the Standing Committee knows, the Advisory Committee has been restyling the Evidence Rules. At the June 2009 meeting, the Standing Committee approved publishing the entire set of restyled rules for public comment. The Advisory Committee and the

Standing Committee's Style Subcommittee have considered the public comments in detail. Most were favorable, and some resulted in changes that have improved the product. The Advisory Committee now asks the Standing Committee to approve the entire set of restyled rules for submission to the Judicial Conference. The Style Subcommittee has approved the rules.

Appendix A sets out the restyled rules as proposed for submission to the Judicial Conference, side by side with the existing rules.

* * * * *

Action Item — Restyled Evidence Rules 101–1103

Background: the History of Restyling the Rules. Beginning in the early 1990s, Judge Robert Keeton, who was chair of the Standing Committee, and a committee member, University of Texas Professor Charles Alan Wright, led an effort to adopt clear and consistent style conventions for all of the rules. Without consistent style conventions, there were differences from one set of rules to another, and even from one rule to another within the same set. Style varied because a committee seeking to amend a rule did not always consider how another rule expressed the same concept. Style varied based on the membership of a particular advisory committee. Style varied as the membership of a particular advisory committee changed over time. And style varied as the membership of the Standing Committee changed over time. Different rules expressed the same thought in different ways, leading to a risk that they would be interpreted differently. Different rules sometimes used the same word or phrase to mean different things, again leading to a risk of misinterpretation. And in other respects, too, rules drafters who were experts in the relevant substantive and procedural areas sometimes did not express themselves as clearly as they might have.

Judge Keeton appointed Professor Wright to chair a newly formed Style Subcommittee of the Standing Committee. At Professor Wright's suggestion, the Standing Committee retained a legal-writing authority, Bryan Garner, as its style consultant. Mr. Garner is the author of such books as *The Elements of Legal Style* and *A Dictionary of Modern Legal Usage*. These are generally regarded as the leading authorities on these subjects. Mr. Garner also is the current editor of *Black's Law Dictionary* and the co-author, with Justice Scalia, of *Making Your Case: The Art of Persuading Judges*.

In conjunction with his work for the Standing Committee, Mr. Garner wrote *Guidelines for Drafting and Editing Court Rules*. First published in 1996, the *Guidelines* manual is now in its fifth printing. It has guided all rules amendments since it was written—whether or not they related to a restyling project. And the *Guidelines* manual has guided successful restylings of the Federal Rules of Appellate, Criminal, and Civil Rules, which took effect in 1998, 2002, and 2007. For matters not addressed in the *Guidelines*, the restylings have followed Garner's *A Dictionary of Modern Legal Usage*. Professor Daniel R. Coquillette has been the Standing Committee's reporter through all of

these projects.

Mr. Garner was himself the style consultant for the restyled Appellate and Criminal Rules. Professor Joseph Kimble took over near the end of the Criminal Rules restyling project and was the style consultant as the Civil Rules project went forward. Professor Kimble is the editor in chief of *The Scribes Journal of Legal Writing* and the author of *Lifting the Fog of Legalese*, a book that compiles some of his many essays. He and Mr. Garner are co-authors of a forthcoming book, *The Elements of Legal Drafting*, which West Publishing Company will publish. Professor Kimble has taught legal writing at Thomas Cooley Law School for 26 years.

Despite some initial opposition, each of the restyling projects has proved enormously successful. Indeed, in recognition of their work in restyling the Civil Rules, Professor Kimble, the Standing Committee, and the Civil Rules Advisory Committee each received a Burton Award for Reform in Law. The Burton is probably the nation's most prestigious legal-writing award. Judge Rosenthal, Judge Thrash (of the Style Subcommittee), and Professor Kimble accepted the awards at a black-tie dinner at the Library of Congress on June 4, 2007.

The Division of Responsibility: Substance or Style. The division of responsibility on the restyling projects has conformed generally to the protocol the Standing Committee has adopted for addressing style issues for a proposed amendment to a rule outside the restyling process. For an amendment outside a restyling project, the relevant Advisory Committee must submit its proposed language to the Style Subcommittee. On style issues, the Style Subcommittee, not the Advisory Committee, has the last word. Thus when an Advisory Committee submits a proposed amendment to any rule to the full Standing Committee, the amendment already has gone through a style review, and style issues have been determined by the Style Subcommittee. The Standing Committee chairs have kept the Style Subcommittee small in order to promote consistency. Although the Standing Committee retains the ultimate authority, through the years it has followed the style decisions of the Style Subcommittee, thus ensuring a high level of consistency across all sets of rules.

Preparing the Restyled Evidence Rules as Issued for Public Comment. With this background, the Advisory Committee on Evidence Rules undertook its restyling project beginning in the Fall of 2007. The Committee established a step-by-step process for restyling that was substantially the same as that employed in the earlier restyling projects. Those steps were: 1) draft by Professor Kimble; 2) comments by the Reporter, Professor Daniel J. Capra; 3) response by Professor Kimble and changes to the draft where necessary; 4) expedited review by Advisory Committee members and redraft by Professor Kimble if necessary; 5) review by the Style Subcommittee of the Standing Committee; 6) review by the Advisory Committee; and 7) review by the Standing Committee to determine whether to release the restyled rules for public comment.

