Evidence Rules Refresher and Evidence Objections at Trial
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I. Objections that Make the Record Helpful

From the perspective of a former public defender with experience mostly as a trial law but also having spent a year handling appeals and a law professor with years of reading appellate decisions for evidence articles and books, I have a dual focus. My primary advice is to think of evidence law in terms of enhancing your chances of an acquittal or a positive outcome in the trial court. As to evidence law generally, concentrate principally on the “here and now” at trial. Lawyers don’t try cases with multiple, elegant objections in order to win a reversal on appeal. It’s not accidental that most evidence discussions are near the end of opinions in criminal cases. The winning issues usually appear toward the beginning of the opinion, and pure evidence errors are not a major source of reversals.

However, while defense attorneys generally should focus on winning the evidence point at trial and handling objections consistent with their trial strategy, a second goal should be to give substantial issues to the appellate lawyer in case you do not prevail at trial. You can enhance those prospects on appeal and unfortunately can definitely harm them by how effectively you present and preserve issues for review.

Under Federal Rule 103(a)(1), if you’re on the losing end of an objection at trial that admits evidence (that is, you object and the judge states, “overruled”), you need to have objected in a timely manner and stated correctly the grounds for objection. Inadequacy in objecting clearly is held against the party that lost the ruling in the trial court.

If the judge excludes the evidence (that is, your opponent objects and the judge responds, sustained), you must under Rule 103(a)(2) make an offer of proof and should make clear the reason the evidence is admissible. Proffers should be full and complete. Documentary evidence excluded should be made part of the record for the purpose of appeal.

If there is any lack of clarity as far as what happened in the courtroom, (e.g., some inappropriate gesture a witness made or a quick answer by a witness before you could interpose an objection), be certain the record reveals exactly what happened. Ask the trial court to “let the record reflect,” and then set out the missing facts.

Motions in limine are great for avoiding damage to your trial strategy. Generally, motions in limine are used to exclude, but they can be used to seek a ruling admitting evidence as well. Why ask for a ruling in limine to admit rather than simply offer the evidence at trial and respond to the objection? I suggest you may move to admit through an in limine motion if you have evidence to offer that appears suspect on first examination but will likely have a better chance of admission if examined carefully and thoroughly. By filing the request in writing or...
presenting it orally before it is offered during trial, you might avoid a reflexive “sustained” ruling
that excludes your evidence, which is difficult for most judges to reverse on more careful
reflection, and efforts at further consideration can be perceived to be disrespectful.

When evidence is admitted for a limited purpose, ask for a limiting instruction. Rule 105
makes such an instruction mandatory upon request. Moreover, some courts hold you have no
right to appeal a failure to give such an instruction unless you requested and were refused the
instruction.

I suggest crafting limiting instructions that do you some good. Situations often have
nuance. Point out in specific what inferences or uses are not to be made of the evidence. There
is no need to accept simple boiler plate language that ineffectively limits damage.

In general, ask for more from the judge than you expect to receive. Figuratively “fill up
the error bag.” You may get some cumulative benefit on appeal from a sense that the trial judge
ruled against you on multiple occasions and that even when the judge found merit in your
position, he or she still denied you full relief.

II. Hearsay Objections

Hearsay is an out-of-court statement offered for the truth of the matter asserted. At the
simplest level of analysis, anytime out-of-court words are being offered, you have a potential
hearsay objection.

One common and sometimes correct response to a hearsay objection is the statement is
not offered for its truth—to prove the substance of what the words state—but for some other
purpose. That response is often right; sometimes wrong; and often partially wrong. You deserve
a limiting instruction if the statement is admitted not for its truth if you request it. Also, don’t
get bluffed. Most words are irrelevant if not offered for their truth. Words that have an effect on
the hearer must be heard or they fail on grounds of conditional relevancy under Rule 104(b).

A. Rule 803(1)—present sense impression

Commentators expect this exception to grow in importance. More frequent use is not the
result of a new theory of admissibility. It’s because more of these statements are likely to be
created and preserved because of changes in technology and the growing popularity of constantly
being in communication with someone about events in one’s life through some form of instant
messaging. Many people today virtually narrate their lives. Some part of what they see and then
immediately communicate to another person may become relevant at a trial. Often the
conversation is digitally preserved for others to find at a later point when litigation spawns
investigation.

However, these communications may lack to general trustworthiness of older style
statements where the in-court witness had to be, in most situations, nearby the speaker to
physically hear the statement. That physical proximity generally provided corroboration of some
of the statement’s surrounding circumstances. We should at least be more skeptical of the

**B. Rule 803(2)—excited utterances**

For a statement to be admitted as an excited utterance, three basic requirements must be met: (1) There must be a startling event; (2) the statement must relate to that startling event; and (3) the statement must be made while the declarant is under stress caused by the startling event. Watch for statements that don’t relate to the event mixed among those that do. The theory set out in the commentary to the federal rules is that spontaneity “may extend no farther.” Said differently, if declarants can talk about a different subject matter, we have some evidence that their normal thinking process is operating, and they are no longer under to truth inducing influence of excitement caused by the event. Also, watch for excessively long periods of time between the exciting event and the statement. Sometimes continued pain may be given as a justification for prolonging the time period, but the exciting event that figuratively starts the clock running remains the initial trauma, not the recurring pain.

