

The Confrontation Clause after *Crawford v. Washington*

Christopher J. Munch

Judge

1st Judicial District of Colorado

2013 - Utah



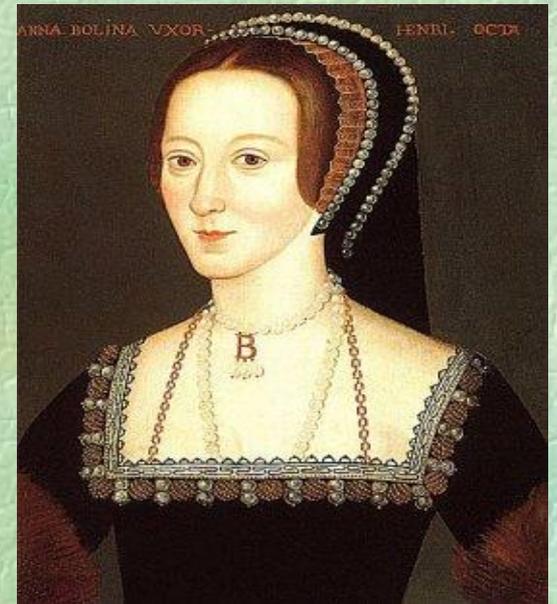






“*Civil Law*” [Continental - Inquisitorial]

§ *Evidenced was gathered by court officers called Justices of the Peace, who reported their findings to the Court.*



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Justices of the Peace, who
reported their findings to
the Court.*











“Civil Law” [Continental - Inquisitorial –
*Evidenced gathered by Justices of the Peace
who report their findings*]

“Common Law” [English – U.S.
Adversarial – *Evidence collected by
the advocates , (not court officers)*

Witnesses (& evidence)–not summaries
-- presented in open court

and *cross-examined*

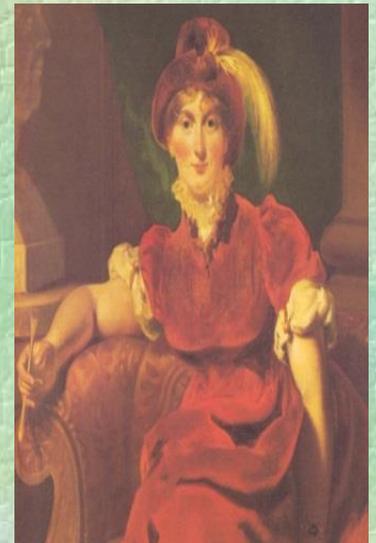
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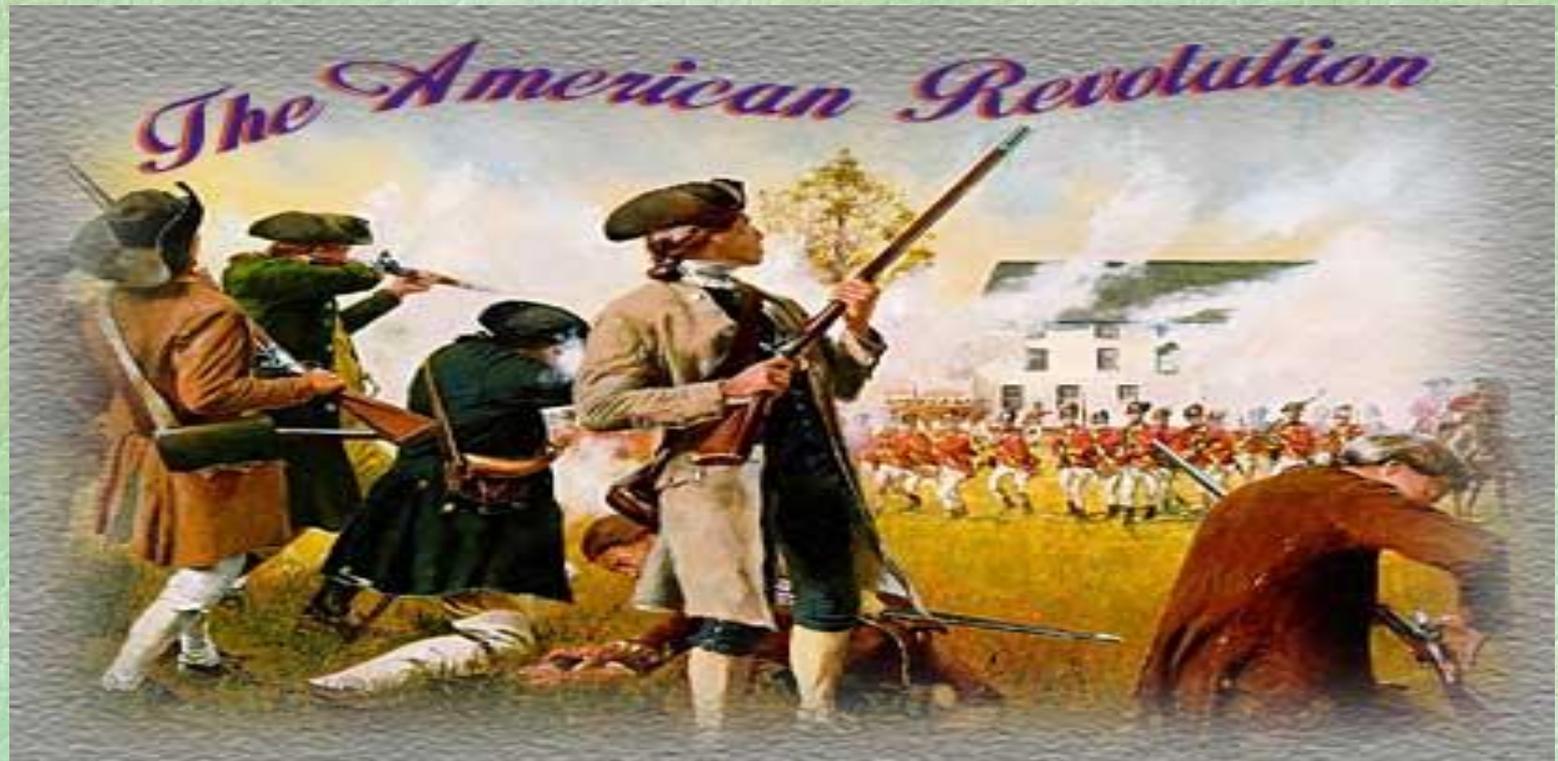
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Common law rule
against *Hearsay*

