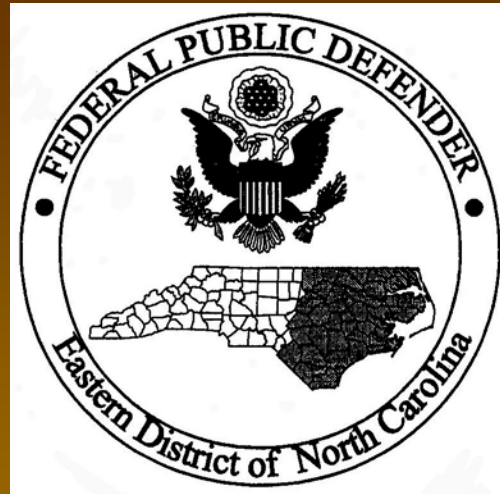


Federal Criminal Practice 2016



Raleigh, NC

Apr. 8, 2016

Evidence

Hearsay: New FRE 801(d)(1)(B)(ii)

Confrontation: The Problem of the Surrogate
Expert

Prof. Woody Woodruff

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New Rule 801(d)(1)(B)

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

- ***

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

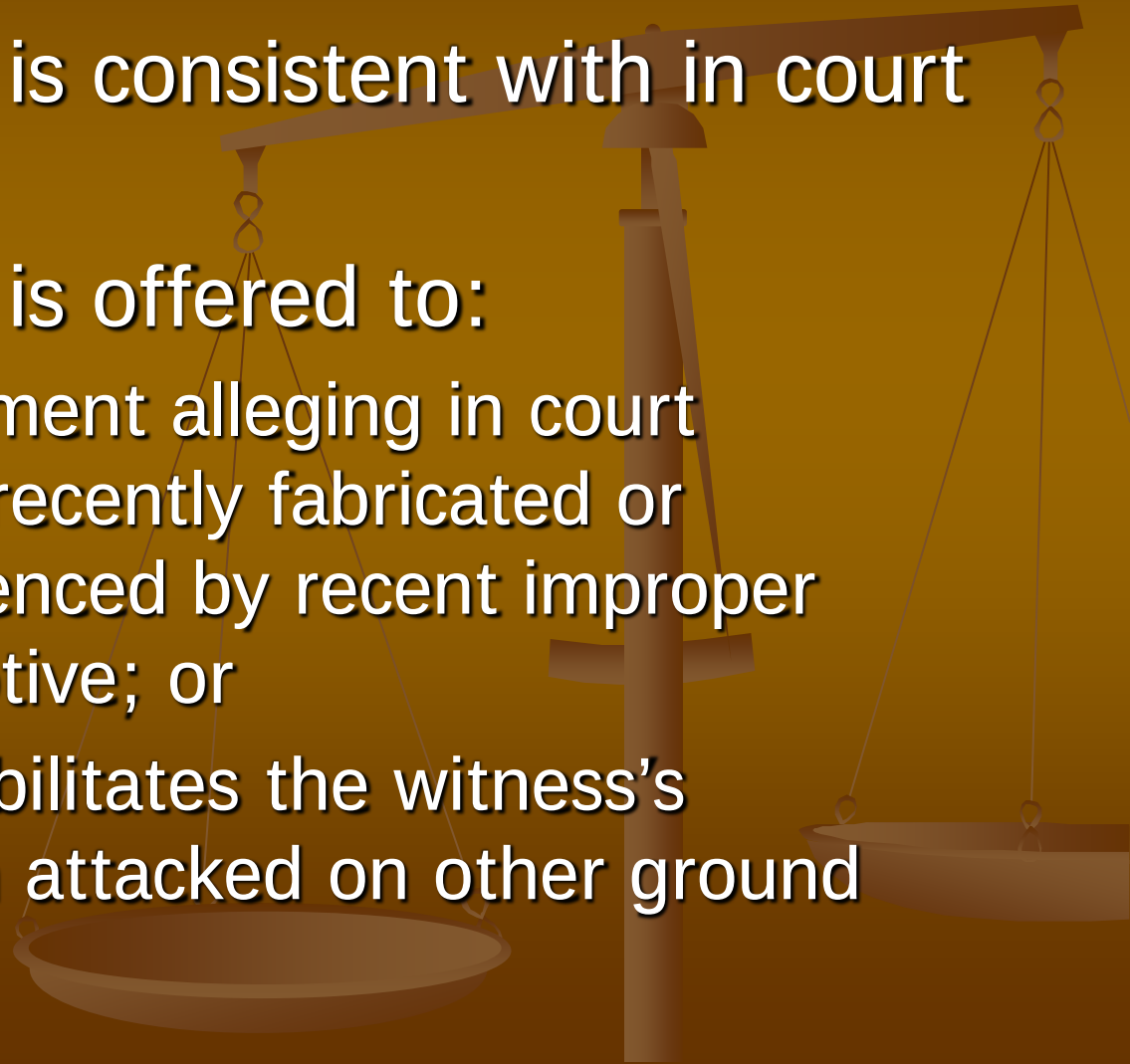
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- (B) is consistent with the declarant's testimony and is offered:

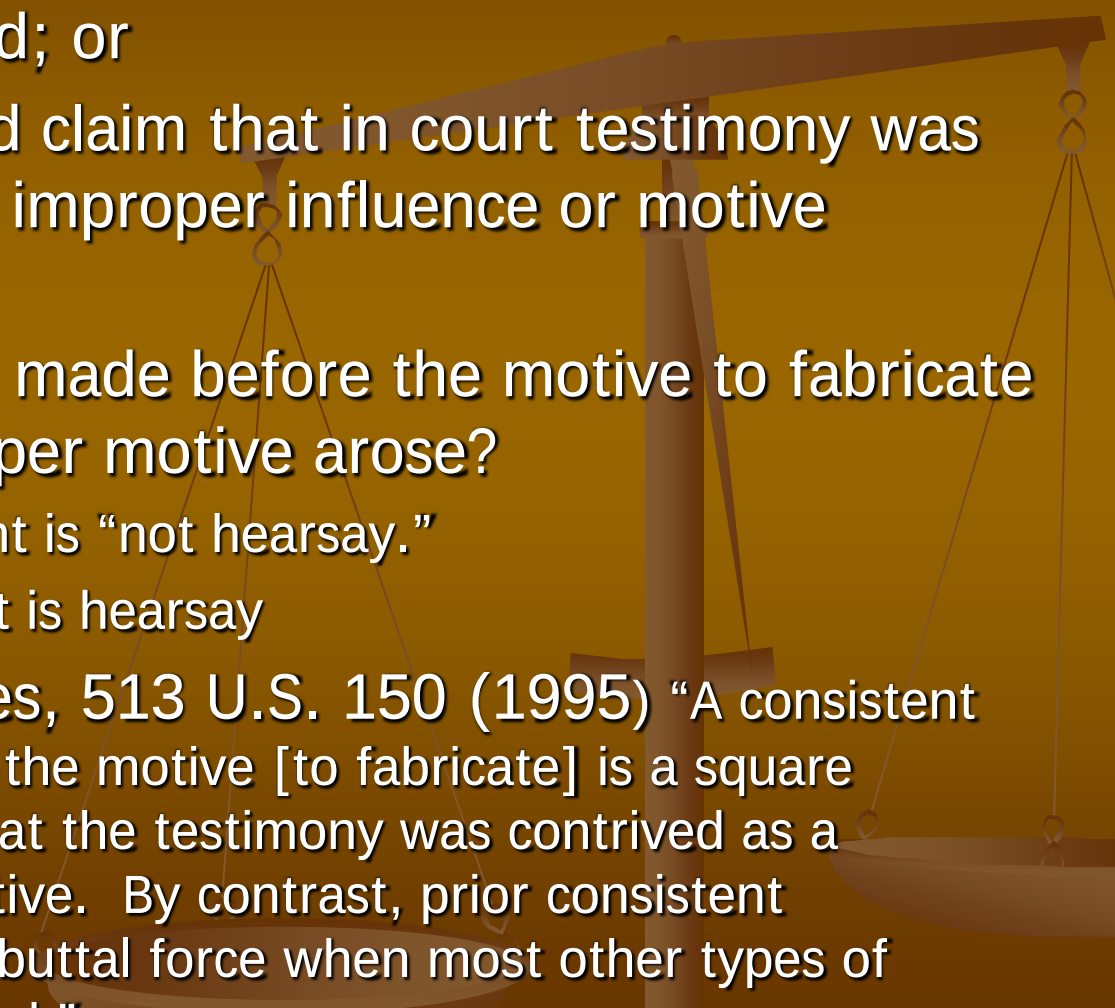
- (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
 - (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground;