**C. Rule 803(3)—then-existing mental, emotional, or physical condition**

Sometimes an existing mental condition is directly in issue in a criminal case and is proved by a statement. One example would be a statement in an insanity defense case by the defendant that he is crazy; another is a statement of intent by the defendant that is inconsistent with that asserted by the prosecution.

_Frequent improper use against the defendant, particularly in domestic violence cases_

Much of the time, statements under Rule 803(3) come in to prove an inferential fact—that because the declarant stated his intention to go to Crooked Creek, he in fact did go to Crooked Creek. See Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285, 295-300 (1892).

This is what I call in my Evidence class a form of “time travel.” However, it is limited time travel. It is travel into the future to prove the acts that the declarant likely did do or did not do because of his or her intent as expressed in the hearsay statement.

The Supreme Court has prohibited another type of “time travel,” and the rule drafters explicitly recognized that prohibition in Rule 803(3) (“but not including a statement of memory or belief to prove the fact remembered or believed”). In Shepard v. United States, 290 U.S. 96 (1933), the Court excluded statements by the victim regarding her then existing belief that her husband had poisoned her to prove that she had seen acts that caused her to have belief. Backward-looking time travel through which the declarant’s state of mind is used to prove what another person, often the defendant, did to the victim to cause her state of mind is excluded by Shepard and Rule 803(3).

Why the backward looking prohibition? Indeed, Rule 803(2)—excited utterance and 804(b)(2)—dying declarations permit backward time travel. In contrast with these other exceptions, the trustworthiness guarantee of Rule 803(3) is weak, and there is no limiting
external control, such as a triggering event by an exciting event, which would inhibit ready fabrication of bogus state-of-mind assertions. Statements under Rule 803(3) are offered in the absence of an exciting event. In a frequently encountered fact pattern, the declarant is instead recounting her feelings to a trusted friend in a period of calm.

The common mistake of courts, a mistake that particularly infects North Carolina state courts, is to admit statements of fear to prove the cause of the fear. The ruling is not entirely unfounded. At the first level, a statement of fear is an existing state of mind, but two problems typically ensue and are often missed by trial courts. The two problems are first, that often the statements of fear are mixed with statements regarding past deeds that cause the fear, which are clearly not admissible and second, that fear is relevant to prove nothing about the declarant’s actions.

Why do courts often miss these problems? I believe it is because the emotion of fear is so logically relevant in the case. The most likely person to have killed the victim is the person she feared most. However, the error in admitting these statements is not with their relevancy. Rather, the problem is one of hearsay, which is not answered by the logical point that this evidence may be highly relevant.

I suggest focusing the court on the issue of why fear is relevant; why is it being offered? What did the victim do in the future after she made the statement that resulted from the fear that is relevant to the case? Usually, the answer is nothing. Then what is her fear being used to prove? It is that she had good grounds to fear and that is because of the explicit violent acts and threats of the defendant noted in the statement, which produced her fearful state. The rejoinder is that those past facts are excluded under the reasoning of Shepard and the language of the rule. If there are no such acts mentioned, the statements should be just as inadmissible because it has the alternative problem that the fear is either baseless and therefore the evidence valueless or it is being offered to prove inferentially that some unstated violent acts or threats occurred.

_Sometimes improperly excluded statements of intention offered by defendants_

Statements by defendants that they intend harm to others are generally admissible without regard to 803(3) as “admissions,” and usually the Rule 803(3) objection is not made. With regard to defendants, a problem does arises under Rule 803(3) if the statement of the defendant is not recounted by a witness on the stand who heard it, but the threat is a second level of hearsay imbedded within the victim’s statement of fear. State of mind statements under Rule 803(3) do not support admission of these statements since they are prohibited facts remembered or believed under the Rule. _See generally 2 McCormick on Evidence § 276 (7th ed. 2013)._  

Statements by defendants that they lack a state of mind that the prosecution is providing do not come in as admissions because they are not offered by the prosecution—the “opposing party” under Rule 801(d)(2). When offered by the defense under Rule 803(3), they are sometimes excluded because considered self-serving or because the judge does not believe them. Often these statements should be excluded because they do not express a then-existing state of mind or the circumstances do not fit other requirements of the rule, such as demonstrating a lack of the required spontaneity. However, this rule, like Rules 803(1), (2), and (4), does not give the
judge the right to exclude what he or she doubts. Unlike Rules 803(6) and 803(8), Rule 803(3) does not authorize ad hoc judgments by the trial court. (Rule 803(6) sets as a condition of admission that “neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.”) The argument based on the plain meaning of Rule 803(3)’s language is that if the statement satisfies the requirements of the rule, it should be admitted without regard to the judge’s view of its truth or to individual credibility factors regarding its making. Those concerns go to weight and credibility. See generally 2 McCormick on Evidence § 270 (7th ed. 2013).

Relevant state of mind statements by other possible perpetrators should be admissible without any serious hearsay issue to show that someone else committed the crime. For example, a statement by another person threatening harm to the victim should be admissible under Rule 803(3) to show that that person likely committed the subsequent violent crime rather than the defendant. The court may exclude weak or ambiguous statements on relevancy grounds but should not do so on hearsay grounds.