1776



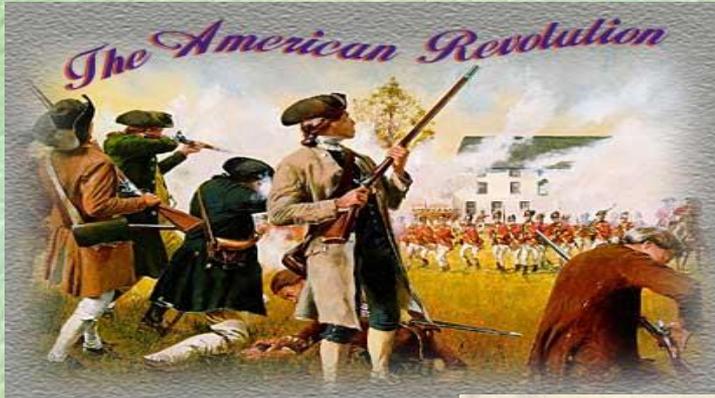
1776



1789



1776



1789

Bill of Rights

Congress OF THE United States,
*begun and held at the City of New York, on
 Wednesday, the fourth of March, one thousand seven hundred and eighty nine.*

The Conventions of a number of the States having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best insure the beneficent ends of its institution:

Resolved, by the SENATE and HOUSE of REPRESENTATIVES of the UNITED STATES of AMERICA in Congress assembled, two thirds of both Houses concurring, That the following Articles be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States; all, or any of which articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution, viz.

Articles in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the Original Constitution.

Article the first After the first enumeration required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred, after which, the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons. [Not Ratified]

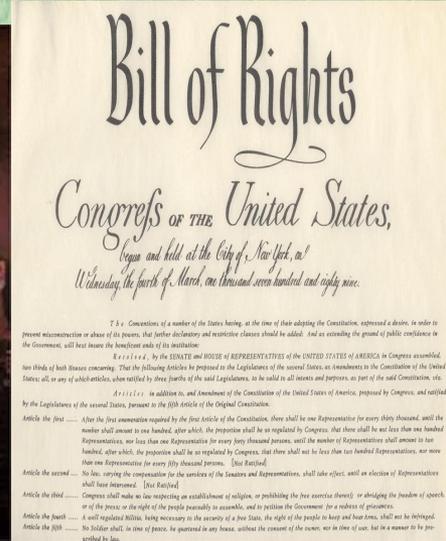
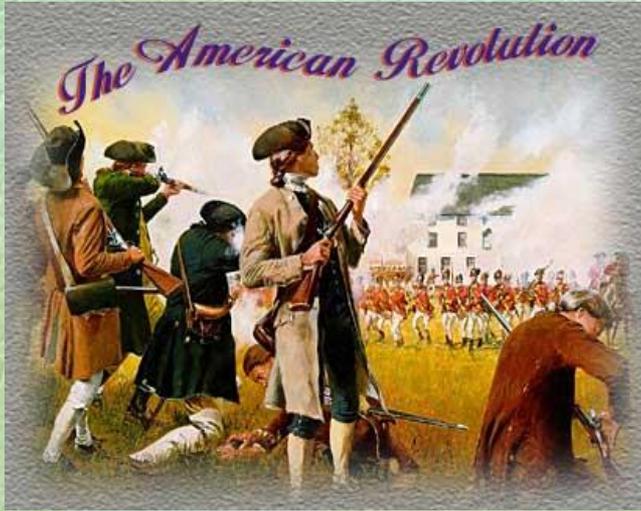
Article the second No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened. [Not Ratified]

Article the third Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article the fourth A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

1791

Confrontation History

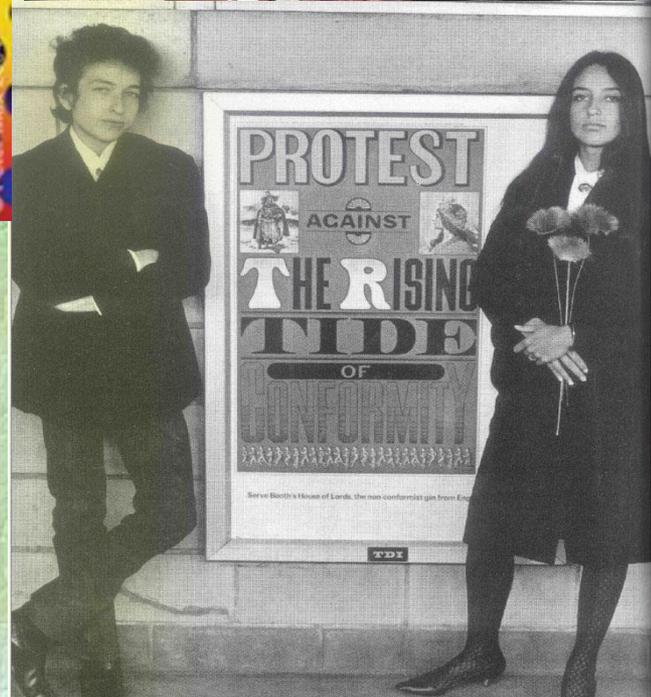


“In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”
6th Amendment adopted 1791.