The Advisory Committee divided the Evidence Rules into three parts. The process described above thus was conducted in three stages. The Committee also agreed that the

entire package of restyled rules should be submitted for public comment at one time.

The Advisory Committee established a working principle for whether a proposed change is one of “style” (in which event the decision is made by the Style Subcommittee) or one of “substance” (in which event the decision is for the Advisory Committee). A proposed change is “substantive” if:

1. Under the existing practice in any circuit, it could lead to a different result on a question of admissibility; or
2. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made; or
3. It changes the structure of a rule or method of analysis in a manner that fundamentally changes how courts and litigants have thought about, or argued about, the rule; or
4. It changes what Professor Kimble has referred to as a “sacred phrase”—“phrases that have become so familiar as to be fixed in cement.”

At its Spring 2008 meeting the Advisory Committee approved the restyling of the first third of the rules (Rules 101–415). The Standing Committee, at its June 2008 meeting, approved these rules for release for public comment, with the understanding that there could be further changes and that publication would occur after the Standing Committee approved all of the rules.

At its Fall 2008 meeting, the Advisory Committee approved the restyling of the second third of the rules (Rules 501–706). The Standing Committee, at its January 2009 meeting, approved these rules for release for public comment, again with the understanding that there could be further changes and that publication would occur after the Standing Committee approved all of the rules.

At its Spring 2009 meeting, the Advisory Committee approved the restyling of the final third of the rules (Rules 801–1103). The Standing Committee, at its June 2009 meeting, approved these rules and the entire set for release for public comment.

The Public Comments. We received 19 public comments, some brief, some running to many pages. In general, they were strongly favorable, with a number of helpful specific suggestions. The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers said:

Our Committee members commented, time and again, on the excellent work of the restyling sub-committee.

Comment 09-EV-002, second page.

The American Bar Association Section of Litigation said:

We commend the Advisory Committee on their excellent and careful work. The overwhelming majority of the proposed changes will lead to clearer rules that will be of great benefit to the practicing bar and the public.

Comment 09-EV-014, at 1.

A law professor said:

I'd like to start by congratulating the Committee on its work. The restyling will make it easier for students to learn the Federal Rules of Evidence. I wish the rules had been written that way in the first place.

Letter from Roger C. Park, Comment 09-EV-012, at 1.

Several other professors made similar comments. There was a single dissent: the Federal Magistrate Judges Association said it “doubts the value of restyling the Federal Rules of Evidence.” Comment 09-EV-011 at 7. The earlier restyling projects drew much more extensive opposition, but even some of the opponents later came to recognize that the restyled rules were better. That restyling the evidence rules drew only a single negative comment is perhaps a testament to the success of the earlier restyling projects.

Considering the Public Comments. The Evidence Reporter (Professor Capra) and the Style Consultant (Professor Kimble) considered the public comments in detail. They also reviewed all of the rules yet again. They provided their input to the Style Subcommittee (consisting of three Standing Committee members: Judge James A. Teilborg, Judge Marilyn L. Huff, and William J. Maledon). The Style Subcommittee considered the public comments and the input during conference calls that consumed many hours spread over many days. They did this in time for their decisions to be reported to the Advisory Committee in advance of the April 2010 meeting. The Style Subcommittee’s prompt work was of enormous assistance to the Advisory Committee.

The Reporter prepared a memorandum to the Advisory Committee that analyzed in detail the public comments, the Style Subcommittee’s decisions, and every issue that had been raised by anyone. At the April 2010 meeting, the Advisory Committee considered the public comments and addressed every issue. The draft minutes—which summarize but are by no means a transcript of the two-day meeting—run to 127 pages I have not attempted to summarize in this report the extensive discussions and many decisions recounted in the minutes.

The Advisory Committee approved the entire set of restyled rules, thus indicating its belief that the restyled rules are substantively identical to the existing rules. The conclusion is underscored by the committee note to each restyled rule. The note to Rule 101 explains the restyling project. The note for each other rule reiterates that the changes have been made as part of the restyling project, that the changes are stylistic only, and

that there is no intent to change any ruling on evidence admissibility. In a few instances, a note includes a further explanation of a specific drafting decision. The notes follow the pattern of earlier restyling projects.

The Advisory Committee also made several recommendations to the Style Subcommittee for changes on matters of style. On those matters, the final decision of course rests with the Style Subcommittee, not with the Advisory Committee. The Style Subcommittee took up the recommendations at an additional conference call. The Style Subcommittee acted on the suggestions and gave its final approval to the entire set of restyled rules. For ease of reference, the Style Subcommittee's decisions have been noted in the minutes of the Advisory Committee meeting, even though they of course came after that meeting.

In sum, the rules and the committee notes come to the Standing Committee with the approval of the Advisory Committee (on matters of substance) and the Style Subcommittee (on matters of style). The degree of cooperation among the Reporter, the Style Consultant, the Advisory Committee, and the Style Subcommittee has been extraordinary.

Recommendation: The Advisory Committee on Evidence Rules recommends that the Standing Committee approve the proposed restyled Evidence Rules 101–1103 and the proposed Committee Notes for submission to the Judicial Conference.