Analytical Framework

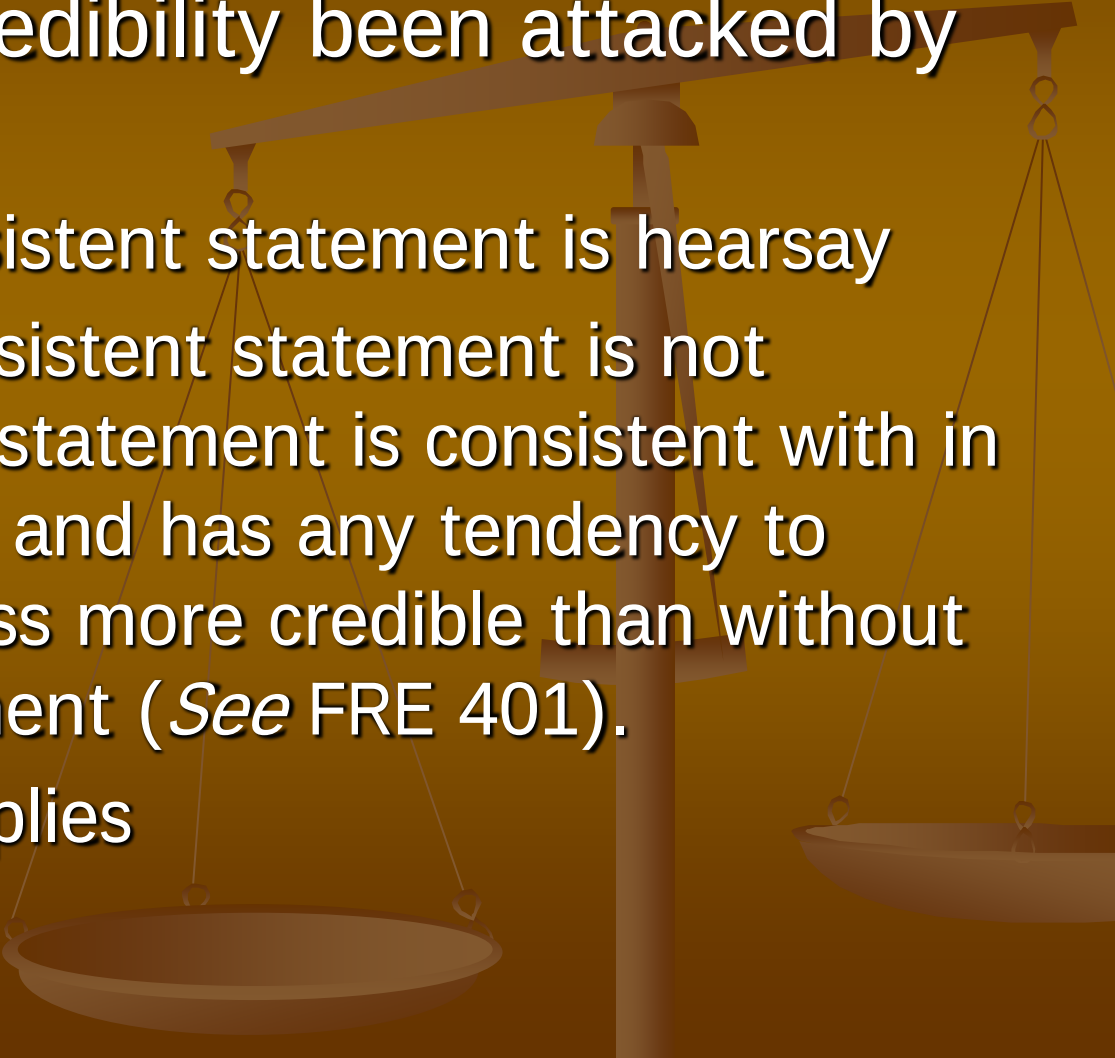
- Declarant testifies at trial
- Prior statement is consistent with in court testimony
- Prior statement is offered to:
 - Rebut impeachment alleging in court testimony was recently fabricated or testimony influenced by recent improper influence or motive; or
 - Otherwise rehabilitates the witness's credibility when attacked on other ground



Critical Questions: (B)(i)

- Has witness's credibility been attacked by
 - Express or implied claim that in court testimony was recently fabricated; or
 - Express or implied claim that in court testimony was product of recent improper influence or motive (bias)?
 - Was prior statement made before the motive to fabricate or the alleged improper motive arose?
 - “Yes”: Prior statement is “not hearsay.”
 - “No”: Prior statement is hearsay
 - *Tome v. United States*, 513 U.S. 150 (1995) “A consistent statement that predates the motive [to fabricate] is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive. By contrast, prior consistent statements carry little rebuttal force when most other types of impeachment are involved.”
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Critical Questions: (B)(ii)

- Has witness's credibility been attacked by other means?
 - “No”: Prior consistent statement is hearsay
 - “Yes”: Prior consistent statement is not hearsay if prior statement is consistent with in court testimony and has any tendency to make the witness more credible than without the prior statement (*See* FRE 401).
 - FRE 403 still applies
- 

Advisory Committee Note:

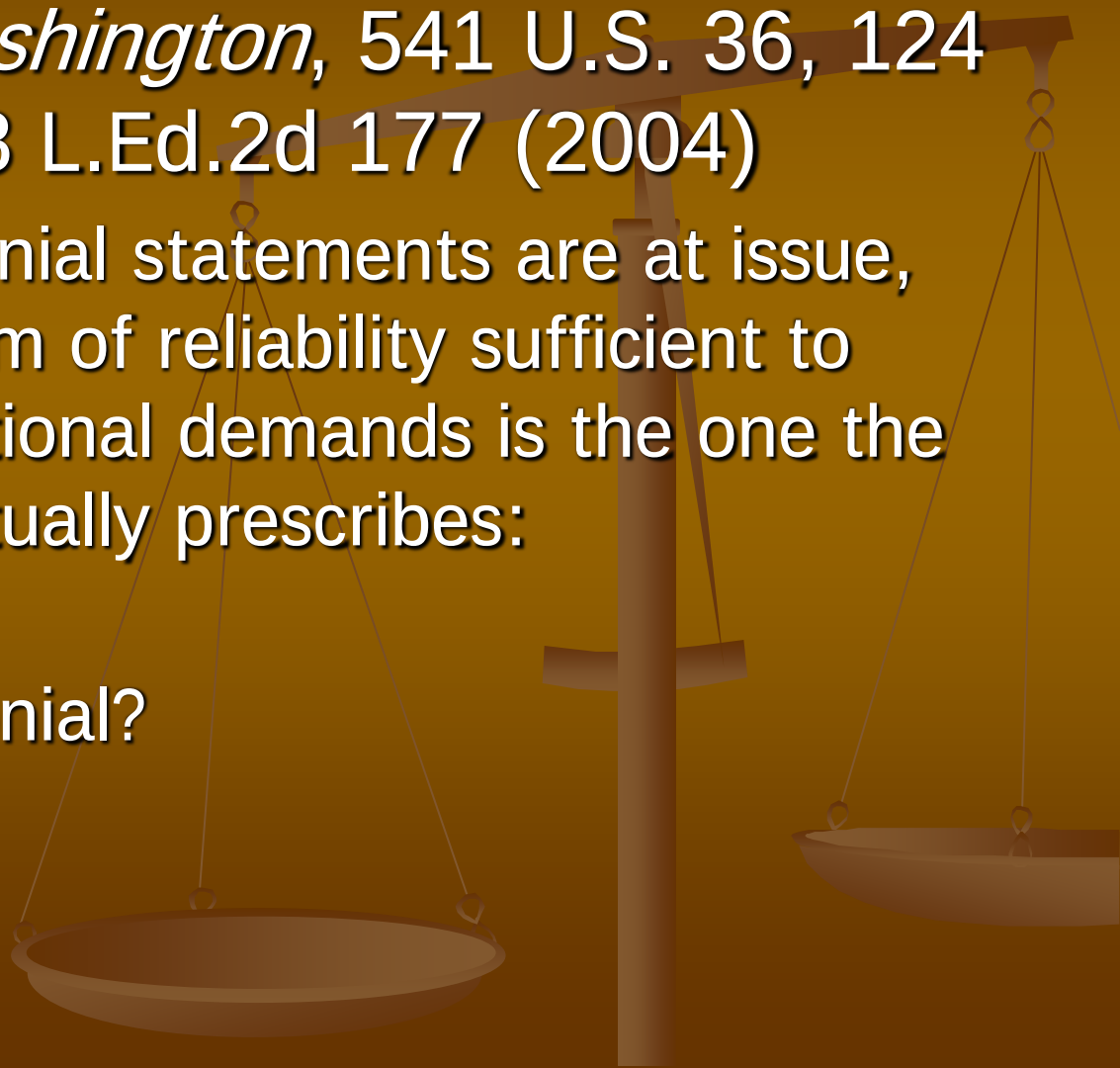
- “The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness—such as charges of inconsistency or faulty memory. . . . It does not allow impermissible bolstering of a witness. . . . The amendment does not make any consistent statement admissible that was not admissible previously—the only difference is that prior consistent statement otherwise admissible for rehabilitation are now admissible substantively as well.”

Examples

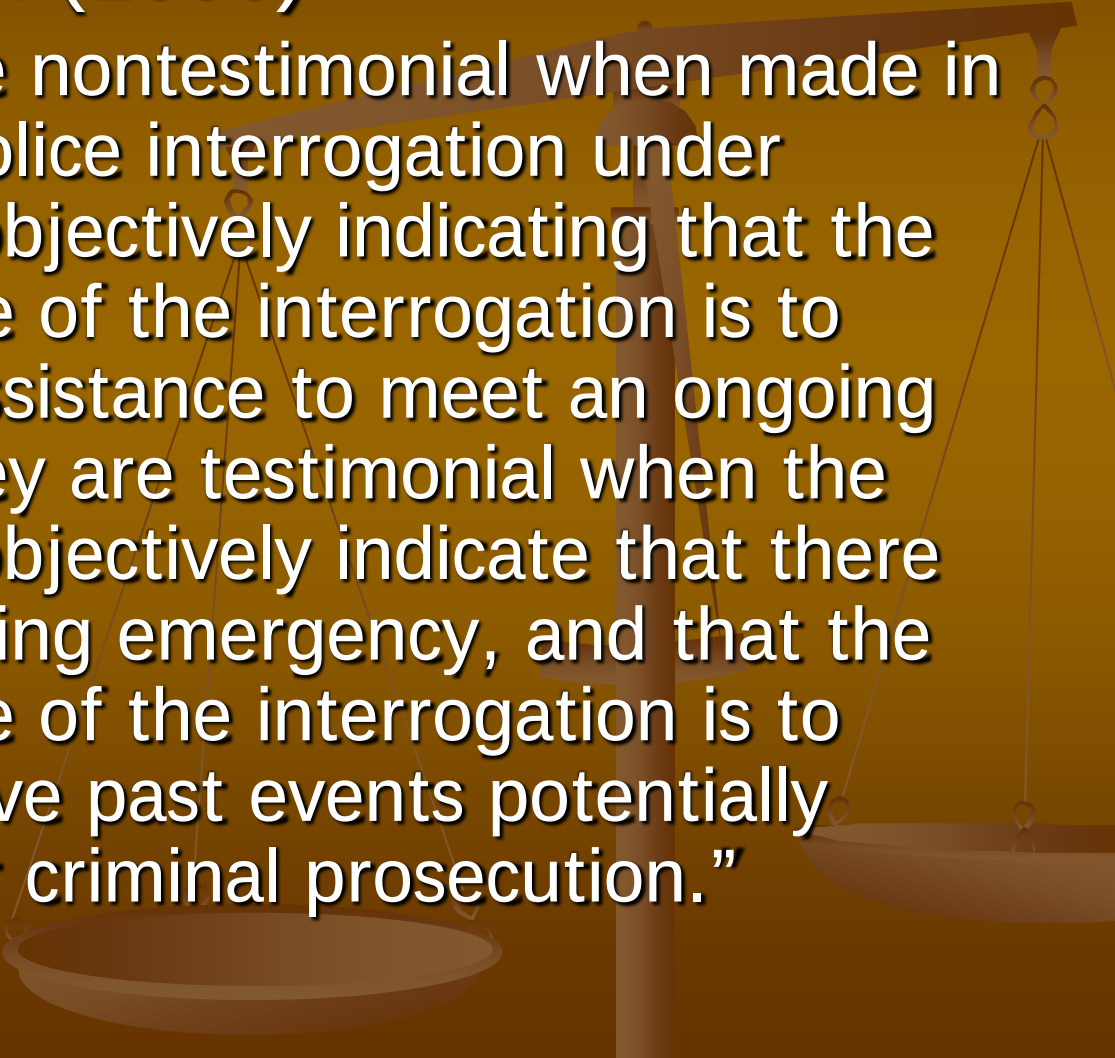
- New rule gives substantive effect to these kinds of prior consistent statements:
- U.S. v. Denton, 246 F.3d 784 (6th Cir. 2001) (witness permitted to read prior consistent statements to jury after defense impeached with prior inconsistent statements)
- U.S. v. Wigenton, 490 Fed. Appx 557 (4th Cir. 2012) (unpub) (FRE 601 permits introduction of other parts of GJ testimony to rehab witness after impeached with portions of GJ testimony inconsistent with trial testimony)