The States recognized
the Common law rule
against *Hearsay*



The 1960s





Selective Incorporation

 Amendment VI *“In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”* adopted 1791.
Pointer v. Texas, 85 S.Ct 1065 (1965)

 *Barber v. Page*, 88 S.Ct. 1318 (1968)

 *“Good faith effort”*

Selective Incorporation

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Barber v. Page, 88 S.Ct. 1318 (1968)

“Good faith effort”

Ohio v. Roberts, 100 S.Ct 2531 (1980) **Overruled in Crawford**

 *In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate “**indicia of reliability.**” Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of **particularized guarantees of trustworthiness.** At 2539.*

Selective Incorporation

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Barber v. Page, 88 S.Ct. 1318 (1968)

Ohio v. Roberts, 100 S.Ct 2531 (1980) *Overruled in Crawford*

 *Idaho v. Wright*, 110 S.Ct. 3139 (1990) *Overruled in Crawford*

 *Indicia of reliability - particularized guarantees of trustworthiness*

 *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887 (1999).

 *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct.

1354 (2004) – *Reliability approach discarded*

Reliability is not an adequate substitute for cross-examination?

“ . . . the **[Confrontation] Clause**’s *ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.*” 124 S.Ct. 1354, at1370

Crawford v. Washington,

124 S. Ct. 1354 (2004)

Testimonial statements *are not admissible*

(for the truth of the matter asserted) against a criminal

defendant unless:

1. The declarant testifies at the trial, *or*

2a. The declarant is unavailable *and*

2b. the defendant had a prior opportunity for

cross-examination.

Crawford v. Washington, 124 S. Ct. 1354 (2004)

If testimonial, there is no adequate substitute for cross-examination.

no “*indicia of reliability*” or

“*particularized guarantees of trustworthiness*” that can substitute for cross-examination.

Contrary language in *Ohio v. Roberts* and *Idaho v. Wright* is **overruled**.

Crawford v. Washington, 124 S. Ct. 1354 (2004)

Why this case?

Then *why* did the Supreme Court take this case?

Some have been skeptical of the “indicia of reliability” approach for a while

They didn’t like what happened

after Lilly v. Virginia 527 U.S. 116 , 119 S.Ct. 1887 (1999).

Lilly v. Virginia 527 U.S. 116 , 119 S.Ct. 1887 (1999).

. . *One cogent reminder: It is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted . . . when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing.*" at 137.

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004)

“... [A recent study showed that] . . . after Lilly, appellate courts admitted accomplice statements to the authorities in 25 out of 70 cases – more than one-third of the time.” at 64.

Crawford v. Washington, 124 S. Ct. 1354 (2004)

What does “*testimonial*” mean?

“We leave to another day any effort to spell out a comprehensive definition of ‘testimonial’.” at 1374.

*[T]he thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists, see *ibid.*, is covered by the new rule. They need them **now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.** *Crawford v. Washington* 124 S.Ct. 1354 (2004) at 1378.*

Crawford v. Washington, 124 S. Ct. 1354 (2004)

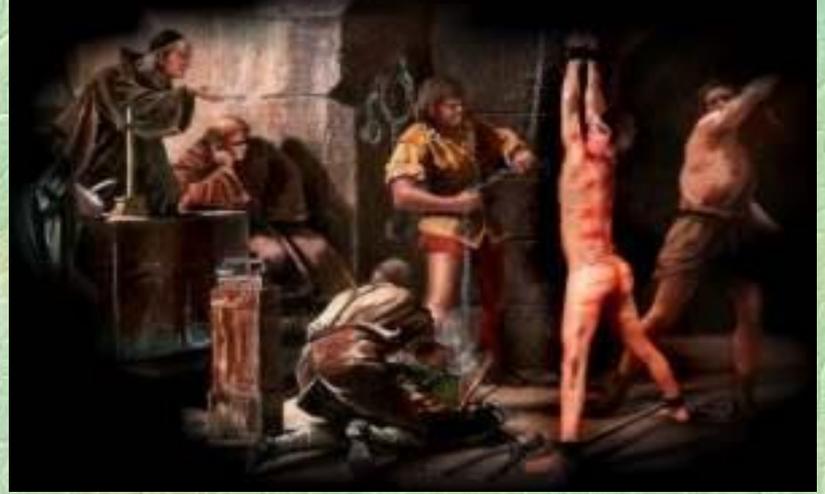
What does “*testimonial*” mean?

“*Civil*” [Continental - Inquisitorial] *vs.*

“*Common Law*” [English - Adversarial]
systems.

Sir Walter Raleigh got a raw deal.

“*Police interrogations bear a striking
resemblance to examinations by
justices of the peace in England.*” *at 1364.*



Crawford v. Washington, 124 S. Ct. 1354 (2004)

What does “*testimonial*” mean?