D. Statements under Rule 803(5)—recorded recollection

The basic requirements of past recollection recorded are: (1) proof that the witness once had a relevant observation and a memory of that observation; (2) a loss of memory; (3) a statement made or adopted while the memory was fresh; and (4) a showing that the statement accurately reflects the witness’ knowledge. Some courts have gone too far in finding compliance with the second and fourth requirements.

These courts find that the requirement that the witness “now cannot recall well enough to testify fully and accurately” is satisfied when an apparently reluctant witness seeks to avoid testifying to a particular fact by claiming no memory. See United States v. Williams, 571 F.2d 344, 349 (6th Cir. 1978) (even if the claim of no memory in fact constitutes a willful refusal to testify, the rule’s requirement is met if it results in incomplete testimony).

In a similar vein, courts sometimes are too liberal in finding that the witness has acknowledged the accuracy of a prior statement, particularly where the witness is apparently hostile or reluctant to testify but does not repudiate the statement. See United States v. Smith, 197 F.3d 225, 230–31 (6th Cir. 1999) (accepting testimony of witness that she did not intend to lie and that she did not lie when she gave statement to police officer as sufficient to establish accuracy of statement). But see United States v. Schoenborn, 4 F.3d 1424, 1427–29 (7th Cir. 1993) (accuracy not established even though witness admitted that he answered agent’s questions accurately where he refused to sign statement when first presented to him and disavowed its accuracy when he testified).

A special danger of misuse of the exception occurs when these two errors occur together. The weak proof of the statement’s accuracy operates in combination with the court accepting reluctance to testify as satisfying the requirement that a witness have insufficient memory of the event. These foundation facts are inadequate. The statement as recorded by the second party may not have accurately reflected the declarant’s knowledge, particularly as to details, and the limited examination of a reluctant declarant may not produce its correction. See generally 2
McCORMICK ON EVIDENCE §§ 282, 283 (7th ed. 2013). Note that these statement lack the qualities of Rule 801(d)(1)(A) of oath and the statement being given at a proceeding where it likely would have been mechanically recorded, which are important to trustworthiness and admissibility.

E. Statements under Rule 803(6)—"business records" and Rule 803(8)—governmental records

One key restriction on admission of business records is that this exception is skeptical of records created for the purpose of litigation. This concern regarding the trustworthiness of litigation statements applied to law enforcement records offered by the prosecution against the defense and recognition of the potential for admission of such statements to violate the defendant’s confrontation rights resulted in the creation of Rule 803(8) for governmental records. That rule prohibits admission of such records against the criminal defendant. Because of the intention of the more restrictive provisions of Rule 803(8) to govern admission of these law enforcement litigation records, Rule 803(6) should not be allowed to operate as a backdoor method to introduce such records against the criminal defendant.

F. Rule 804(b)(3)—Statements against interest

In Williamson v. United States, 512 U.S. 594 (1994), the United States Supreme Court examined the issue of whether a statement that was clearly against the declarant’s interest in one respect could carry along with it statements neutral to the declarant’s interest when located nearby in the same overall narrative. It focused on the definition of “statement” as used in this rule. It concluded that the principle behind the rule pointed to a narrow reading to the term—“a single declaration or remark” rather than “a report or narrative”—because only as to the more narrow meaning does the rationale hold that not particularly honest people make self-incriminatory statements only if they believe them to be true. Indeed, one of the most effective ways to lie is to mix falsehood with truth; to mix within a larger report the exculpatory with the self-incriminating. The result is that only the specific parts of the narrative that incriminate qualify. Id. at 599-600. The determination of whether a statement in this narrow sense is self-incriminatory requires examination of context. Id. at 603.

Williamson noted that under its new test statements against interest by third parties can continue to be admitted against the defendant where the statement does not mention the defendant directly but either logical inferences or the operation of law makes it incriminating to the defendant. The examples Justice O’Connor gave were: an inculpatory statement by one defendant admissible against accomplices tried under a co-conspirator theory; a statement that the declarant knew a fact from which the jury might be able to infer that a confederate knew the same information; and a statement that the declarant committed a crime that could be used to help prove a co-defendant’s guilt by virtue of being with the declarant according to independent evidence. Id. at 603. Also, statements mentioning a defendant may be admissible if a reasonable person in the declarant’s position would realize that being linked to others implicated the declarant in another crime. Id. at 603.

Applying Williamson, federal courts have most frequently admitted third party statements
that inculpate a defendant where two general conditions are satisfied: (1) the statement does not seek to curry the favor of law enforcement authorities, and (2) it does not shift blame. See United States v. Berrios, 676 F.3d 118, 129 (3d Cir. 2012) (admitting surreptitiously recorded conversation in which speaker brags about his role in the crimes and mentions the defendant only to complain him crashing the getaway car); United States v. Manfre, 368 F.3d 832, 841–43 (8th Cir. 2004) (admitting statements made to fiancé when witness not under threat of prosecution and to friend in setting where no incentive to shift blame).

The setting in which the statement is made is of particular importance where statements against penal interest are offered to inculpate the accused. If the declarant was in police custody when he or she made the statement, the statement or parts of it implicating others very likely were made to curry favor even if it also inculpates the declarant. Moreover, if made to law enforcement agents they are likely to be testimonial under the Confrontation Clause and Crawford v. Washington, 541 U.S. 36 (2004).