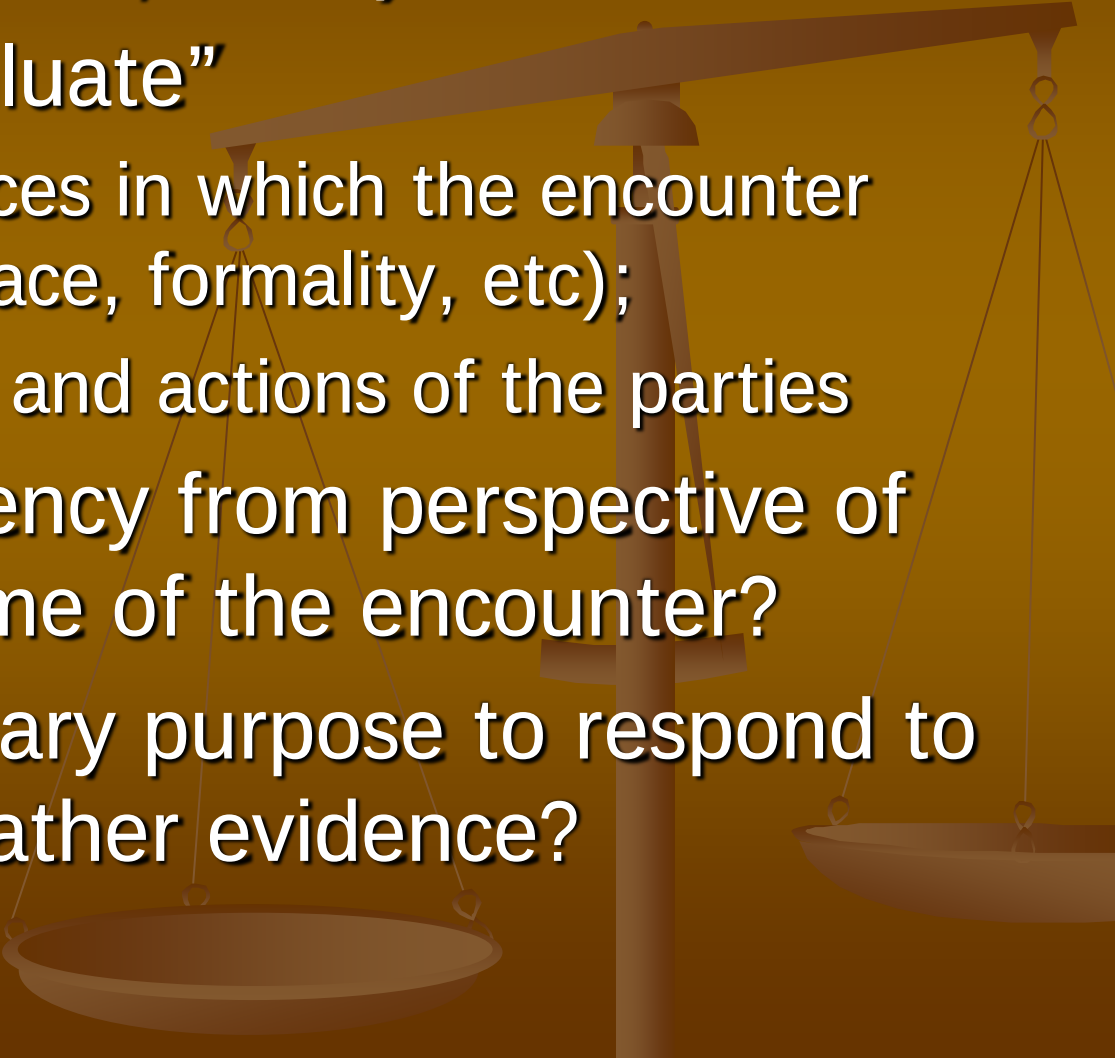
Confrontation

- *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004)
 - “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”
 - What is testimonial?



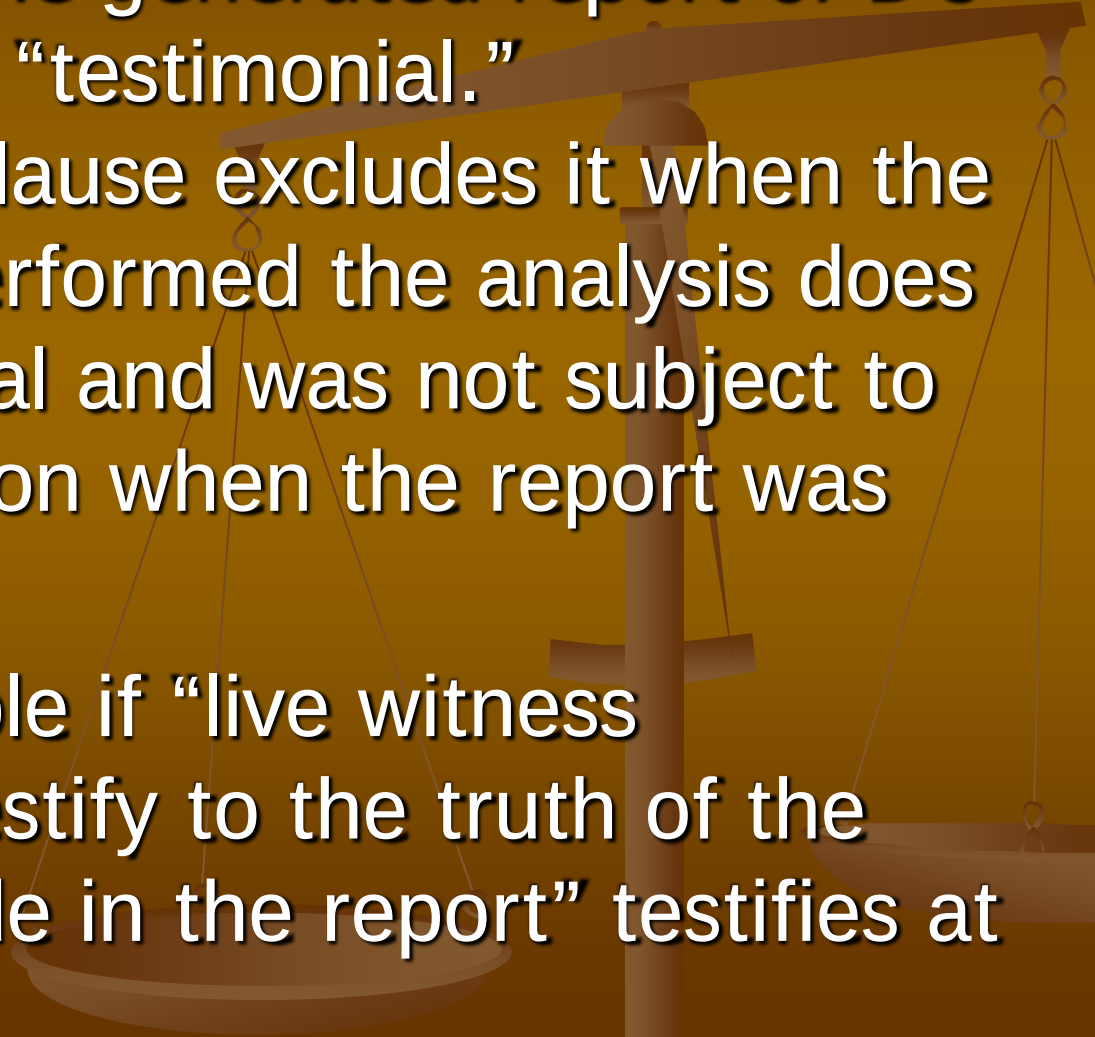
What is testimonial?