“We leave to another day any effort to spell out a comprehensive definition of ‘testimonial’.

Whatever else the term covers, it applies at a minimum to”

Crawford v. Washington, 124 S. Ct. 1354 (2004)

What does “testimonial” mean?

“prior testimony at a preliminary hearing, before a grand jury, or at a former trial

Crawford v. Washington, 124 S. Ct. 1354 (2004)

What does “testimonial” mean?

“prior testimony at a preliminary hearing, before a grand jury, or at a former trial and to police interrogations” at 1374.

Crawford v. Washington, 124 S. Ct. 1354 (2004)

“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.” at 1364

Crawford v. Washington, 124 S. Ct. 1354 (2004)

Scalia's hints

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What is not “testimonial” ?

“Most of the [historical] hearsay exceptions covered statements that by their nature were not testimonial – for example, business records or statements in furtherance of a conspiracy.” at 1367.

Crawford v. Washington, 124 S. Ct. 1354 (2004)

“**Most** of the [historical] *hearsay exceptions* . . . were not testimonial”

“The one deviant we have found involves *dying declarations* (at 1367, fn 6.)”

***Police Interrogations --
Ongoing Emergency Statements***

Davis v. Washington and

Hammon v. Indiana,

547 U.S. 813 (2006)

Michigan v. Bryant, 131

S.Ct. 1143 (2011)

Police Interrogations

☐ *Crawford v. Washington,*

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Police Interrogations: Davis v. Washington and Hammon v. Indiana, 547 U.S. 813 (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. at 2274

*Police Interrogations: Davis v. Washington and
Hammon v. Indiana*, 547 U.S. 813 (2006)

[Interrogations] 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*. *at 2274-75*

Problem

Davis caused many judges to believe we had a bright line ongoing emergency test

□ If the declarant was telling authorities *what was happening now*, it was *non - testimonial*;

□ If she was telling them *what already happened*, it was *testimonial*

Police Interrogations: Michigan v. Bryant,
131 S.Ct. 1143 (2011)

Bryant and Covington argued and Bryant shot Covington thru Bryant's back door. Covington drove to a nearby gas station and the police were called. They asked what happened. He said Bryant shot him thru the door, and he drove to the gas station. Covington died of his wounds.

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Police Interrogations: Michigan v. Bryant, 131 S.Ct. 1143 (2011)

At the pre-*Crawford* trial, Covington's statements were admitted as excited utterances.



Bryant was convicted of 2nd Degree Murder.

Post *Crawford*, Michigan Court of Appeals found the statements to be non testimonial.

The Michigan Supreme Court, based on *Hammon*, found the statements testimonial and reversed.

Police Interrogations: Michigan v. Bryant, 131 S.Ct. 1143 (2011)

The U. S. Supreme Court found that the statements were *non-testimonial*, reversed the Michigan Supreme Court and remanded the case.



Police Interrogations: Michigan v. Bryant, 131 S.Ct. 1143 (2011)

Bryant helps us understand:

- (1) our focus is on the **“Primary Purpose”** of the statement.
- (2) Trial court looks at all the circumstances.
- (3) The analysis is objective, not subjective.
- (4) For statements to police, do **“the circumstances objectively indicate an ongoing emergency.”**
- (5) **Ongoing Emergency analysis is like Excited Utterance analysis.**
- (6) How does **“formality”** affect the analysis.

Michigan v. Bryant, 131 S.Ct. 1143 (2011)



The [currently] proper analysis of statements to government agents.

What was the “primary purpose” of the interaction?

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If it is to preserve or create a record with a view toward prosecution, there is a Confrontation Clause problem

*If it was **not** to preserve or create a record with a view toward prosecution, **while** there may be a hearsay or Due Process problem, there is **no** Confrontation Clause problem.*

Police Interrogations: Michigan v. Bryant,

2011 WL 676964 (2011)

To determine the “*primary purpose*” of a police interrogation, the trial court must look at *all the circumstances* of the encounter. “*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.*” at 1161.

Police Interrogations: Michigan v. Bryant, 131 S.Ct. 1143 (2011)

“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 ‘Undoubtedly most police officers . . . would act out of a host of different, instinctive, and largely unverifiable motives-their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect . . .’ at 1161.

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Police Interrogations: Michigan v. Bryant, 131 S.Ct. 1143 (2011)

“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. The victim's injuries could be so debilitating as to prevent her from thinking sufficiently clearly to understand whether her statements are for the purpose of addressing an ongoing emergency or for the purpose of future prosecution.” *at 1161.*

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*If it was not to preserve or create a record with a view toward prosecution, while **there may be a hearsay or Due Process problem**, there is no Confrontation Clause problem.*

Michigan v. Bryant, 131 S.Ct. 1143 (2011)

Compare to Excited Utterances

The existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial” *at 1162.*

“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,”

131 S.Ct. 1143 (2011) *at*

Michigan v. Bryant, 131 S.Ct. 1143 (2011)

The existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation. .

.. [T]he existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public. at 1162. [like excited utterance analysis]

Michigan v. Bryant, 131 S.Ct. 1143 (2011)

Objective, not subjective analysis

“ . . . 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.” at 1156.

Ongoing Emergency Factors

- ☐ *Scope of potential victims*
- ☐ **Weapons used or possessed**
- ☐ *Extent of Injuries*
- ☐ Location
- ☐ Magnitude of Response
- ☐ *Ongoing stream of information*
- ☐ **Passage of Time**
- ☐ *Formality*



*“An accuser who makes a formal
statement”* *Crawford v. Washington*, 124 S. Ct. 1354
(2004)

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. 131 S.Ct. 1143 *at* 1160.