One frequently encountered situation that courts consider self-serving occurs when a statement is given in custody and the declarant knows that the police already possess substantial incriminating evidence, sometimes finding large quantities of drugs at the time of arrest. In that situation, a statement that largely confirms what authorities already know and that implicates a “higher up” is regarded as currying favor. See, e.g., United States v. Hall, 113 F.3d 157, 159 (9th Cir. 1997); United States v. Mendoza, 85 F.3d 1347, 1351–52 (8th Cir. 1996).

Where the defendant is in custody when making the statement and reaches a plea agreement, the statement is excluded. See United States v. Boyce, 849 F.2d 833 (3d Cir. 1988); United States v. Sarmiento-Perez, 633 F.2d 1092 (5th Cir. 1981). In addition, statements made in custody that in context shift blame from the speaker to a third party are even more clearly inadmissible. See Williams v. State, 667 So. 2d 15, 20 (Miss. 1996). However, courts have not treated being in custody as conclusively establishing that the statement is self-serving if it is voluntarily given, strongly incriminating of the declarant, and shows no indication of currying favor. Where the declarant is not speaking to a person known to be a law enforcement agent, statements are unlikely to curry favor of law enforcement even if made in custody. Where made while not in custody and to a private individual, the concern of currying favor is largely eliminated. See United States v. US Infrastructure, Inc., 576 F.3d 1195, 1209 (11th Cir. 2009).

A relation of trust and confidence between speaker and listener could militate against awareness that making the statement might be against declarant’s interest. However, the possibility of disclosure appears to be enough. Instead, in the context of statements against penal interest, greater significance is attached to the fact that a statement made to private individuals, rather than to law enforcement authorities, was not likely made for the purpose of currying favor. Such statements also may avoid exclusion under Crawford, because they are generally viewed as nontestimonial. See, e.g., United States v. Manfre, 368 F.3d 832, 838 n.1 (8th Cir. 2004) (ruling that witness’ statements to loved ones and friends, admissible as statements against interest, were not testimonial).

Although not impacting the hearsay definition, the Supreme Court’s decision in Crawford, eliminates the practical importance of whether many of the most significant
statements against interest are admissible. Such statements made during police interrogation or the grand jury testimony of another participant in the crime are now clearly inadmissible under the Confrontation Clause. *Crawford* eliminates some of the most problematic applications of the statement against interest exception that appeared to have particularly angered the Court and likely motivated the determination to revamp this constitutional protection.

*An aside to Bruton*

In *Bruton v. United States*, 389 U.S. 818 (1968), the Supreme Court ruled that a limiting instruction did not effectively protect the accused against the prejudicial effect of admitting the confession of a codefendant that implicated the defendant as well. The point relevant to the statement against interest analysis above is that the statement of the codefendant was inadmissible against Bruton because it was introduced only as an admission of the codefendant, which is not an admission of Bruton. However, if the statement qualifies as against the interest of the codefendant, it is admissible without limitation and does not run afoul of *Bruton*. Similarly, if the statement comes in as a coconspirator statement, then it is admissible against all the members of the conspiracy, and there is no *Bruton* problem.

On the other hand, if there is a *Williamson* error and the statement is admitted, there is also a *Bruton* error. Similarly, if a statement is admitted by the codefendant but with ineffective redaction, *Bruton* is violated. If you believe there is a *Bruton* problem, you likely should ask for a limiting instruction anyway, but start with an effort to exclude entirely and an explanation that admission will violate *Bruton*. Once the request to exclude has been denied, then you can ask for the limiting instruction, but be certain to preserve your initial objection by indicating you find this remedy inadequate, albeit better than no remedy at all.

**G. Rule 801(d)(2)(E)—coconspirator statements**

Rule 801(d)(2)(E) governing statements by coconspirators contains two evidentiary limitations. First, the statement must be made in “furtherance of the conspiracy.” That means the statement must aid the conspiracy in some way. Courts view this requirement expansively, but it is still an important restriction. “Idle chatter” by a conspirator or simple bragging does not qualify. However, the limitation can become a weak one because courts may rule that the bragging, for example, was part of a recruitment effort that was intended to aid the conspiracy.

Second, the statement must be made “during . . . the conspiracy.” The question here is whether the primary object of the conspiracy has been achieved or has failed. My illustration is from the “Oceans” movies. George Clooney and his coconspirators gather after their successful caper to celebrate before they part ways. The waterworks outside a Las Vegas casino bursts into the air, and they then depart. All statements that the individual participants make after this point as they try to conceal their ill-gotten gains are inadmissible through this hearsay exclusion. There must be a separate conspiracy to conceal for the statements designed to conceal the conspiracy to be admissible against the others.

Additional restrictions flow from the substantive law of conspiracy. These statements must be made by “the party’s coconspirator.” That means if the declarant is no longer a member
of the conspiracy because of effective withdrawal or never joined it, the statement is not admissible under this provision. However, the statement need not be made to a coconspirator. It only need be made in furtherance and during a conspiracy by a member of the conspiracy. Thus, a recruitment statement to an undercover agent who never joined the conspiracy is within this hearsay exclusion.

H. Confrontation

In the confrontation area, the Supreme Court has decided two cases that create complete messes—Michigan v. Bryant, 131 S. Ct. 1143 (2011) and Illinois v. Williams, 132 S. Ct. 2221 (2012). I will begin with the one that creates huge havoc but may create some interesting and helpful possibilities—Illinois v. Williams.

In Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004), the Court established as an exception to the Confrontation Clause statements that, even though testimonial, are not offered for the truth of the matter asserted: “[t]he Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” Last year in Williams, the Court reached and hopelessly mangled the unresolved issue of whether the Confrontation Clause was violated when the testifying expert relied on the forensic report of a non-testifying expert to provide the basis for the expert's opinion. Four members of the Court concluded that Crawford’s exception for a statement not used “for the truth of the matter asserted” rendered nontestimonial the testifying expert’s use of a report by a non-testifying expert where the report was neither admitted into evidence nor shown to the factfinder. Justice Alito, writing the plurality opinion, reasoned that while reliance on these documents might result in weaknesses in the proof or the irrelevance of inadequately supported propositions, those possible defects would be either matters of state law or due process, not the Confrontation Clause. He also concluded that, since the DNA report at issue was prepared without the primary purpose of accusing a targeted individual but rather to catch a dangerous unidentified rapist who was still at large, it was not testimonial.

Five Justices concluded that the use of the report to support the testifying expert’s opinion did not qualify as a “legitimate” or “plausible” nonhearsay purpose and that the use of the statement to provide the basis of the opinion was effectively to use it for the truth within the meaning of the Confrontation Clause. However, one of those five, Justice Thomas, found the report nontestimonial because, although the report was signed, it contained no certification. In his view, it “lacked the requisite ‘formality and solemnity’ to be considered ‘testimonial.’” Id. at 2260-61 (Thomas, J., concurring in the judgment). Accordingly, Justice Thomas concurred in the judgment reached by Justice Alito’s plurality opinion, albeit on quite distinct grounds. Thus, Williams leaves the testimonial treatment of forensic reports badly confused.

Given the divisions in Williams, how courts should treat other statements that under evidentiary law may arguably be used for a purpose other than their truth remains uncertain. Crawford cited Tennessee v. Street, 471 U.S. 409 (1985), as an example of a legitimate nonhearsay use of a testimonial statement excepted from the confrontation right. Street, which all the justices endorsed in Williams as a proper use of the concept, involved a defendant who claimed that his confession was coerced and that the sheriff who secured it read his co-
defendant’s confession to him and told him to “say the same thing.” *Id.* at 411. The Court approved the response of reading the co-defendant’s confession to the jury along with the sheriff’s indications of the differences between the statements. Admission was also accompanied by a limiting instruction telling the jury to consider the co-defendant’s confession only for impeachment purposes.

In principle, the exception for statements that are not offered for the truth is sound because such statements are supposed to make no claims that the declarant’s out-of-court statement was truthful, which cross-examination could test. However, varying evidentiary definitions of this concept should not determine the dimensions of the Confrontation Clause exception, which should have a constitutional definition. The specific argument in *Williams* regarding expert use of inadmissible hearsay statements presents one clear problem area but is not unique in challenging the absence of any significant truth claim for statements within this general nonhearsay category when applied to the Confrontation Clause.

A particularly problematic type of hearsay evidence admitted frequently in criminal cases under the argument that it is not used for its truth presents a similar problem for confrontation. It involves statements by arresting or investigating officers regarding the reason for their presence at the scene of a crime. While investigating officers should not be put in the misleading position of appearing to have happened upon the scene and therefore should be entitled to provide some explanation for their presence, they should not provide detailed accounts of complaints containing inadmissible hearsay. Such statements are all too often erroneously admitted as nonhearsay to give the information upon which the officers acted. *See* 2 MCCORMICK ON EVIDENCE § 249 (7th ed. 2013). When the statements exceed the limited need to explain the officer’s presence and go into extensive discussion of historical fact, they can no longer legitimately be admitted under a “not-for-the-truth-of-the-matter-asserted” rationale. When the statements recited are testimonial, the violation is not only of the nonhearsay concept but implicate the Confrontation Clause as well.

Even before the five justices concluded that not-for-the-truth had a substantive meaning under the Confrontation Clause different than its broad usage in evidence law, this argument that police explanations of their actions are unwarranted and have constitutional implications attracted significant interest. *See* United States v. Meises, 645 F.3d 5, 21-23 (6th Cir. 2011) (ruling that implication from police action taken after conversation with informant effectively asked jury to infer content of informant’s incriminating testimonial statements and constituted Crawford error despite government’s argument that statements were not hearsay showing effect on hearer); Jones v. Basinger, 635 F.3d 1030, 1040–51 (7th Cir. 2011) (ruling that non-testifying informant’s statements admitted to explain the “course of the investigation” were effectively used for the truth and violated defendant’s confrontation rights); United States v. Hearn, 500 F.3d 479, 483 (6th Cir. 2007) (ruling that “had jurors heard that authorities followed and pulled over Hearn because of ‘some illegal activity’ instead of hearing that Hearn transported illegal drugs with the intent to sell them, the jurors would have understood why police behaved the way that they did without Hearn’s suffering a Sixth Amendment violation”); State v. Hoover, 220 S.W.3d 395, 401–13 (Mo. Ct. App. 2007) (reversing defendant’s conviction for violation of both hearsay and Confrontation Clause where statements by accomplices were introduced through police officers under the justification of explaining the officers’ actions). *See also* United States
v. Cruz-Diaz, 550 F.3d 169, 177 (1st Cir. 2008) (recognizing that government’s claim of nonhearsay use could be a mask to evade Confrontation Clause and must be examined as possible pretext). See generally Kainen, The Case for a Constitutional Definition of Hearsay: Requiring Confrontation of Testimonial, Nonassertive Conduct and Statements Admitted to Explain an Unchallenged Investigation, 93 MARQ. L. REV. 1415 (2010).