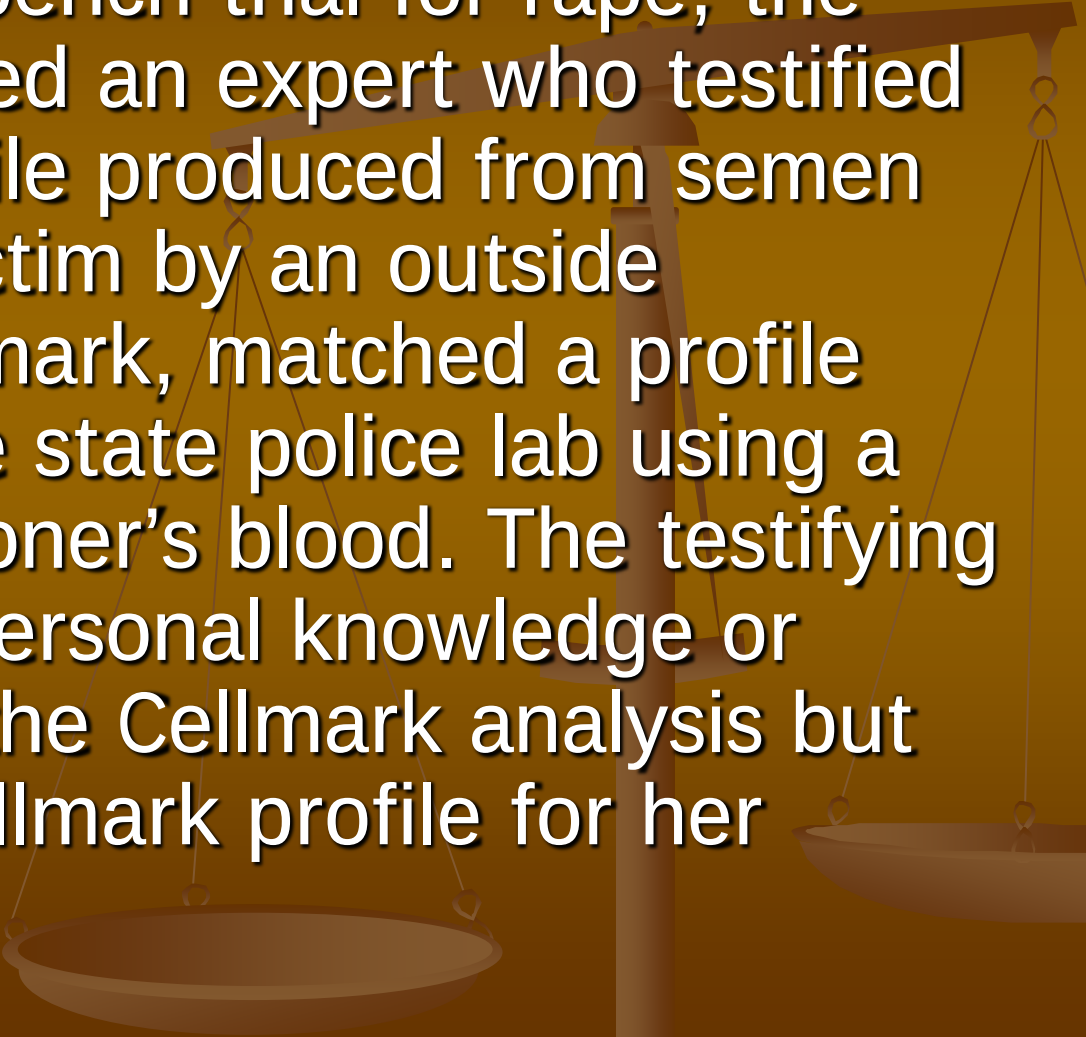
- *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 2273-4 (2006)
 - “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. 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.”
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- *Michigan v Bryant*, 562 U.S. ____; 2011 US Lexis 1713 (Feb. 28, 2011)
 - “Objectively evaluate”
 - the circumstances in which the encounter occurs (time, place, formality, etc);
 - The statements and actions of the parties
 - Ongoing emergency from perspective of parties at the time of the encounter?
 - If yes, was primary purpose to respond to emergency or gather evidence?

Forensic Reports and Surrogate Experts: What is testimonial?

- *Melendez-Díaz v. Massachusetts*, 557 U.S. 2527; 129 S. Ct. 2527; 174 L. Ed. 2d 314 (2009)
 - Affidavits of chemist that the material found in Defendant's car was cocaine and offered as official or business records are "testimonial" and not admissible unless the declarant testifies at trial or is unavailable and the Defendant had the opportunity to cross examine the declarant when the statement was made.

- 
- *New Mexico v. Bullcoming*, 564 U.S. ____ (2011) A machine generated report of D's blood-alcohol is "testimonial." Confrontation Clause excludes it when the lab tech who performed the analysis does not testify at trial and was not subject to cross-examination when the report was generated.
 - Report admissible if "live witness competent to testify to the truth of the statements made in the report" testifies at trial.

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- *Williams v. Illinois*, 132 S.Ct. 2221 (2012)
 - In petitioner's bench trial for rape, the prosecution called an expert who testified that a DNA profile produced from semen found on the victim by an outside laboratory, Cellmark, matched a profile produced by the state police lab using a sample of petitioner's blood. The testifying expert had no personal knowledge or involvement in the Cellmark analysis but relied on the Cellmark profile for her opinion.

Williams v. Illinois

- Specifically, does *Crawford* bar an expert from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify?
- We also decide whether *Crawford* substantially impedes the ability of prosecutors to introduce DNA evidence and thus may effectively relegate the prosecution in some cases to reliance on older, less reliable forms of proof?