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1143 *at* 1160.



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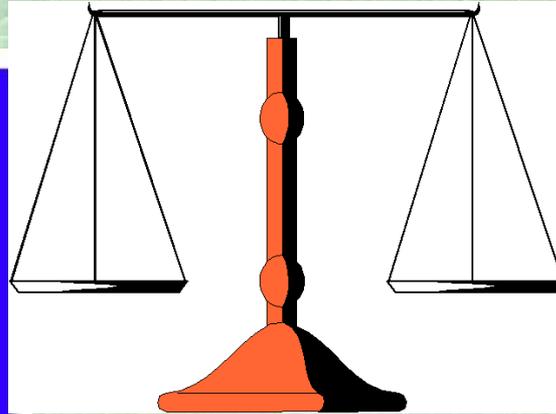




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Balancing



For encounters with government, what was the “primary purpose” of the interaction?

If it is to preserve or create a record with a view toward prosecution, there is a Confrontation Clause problem.

If it was not to preserve or create a record with a view toward prosecution, while there may be a hearsay or Due Process problem, there is no Confrontation Clause problem.

Primary Purpose of the interview?

Accuser v. Person

Formal v. Casual

Official v. Acquaintance



Solely for medical treatment, for psychological assessment, for a child protection team assessment, for D&N evaluation (of removal from the home) a forensic interview to investigate a crime?

Where did the interview occur?

Accuser v. Person

Formal v. Casual

Official v. Acquaintance



Was it *on the street*, at the crime scene, in an **emergency room**, in a *psychologist's office*, in a child interview room equipped with a video recording machine and anatomically correct dolls?

Relationship among interviewer,
declarant and police.

Accuser v. Person

Formal v. Casual

Official v. Acquaintance



The declarant and interviewer were
acquainted, *he avoids police when
possible; on the same child
protection team but police may not
sit in, allows police to observe the
interview; is employed to assist the
police.*

Scientific Evidence

Melendez-Diaz v. Mass.,

*129 S.Ct. 2527 (2009) **Reversed***

Bullcoming v. N.M. 131 S.Ct.

*2705(2011) **Reversed***

Williams v. Ill. 132 S.Ct. 2221

*(2012) **Affirmed***

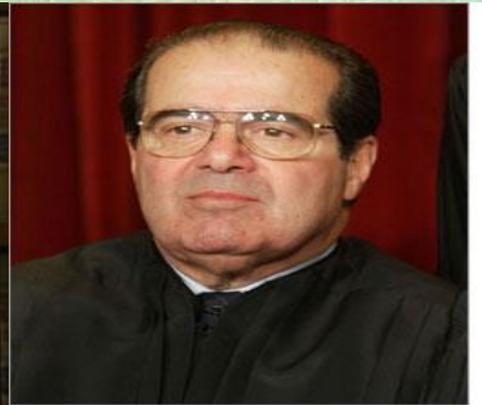
Scientific Evidence

In general, scientific evidence should not be a Confrontation Clause problem.