However, Williams is very challenging to use with respect to the rationale adopted by five justices for a narrow interpretation of the truth-of-the-matter-asserted concept under the Confrontation Clause. The fractured opinion produced on the other hand not a rationale but a result for the prosecution through votes garnered on two different rationales. Normally Marks v. United States, 430 U.S. 188, 193 (1977), guides how to discern a rule from a decision lacking a single opinion that garners five votes. It states, “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those members who concurred in the judgments on the narrowest grounds.” It is difficult to apply that analysis to the fractured rationales and inconsistent result in Williams. See United States v. James, 712 F.3d 79, 95 (2d Cir. 2013) (Williams does not, as far as we can determine, using the Marks analytic approach, yield a single, useful holding relevant to the case before us.”). Nevertheless, the majority rationale for a more limited meaning of the truth-of-the-matter-asserted rationale under the Confrontation Clause surely should have significance in applying the Confrontation Clause.

The other recent decision in which the confrontation analysis became much more unpredictable and the limitations of the Confrontation Clause less substantial was Michigan v. Bryant, 131 S. Ct. 1143 (2011). There the nature of the ongoing emergency concept was treated outside of the domestic violence context where it began in Davis v. Washington, 547 U.S. 813 (2006). The ongoing emergency concept was problematic to begin with, and Bryant expanded and mangled it. In Bryant, the police spoke with a severely injured individual found in a gas station parking lot about the circumstances of the shooting that caused his injury, which had occurred sometime earlier and at a different location. The Court ruled that statements made by the victim regarding the identification and description of the shooter and the location of the shooting were not testimonial statements because they had a “primary purpose . . . to enable police assistance to meet an ongoing emergency.” Id. at 1167.

The Bryant opinion, written by Justice Sotomayor, explained that the limited range of time involved in Davis was a function of the fact that the crime was an act of domestic violence targeted against a particular victim by an unarmed perpetrator. In Bryant, it reasoned that the perpetrator’s use of a gun, his continued possession of that weapon, and his unknown motivation made more expansive inquiries pertinent to the ongoing emergency. The Court considered questions designed to identify and find the attacker legitimately related to concern for public safety regarding an armed attacker whose location and motivation were unknown and therefore did not consider those inquiries to have the primary purpose of developing evidence for trial but rather concerned the ongoing emergency.

Among the other factors the Court found pertinent in the testimonial determination were the serious medical condition of the victim and the informality of the police interrogation. The exact impact of Bryant is not clear, but it will permit a broader reading of the time period of an
ongoing emergency in armed perpetrator situations, and its multi-factor analysis will effectively give broader discretion to trial judges in evaluating the primary purpose of the law enforcement inquiry and the declarant’s motivation. Predictably, a larger group of statements will be ruled nontestimonial after Bryant generally, and particularly in armed, unidentified perpetrator cases.

I have little hope to offer here. However, those who argue these cases regularly in the Supreme Court believe that Bryant was not typical of the general commitment of Justice Sotomayor, the opinion’s author, to a strong confrontation right. As a result, there may be hope in future decisions of providing some limits to the expansiveness of Bryant.

Will statements to private parties be covered by Crawford?

In both Washington v. Davis and Michigan v. Bryant, the Court explicitly reserved the question of “whether and when statements made to someone other than law enforcement personnel are ‘testimonial.’” Bryant, 131 S. Ct. at 1155 n.3. See also Davis, 547 U.S. at 823 n.2. Whether the Confrontation Clause under Crawford applied to statements made to private individuals remains unresolved by the Supreme Court and is a very important issue.

One of the most solid historical cases supporting exclusion of statements made to private parties is King v. Brasier, 1 Leach 199, 200, 168 Eng. Rep. 202, 202–203 (K.B. 1779). As described by the Supreme Court in Davis, Brasier involved statements made by a child to her mother—a private citizen—just after the child had been sexually assaulted. See Davis, 547 U.S. at 828. Given the Court’s use of Brasier, its potential to support arguments both regarding the Confrontation Clause’s general applicability to statements made to private individuals and the testimonial nature of accusatory statements made by children should not be ignored.

III. Impeachment

A. Impeaching a hearsay declarant

I begin with an often overlooked type of impeachment. That is impeachment of a hearsay declarant under Rule 806. In the words of the Advisory Committee’s Note to this rule, the theory is that as to most statements admitted under a hearsay exception, the “declarant . . . is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified.”

Impeachment by prior convictions (Rule 609), calling character witnesses as to untruthfulness (Rule 608(a)) and calling attention to prior false statements (Rule 608(b)) is authorized. Prior consistent statements can be used under the second sentence of Rule 806 regardless of whether the declarant had a chance to explain or deny it. The logistics of presenting evidence impeaching a hearsay declarant in court can be challenging since the declarant does not actually testify, but accommodation should be made by the trial court to achieve the substantive goal of the rule drafters to permit impeachment of hearsay declarants just as if they had testified.
B. Credibility generally

Under the basic rules of credibility, a party should not be able to bolster its witness before the opponent has attacked that witness’ credibility. At some point, the allowed process on direct examination of “putting the witness in his or her community,” for example, by providing some background information becomes for some witnesses positive creditability evidence (e.g., awards won), and is impermissible bolstering and/or character evidence and should be stopped with an objection.