Williams v. Illinois

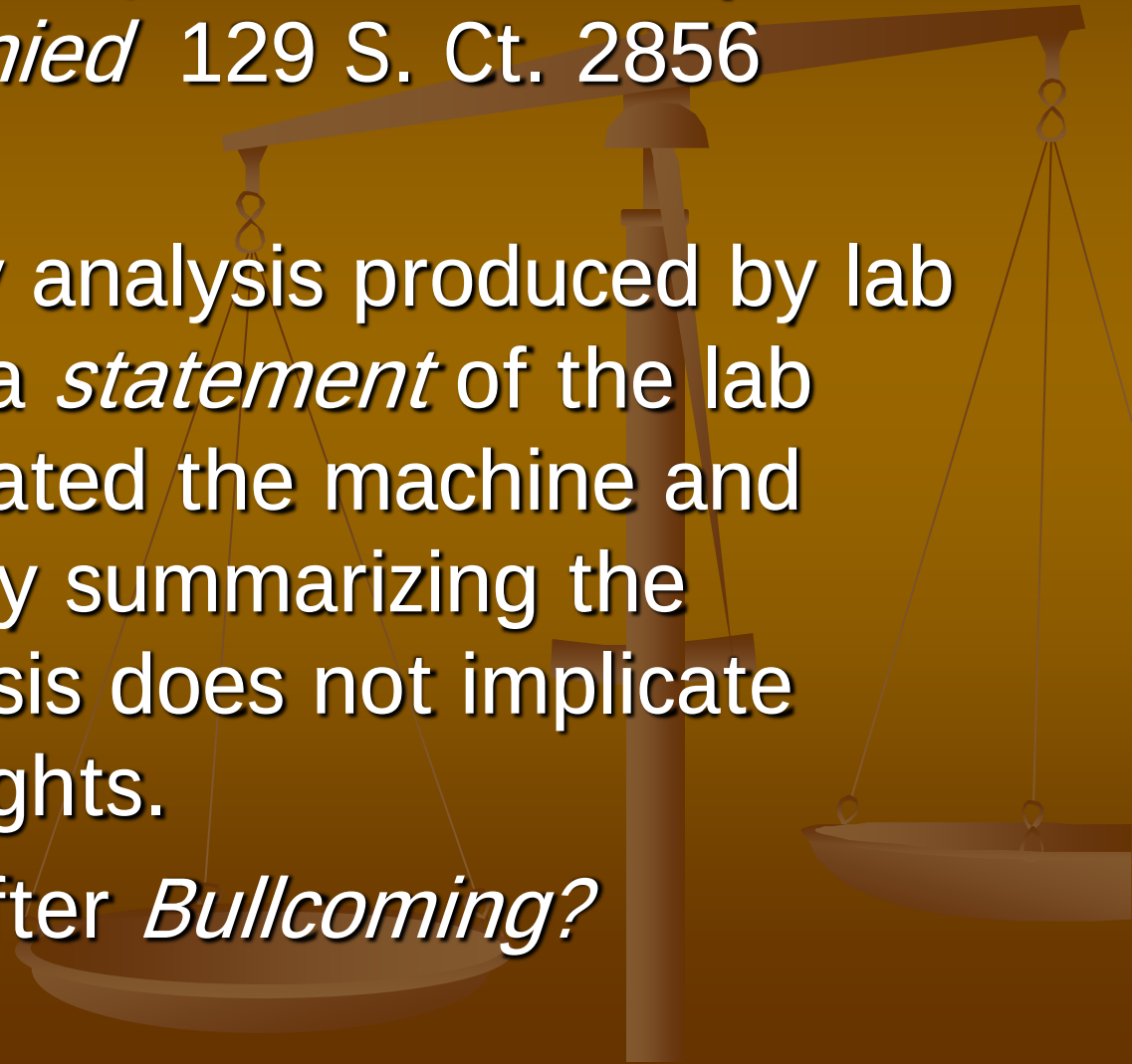
- 1st Issue: Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause. Applying this rule to the present case, we conclude that the expert's testimony did not violate the Sixth Amendment.
- Plurality: Alito, Roberts, Kennedy, & Breyer
- Dissent & Concurrence: Thomas, Kagan, Ginsburg, Sotomayor, & Scalia specifically rejected this rationale.

Williams v. Illinois

- 2d Issue: Cellmark lab tech was not a “witness against” the accused within the meaning of the Clause.
- The report was produced before any suspect was identified. The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose. And the profile that Cellmark provided was not inherently inculpatory.
- Plurality: Alito, Roberts, Kennedy & Breyer
- Dissent & Concurrence: Thomas, Kagan, Ginsburg, Sotomayor, & Scalia

4th Circuit's View

- *U.S. v. Washington*, 498 F.3d 225 (4th Cir. 2007), *cert. denied* 129 S. Ct. 2856 (2009).
- Blood chemistry analysis produced by lab machine is not a *statement* of the lab techs who operated the machine and expert testimony summarizing the computer analysis does not implicate confrontation rights.
- Still good law after *Bullcoming*?



4th Circuit's View

- *U.S. v. Johnson*, 587 F.3d 625 (4th Cir. 2009), *cert. denied* 78 U. S. L. W. 3611, 2010 U.S. LEXIS 3188 (Apr. 19, 2010)
- “An expert’s reliance on evidence that *Crawford* would bar if offered directly only becomes a problem where the witness is used as little more than a conduit or transmitter for testimonial hearsay....”

4th Circuit's View

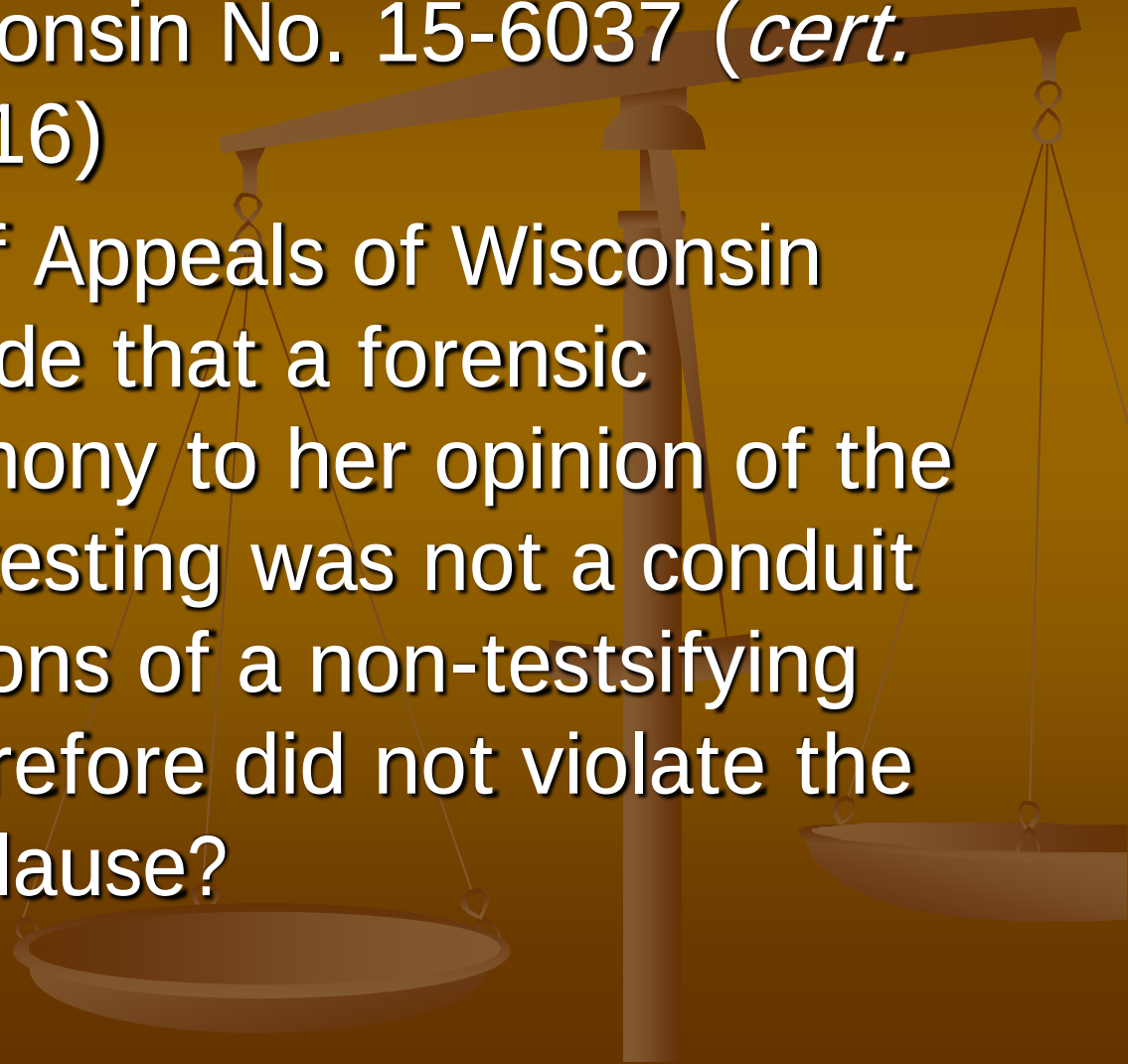
- *U.S. v. Shanton*, 513 Fed.Appx. 265 (4th Cir. 2013) (unpub) (applying *Williams* plurality and Thomas concurrence to find no 6th Amend violation in admission of DNA match evidence).
- *U.S. v. Summers*, 666 F.3d 192 (4th Cir. 2011) (DNA lab supervisor's opinion as to DNA match with defendant did not violate 6th Amend even though supervisor did none of the lab work but based his opinion on reports of the testing analysts).