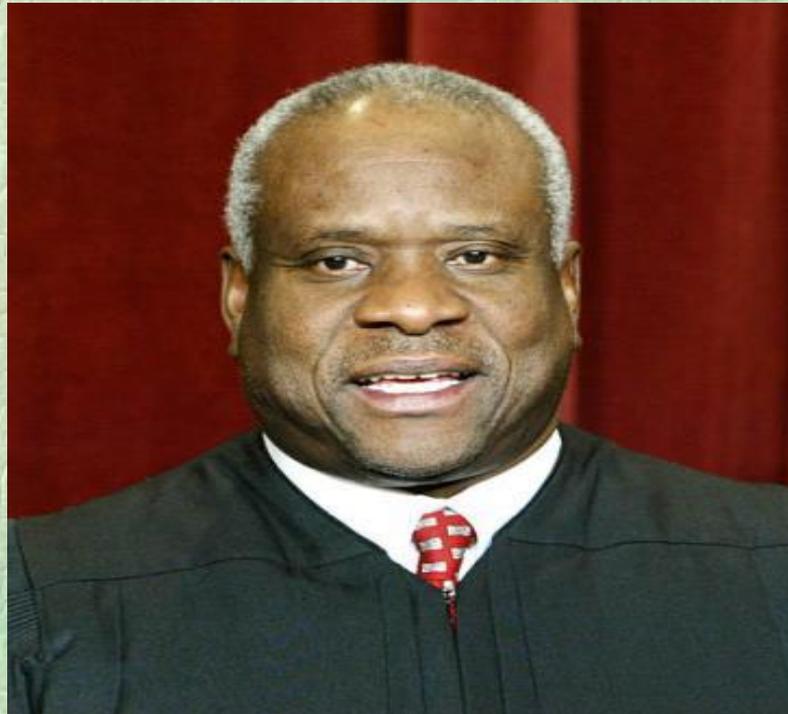


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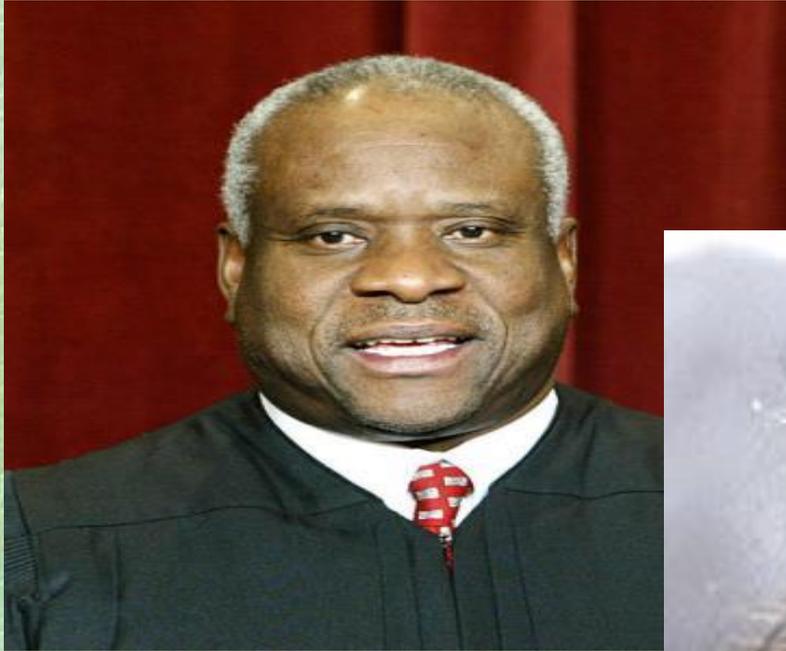
Scientific evidence is no different than any other.



Scientific Evidence



Scientific Evidence



The Princess Bride

“You keep using that word. I do not think it means what you think it means.”



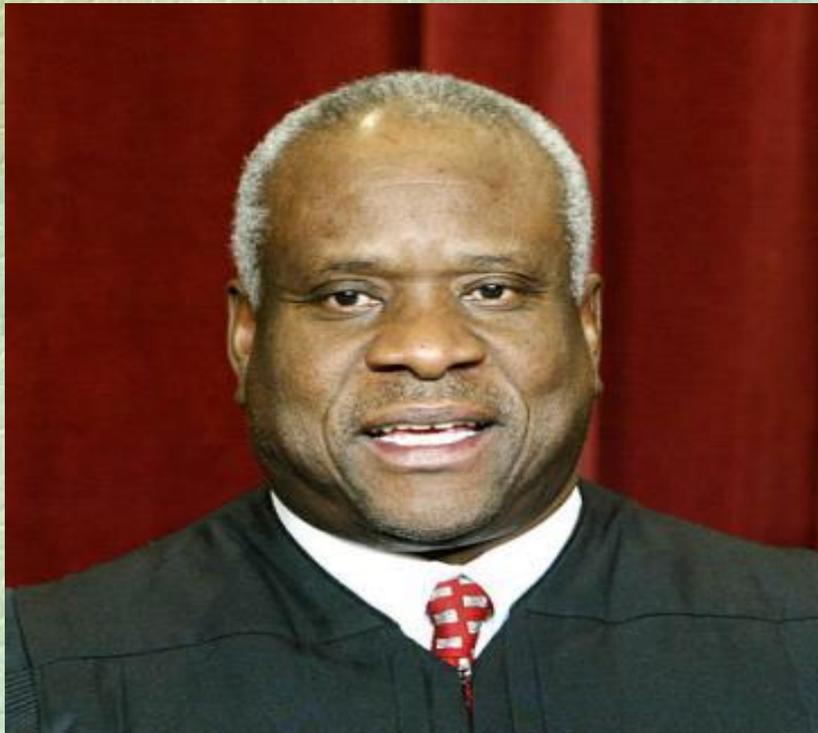
INCONCIEVABLE

I do not think it means what you think it means.



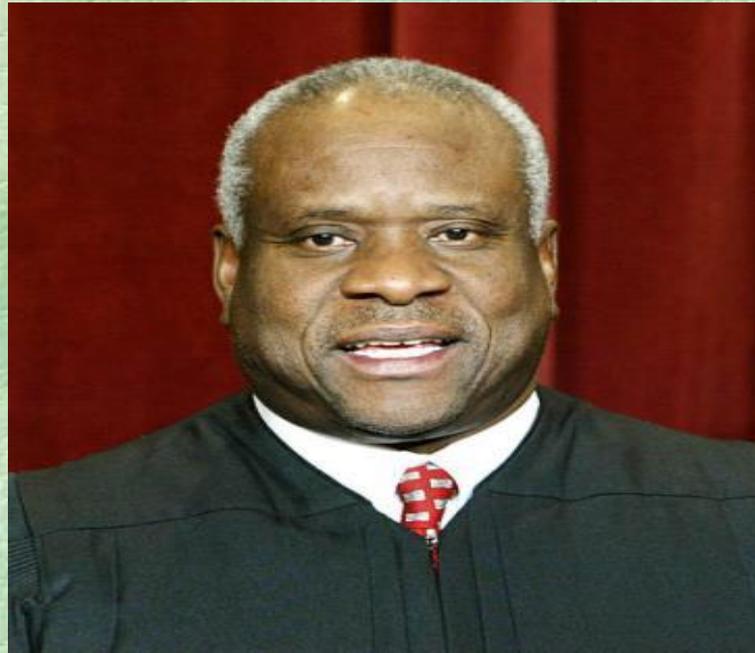
Scientific Evidence

Testimonial. I do not think it means what you think it means.