C. Types of Impeachment

The major categories of impeachment evidence are:

1. Bias, interest, or corruption (no rule). Sensory or mental defect (no rule).
2. Untruthful character:
   - Reputation evidence. Rule 608(a).
   - Specific acts reflecting untruthful character. Rule 608(b).
   - Conviction of crime. Rule 609.
4. Specific contradiction (no rule).

D. Rehabilitation

1. Evidence of truthful character is admissible if the witness has been impeached on character grounds. Rule 608(a). Such impeachment should include attacks that suggest untruthful character such as allegations of bias not based simply on status (e.g., kinship) but corruption.

2. Evidence of prior consistent statements for credibility if it survives the common law’s skeptical attitude toward receipt of such statements, which might be termed “so what” embodied in Rule 403’s balancing test. In the classic Wigmore view, repetition (a prior consistent statement) is expected and virtually valueless without attack in that repetition does not affect the value of an improbable or untrustworthy statement.” However, if the consistent statement is offered to rebut a charge of recent fabrication or improper motive and that statement predates the onset of the distorting influence, Rule 801(d)(1)(B) admits the statement substantively.

3. Almost any type of response that in logic and human experience explains or diminishes the impact of the impeachment (e.g., prior inconsistent version of assault did not mention self-defense by the criminal defendant may be rehabilitated with an explanation that self-defense was not mentioned because the person taking the statement was related to the decedent and was armed and might have been angered by a statement that indicated the decedent was in the wrong). The response must concern the same dimension of credibility as the attack (e.g., an attack on truthfulness cannot be rehabilitated by a showing that the witness has good eyesight).
E. Collateral Matters.

The rule that a witness cannot be impeached on “collateral matters” concerns when extrinsic evidence is admissible. If a matter is collateral, no extrinsic evidence (meaning, calling another witness to testify regarding the impeaching fact) may be introduced. In such a case, the impeaching party is generally permitted to question effectively about the impeaching matter, but “must take the answer” given on cross-examination, even if false and subject to refutation by the extrinsic evidence.

Determining what is a collateral matter may prove troublesome. This problem, however, is not present with all methods of impeachment. Character evidence proved by reputation and opinion must be introduced through a character witness (this is extrinsic evidence). Moreover, in some situations something close to black letter rules have developed. Bias was never considered collateral under the common law, and thus extrinsic evidence was always permitted (subject to a foundational requirement in most jurisdictions). The same result will likely, but not always, be reached under the Federal Rules of Evidence because of the very strong impeaching power of bias in most situations. The result is not a categorical one, however, and is decided under Rule 403 balancing. Character evidence as to truthfulness proved by prior specific acts is always collateral and thus may be raised only during cross-examination of the witness being impeached and extrinsic evidence is never permitted. Rule 608(b). Prior convictions under Rule 609 may be proved by extrinsic evidence, but only of one type—the record of conviction.

Particularly difficult areas involve prior inconsistent statements of the witness (self-contradiction) and specific contradiction by the testimony of another witness. There is no blanket rule. With these methods, the traditional (Wigmore) approach permits extrinsic evidence if such evidence is “independently provable” separate from the contradiction. For example, self-contradiction (prior inconsistent statement) regarding a fact of consequence (the witness’ prior statement that the light was red/green in a case where the color of the light at the time of the traffic accident is “material” and the witness says the opposite during his/her testimony). Other scholars have suggested additional categories where extrinsic evidence is generally permitted, such as self-contradiction going to capacity (the witness saying in a prior statement that contrary to her in-court testimony she was not wearing her glasses when she observed the accident) or to a fact about which a normal person could not be reasonably mistaken and remain believable. The Federal Rules of Evidence approach is to make this determination one of balancing under Rule 403, with the results frequently, but not always, the same as various categorical approaches. Thus, the categories are good places to begin, but not end, the analysis of whether extrinsic evidence may be used to impeach a witness who does not admit on cross-examination the impeaching fact.
### Chart: Methods of Impeachment

<table>
<thead>
<tr>
<th></th>
<th>Cross-examination</th>
<th>Extrinsic evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Bias/interest</td>
<td>yes</td>
<td>yes with foundation (majority common law rule); Rule 403 now controls</td>
</tr>
<tr>
<td>B. Sensory/mental capacity</td>
<td>yes</td>
<td>yes (common law); Rule 403 now controls</td>
</tr>
<tr>
<td>C. Character (untruthful)</td>
<td></td>
<td>hold</td>
</tr>
<tr>
<td>– reputation, Rule 608(a)</td>
<td>not applicable</td>
<td>yes, character witness</td>
</tr>
<tr>
<td>– opinion, Rule 608(a)</td>
<td>not applicable</td>
<td>yes, character witness</td>
</tr>
<tr>
<td>– prior conviction, Rule 609</td>
<td>yes</td>
<td>yes, record of conviction</td>
</tr>
<tr>
<td>– prior acts, Rule 608(b)</td>
<td>yes</td>
<td>no</td>
</tr>
<tr>
<td>D. Prior inconsistent statement</td>
<td>yes</td>
<td>sometimes with foundation (common law: if not “collateral”); Rule 613(b) no foundation &amp; Rule 403 controls extrinsic evidence</td>
</tr>
<tr>
<td>E. Specific contradiction</td>
<td>not applicable</td>
<td>sometimes (common law: if not “collateral”); Rule 403 now controls</td>
</tr>
</tbody>
</table>