Cert. Petitions Filed

- Griep v. Wisconsin No. 15-126 (*cert. denied* 1/11/2106):
- Is the testimony of a surrogate analyst, who merely reviews and restates the certified report of a nontestifying forensic analyst without performing any additional tests or analysis, and who did not peer review or supervise the testing, merely a conduit for the contents of the nontestifying analyst's report, in violation of the Confrontation Clause?

Cert. Petitions Filed

- Roalson v. Wisconsin No. 15-6037 (*cert. denied* 1/11/2016)
- Did the Court of Appeals of Wisconsin correctly conclude that a forensic scientist's testimony to her opinion of the results of DNA testing was not a conduit for the conclusions of a non-testsifying analyst and therefore did not violate the Confrontation Clause?

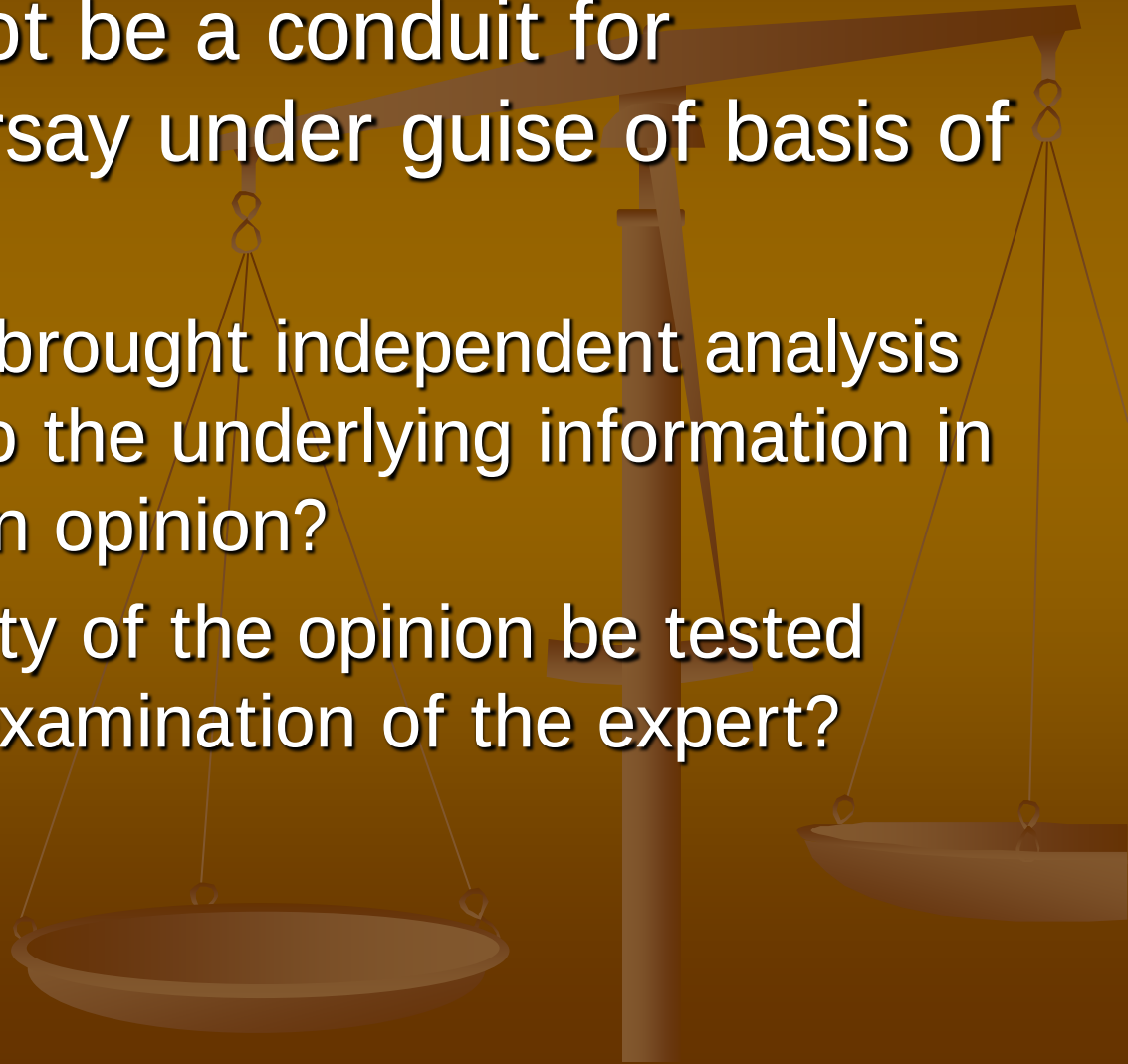


Cert. Petitions Filed

- Katso v. United States No. 14-405 (*cert. denied* 4/4/2016)
- If a forensic analyst reports on tests targeting the accused but does not appear at trial, does the Confrontation Clause permit another analyst, who did not observe any of the testing, to testify to an opinion that necessarily relies on testimonial assertions made by the first analyst?

“Surrogate” expert continuum

- Surrogate cannot be a conduit for testimonial hearsay under guise of basis of opinion.
 - Has the expert brought independent analysis and expertise to the underlying information in order to form an opinion?
 - Can the reliability of the opinion be tested through cross examination of the expert?