Testimonial

*Statements need a requisite
“formality and solemnity” to be
considered “testimonial”*



*Melendez-Diaz v. Mass.,
129 S.Ct. 2527 (2009)*

Police flipped a buyer and arrested

*Melendez-Diaz (and his companion) driving
away from a cocaine sale.*

*He ditched 14 baggies of cocaine in the back
of the police car which were recovered.*

*At his trial, a chemist's certificate was admitted over
a Confrontation Clause objection.*

*Under state law, it constituted prima facie evidence
that the baggies held cocaine of a certain weight.*



Melendez-Diaz v. Mass., 129 S.Ct. 2527 (2009)



“[N]ot 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

*“In short, under our decision in Crawford, the analysts’ affidavits were **testimonial**”*

Melendez-Diaz v. Mass., 129 S.Ct. 2527 (2009)



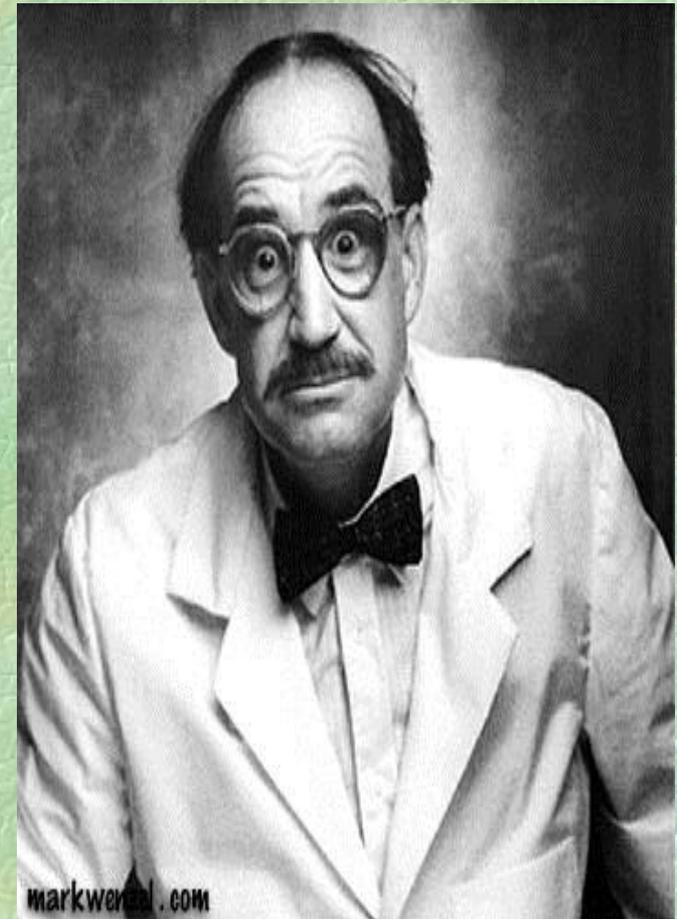
The decision was 4-1-4 and Scalia spent most of his time answering the dissent.

Notice and Demand laws are just fine.

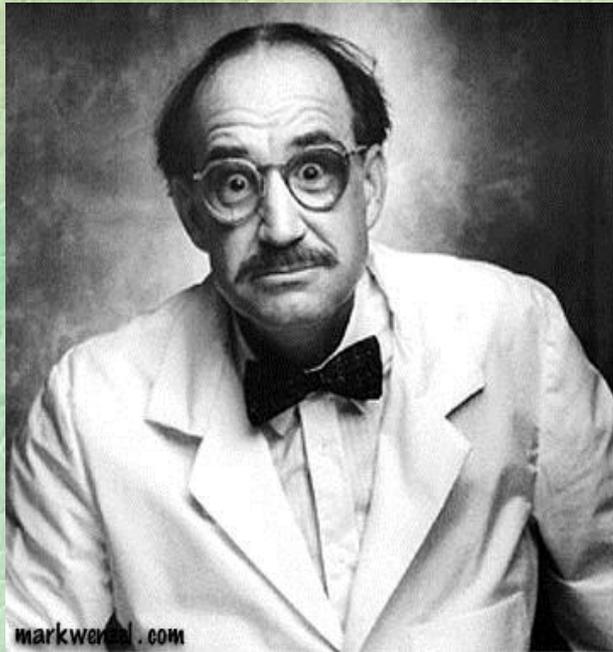
“The defendant always has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the time within which he must do so. States are free to adopt procedural rules governing objections. “

Bullcoming v..N.M. 131 S.Ct. 2705(2011)

Chemist Craylor tested
Bullcoming's blood.
Bullcoming was drunk.



Bullcoming v..N.M. 131 S.Ct. 2705(2011)



Bullcoming v. N.M. 131 S.Ct. 2705 (2011)

- I'm another chemist.
- I didn't do the work, Craylor did.
- Craylor concluded that Bullcoming was drunk.
- Reversed.*



Williams v. Ill. 132 S.Ct. 2221 (2012)

- Williams raped a woman in 2000.
- A vaginal swab was processed by the Ill. State lab, then sent to Cellmark in Md.
- Cellmark processed the swab and provided the digital DNA profile.
- Williams' DNA was taken in a later, unrelated matter. That profile was entered and a computer signaled a hit.