### IV. “Other crimes” evidence

Rule 404(b), which permits admission, subject to Rule 403 balancing, of crimes, wrongs, or other acts if offered for another purpose than character is widely used by prosecutors. Admission of such evidence puts the defense to the task of effectively defending against multiple criminal charges in a single case. The evidence often has at least an indirect effect of showing the defendant’s character is bad in the eyes of the jury. The challenge is to achieve meaningful limitation on admission of this powerful and potentially highly prejudicial evidence.
The trial court should be prompted to focus on exactly what the evidence tends to show. I suggest two ways to channel the judge’s attention. First, if you are dealing with what is claimed to be modus operandi evidence to prove the defendant’s identity as the perpetrator of the crime, the question is whether the evidence which appears similar on initial analysis really shows the “signature” nature of the crime or is instead little more than how such crimes are generally committed. As the circuit court stated in *United States v. Robinson*, 161 F.3d 463, 465 (7th Cir. 1998), “‘[i]f defined broadly enough, modus operandi evidence can easily become nothing more than character evidence the Rule 404(b) prohibits’” (quoting *United States v. Smith*, 103 F.3d 600, 603 (7th Cir. 1996)). In that case, the evidence in combination did show more than character. Among other similarities, the man entered the bank in both instances with hand gun in one hand and quite significantly a large Louis Vuitton duffle bag in the other to haul away the proceeds of the bank robbery. That distinctive item along with a combination of other specific features did give the crime a signature quality. Careful debunking of spurious corresponding efforts is important. Expert testimony at in limine motions seeking to exclude this evidence regarding how certain crimes tend to be committed in that area could prove decisive in showing what appeared to be relatively unique was instead closer to common place. Recognize that correspondence between two crimes on some features will be nothing more than coincidence, e.g., both crimes occurring on the same weekday. If the act is divided into enough component features, multiple similarities should be expected as a matter of chance rather than because the method of commission has a signature quality.

Another way I have found effective in describing improper Rule 404(b) evidence is that it “relates not to the crime but to the alleged criminal.” *United States v. Hernandez*, 935 F.2d 1035, 1040 (4th Cir. 1992). In *Smith*, the other crimes evidence showed the defendant had participated in, and was knowledgeable about, crack cocaine manufacturing in New York City. It therefore showed she would be the type of person likely to have been a part of a drug selling enterprise in northern Virginia and Washington, D.C., but it had no more specific connection to the crime than that. The evidence was excluded as being primarily about the person and therefore character rather than to prove a specific feature of the crime.

V. Challenging Documents

The major categories of challenges to documents are (1) relevancy (Rule 401-403), (2) hearsay, (3) authentication (Rules in the 900 series), and (4) best evidence (Rules in the 1000 series). I focus here on relevancy and authentication. Whether the evidence is real or demonstrative, both the logical relevancy of the evidence and authentication must be shown.

The burden of the proponent of the evidence under Rule 901(a) is to establish a sufficient showing that the item is what the proponent claims it to be. That claim sets out the terms of the battle for admission. What the party claims it to be must have relevancy under Rules 401-403. The claim also establishes the issues that must be authenticated under Rule 901.

If the item is real evidence, it played a role in the crime. It is logically relevant to teach the jury directly from their perceptions facts about the crime. However, to be logically relevant, it must be in the same or similar condition on the issue it is being used to prove as it was at the time of the crime. Changes in appearance, chemical composition, smell, etc. could destroy
logical relevancy. Thus, the proponent must establish under the authentication rules that there have been no changes or that the changes had minor or no impact on its utility. Analysis should focus on what relevant point the item being used to prove and its pertinent features to provide proof of that point. The item must then be authenticated with respect to those features.

Authenticating demonstrative evidence is often much easier than authenticating real evidence. Demonstrative evidence need only be helpful to understanding the witness’ testimony, and the demonstrative item need not have any particular form as long as helpful. For example, a drawing of the crime scene could be merely schematic or drawn to scale. Either would likely be helpful to the jury. However, if the proponent claims something about the demonstrative aid, it must be proven to satisfy authentication. To-scale drawings must be shown to actually be to-scale. Computer generated animations of multiple witnesses’ testimony and crime scene measurements must be shown to be accurate to be properly authenticated. A claim that the demonstrative aid is sophisticated and highly accurate may make it more easily admissible under Rules 401-403 as helpful to understanding the witness’ testimony, but those same claims of sophistication and accuracy make admission more challenging to authenticate under Rule 901.

I suggest that in some situations showing the trial court that erroneous authentication is plausible could be helpful in convincing a judge to exclude evidence. For example, if a full name and middle initial are offered as proof that a criminal record belongs to a certain person, a quick internet searches showing multiple individual with that same name demonstrates the inadequacy of this limited authentication evidence.