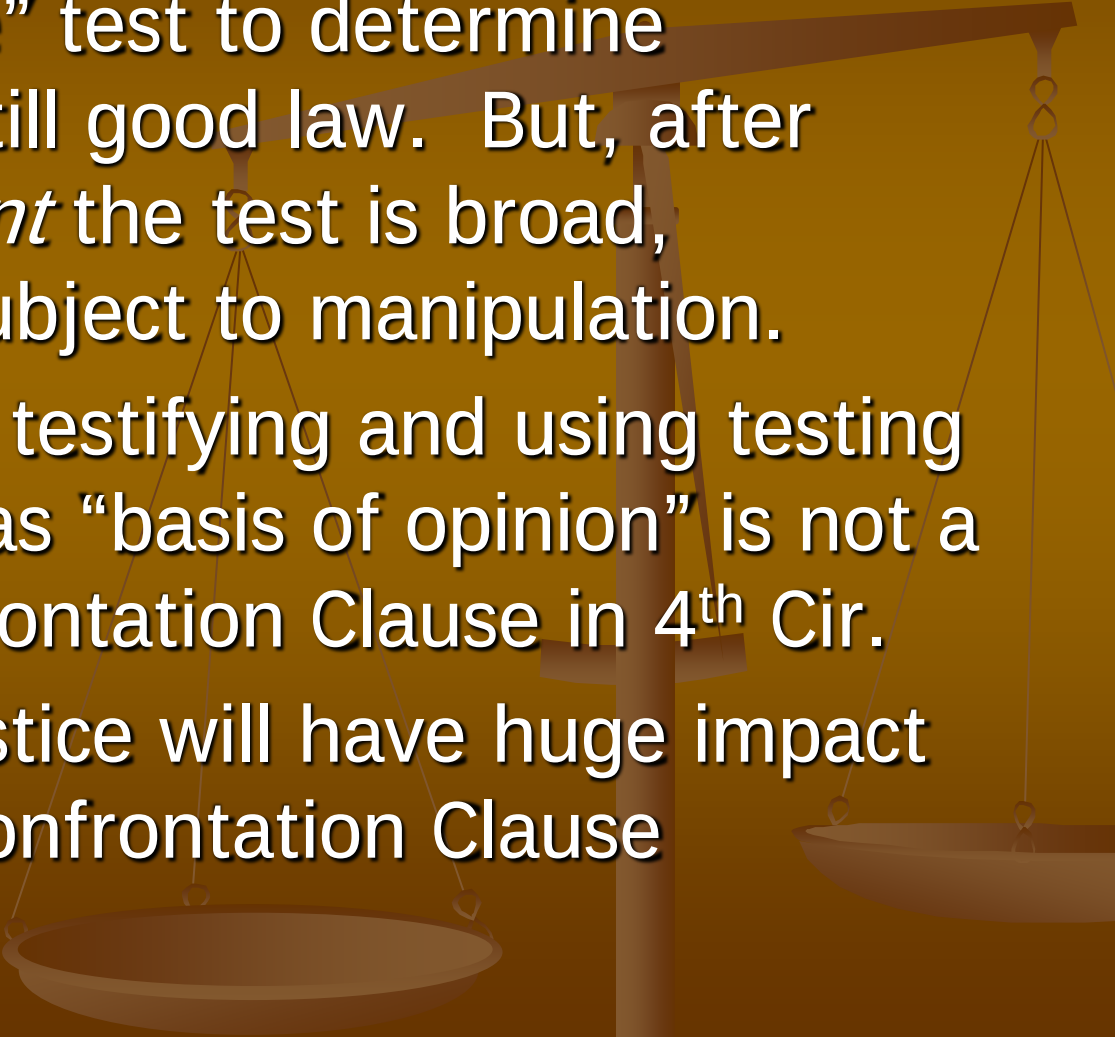


“Surrogate” expert continuum

- If not independently admissible the surrogate can disclose info as basis of opinion only if $PV \gg PE$ (FRE 703)
 - Is the underlying info the type reasonably relied upon by experts in the field?
 - Does the PV of underlying info in assisting the jury to evaluate the expert’s opinion substantially outweigh the PE to the accused of the jury accepting the underlying info as true?

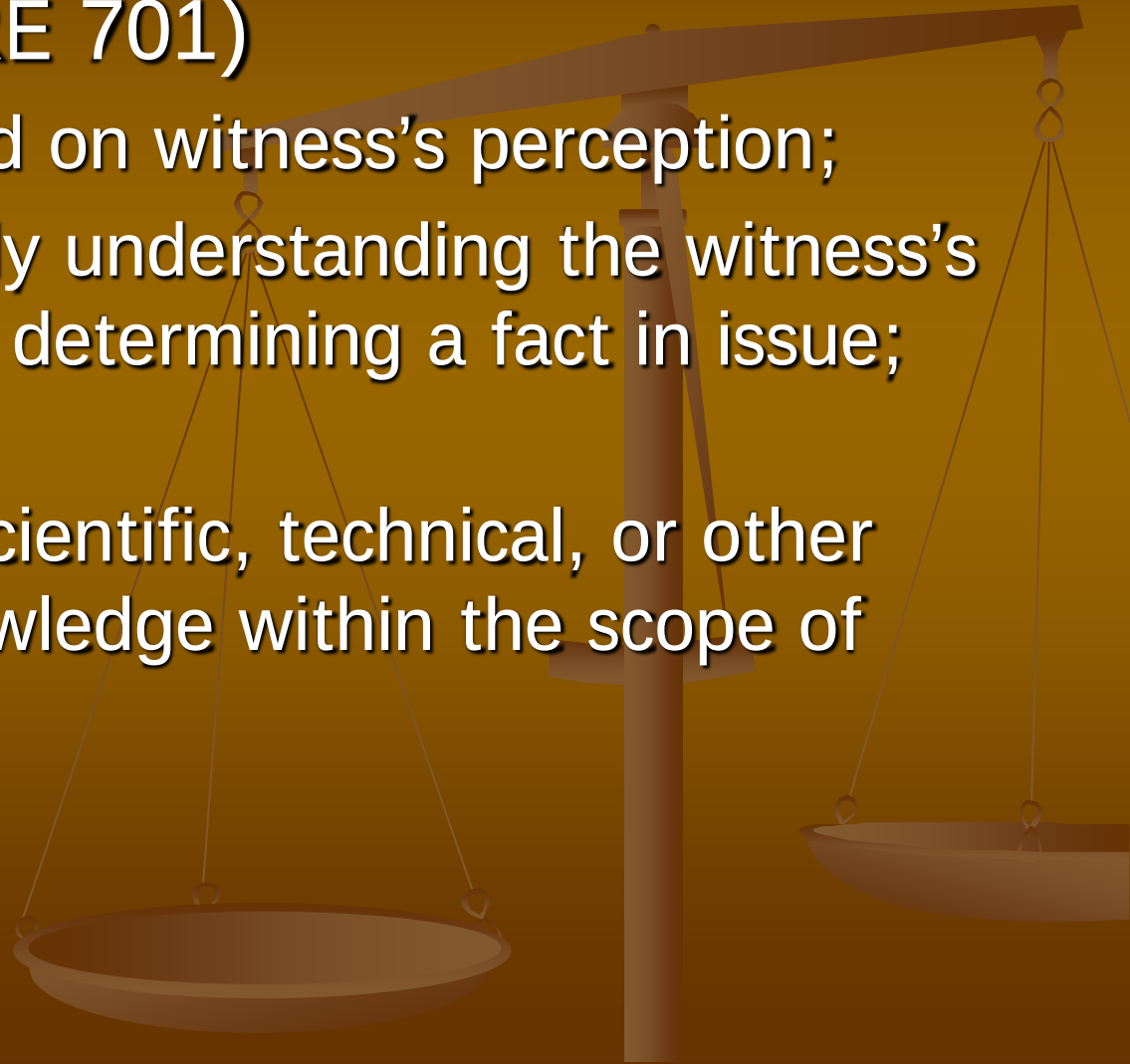


Where Are We?

- “Primary Purpose” test to determine “testimonial” is still good law. But, after *Michigan v. Bryant* the test is broad, confusing, and subject to manipulation.
 - Surrogate expert testifying and using testing analyst’s results as “basis of opinion” is not a violation of Confrontation Clause in 4th Cir.
 - Next SCOTUS Justice will have huge impact on direction of Confrontation Clause jurisprudence
- 

Lay Opinion v. Expert Opinion

- Lay Opinion (FRE 701)
 - Rationally based on witness's perception;
 - Helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
 - Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702



Lay Opinion v. Expert Opinion

- U.S. v. Perkins, 470 F.3d 150 (4th Cir. 2006)
- Officers who observed defendant police officer violently kick handcuffed and subdued suspect permitted to testify to lay opinion that defendant's actions were not "reasonable" and there was no "law enforcement" reason for the defendant to kick the suspect.
- *But see, Kopf v. Skym*, 993 F.2d 374 (4th Cir. 1993)