Williams v. Ill. 132 S.Ct. 2221 (2012)

- No one from Cellmark testified.
- At a court trial, an Ill. analyst testified she extracted DNA from Williams' blood and developed a state data base profile.
- A second Ill. analyst testified that she ran the profile from Cellmark against the state database.
- Over Confrontation and Form of the Question objections, she was then asked:

Williams v. Ill.132 S.Ct. 2221 (2012)

- “Did you compare the semen that had been identified . . . from the vaginal swabs to the male DNA profile that had been identified from the blood of Williams”*
- She answered *“Yes.”*

Williams v. Ill.132 S.Ct. 2221 (2012)

□ Conviction affirmed - *not the requisite “formality and solemnity” for Justice Thomas.*

□ *The justices seem to be coming to understand the magnitude of the problem.*

Summary: No Confrontation

problem if:

The declarant testifies, or

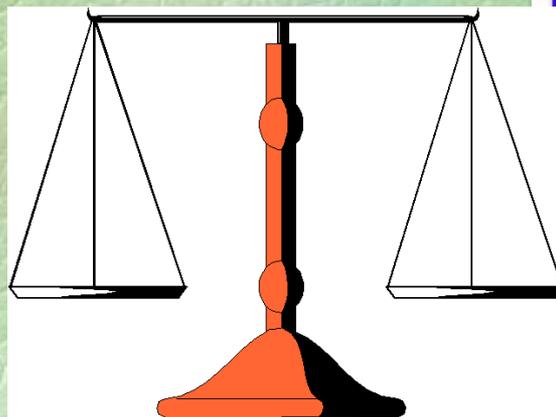
The statement is not offered for the truth of the matter asserted, or

If the primary purpose of the interaction was not to preserve or create a record with a view toward prosecution,

If the **primary purpose** of the interaction was not to preserve or create a record with a view toward prosecution, there is no Confrontation Clause problem.

Person
Casual Remark
Acquaintance

Accuser
Formal Statement
Gov't Officer



If the *primary purpose* of the interaction was not to preserve or create a record with a view toward prosecution, while there may be a hearsay or Due Process problem, there is no Confrontation Clause problem.

If the primary purpose of the interaction was not to preserve or create a record with a view toward prosecution, while **there may be a hearsay** or Due Process problem, there is no **Confrontation Clause** problem.

The Rule Against Hearsay

Christopher J. Munch
Judge
1st Judicial District of Colorado
2013 - Utah

Rules of Evidence

- I. General Provisions
- II. Judicial Notice
- III. Presumptions
- IV. Relevancy and its Limits
- V. Privileges
- VI. Witnesses
- VII. Opinions and Expert Testimony
- VIII. Hearsay
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Rules of Evidence

- ❑ I. General Provisions
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- ❑ VII. Opinions and Expert Testimony
- ❑ **VIII. Hearsay**
- ❑ IX. Authentication and Identification
- ❑ X. Contents of Writings, etc.

Article VIII -- Hearsay

- 801. Definitions
- 802. Hearsay Rule
- 803. Hearsay exceptions -- Availability of Declarant Immaterial
- 804. Hearsay exceptions -- Declarant Unavailable
- 805. Hearsay within Hearsay
- 806. Attacking and Supporting Credibility of Declarant
- 807 Residual Hearsay.

Article VIII -- Hearsay

- 801. Definitions -- **What is hearsay?**
- 802. Hearsay Rule **No hearsay w/o exception.**
- 803. Hearsay exceptions -- Availability of Declarant **Immaterial** -- **“First Class exceptions”**.
- 804. Hearsay exceptions -- **Declarant Unavailable** -- **“Second Rate exceptions”**.
- 805. Hearsay within Hearsay **So what!**
- 806. Attacking and Supporting Credibility of Declarant. **This one can be fun.**
- 807 Residual Hearsay. ***Hearsay w/ a Special Pardon***

Hearsay - terminology

- The “**declarant**” made the statement out in the real world – the **declarant** is the one being quoted.
- The “**witness**” is the person on the stand who is repeating the **declarant’s** statement.
- The **declarant** and the **witness** might or might not be the same person.

□ Rule 801. Definitions:

□ *Statement.* A “statement” is

- (1) An oral or written assertion; or
- (2) Nonverbal conduct of a person, if it is intended by him as an assertion.

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

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

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

Knowingly eluding the police.

- **Accused** (“*Al*”) was the driver.
- **Declarant** (“*Delbert*”) was the front seat passenger.
- Wide eyed **Wendy**, our **Witness**, was the back seat passenger.

Knowingly eluding the police.

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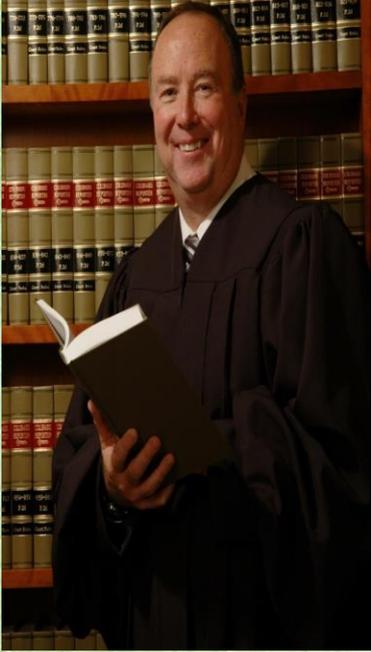
Knowingly eluding the police.

Wendy, the witness will testify that

Just as the high speed chase was starting,

Delbert, the declarant said to **Al,**
the accused driver,

*“F***, dude, are you
tryin’ to outrun that
f***ing pig?”*



“Objection, Hearsay.”

“Judge, it’s not offered for the truth of the matter asserted.”

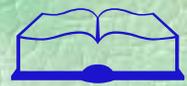
 Let’s see, guy said *“Trying to outrun the cop”*

 DA wants to show he was tried to outrun the cop;

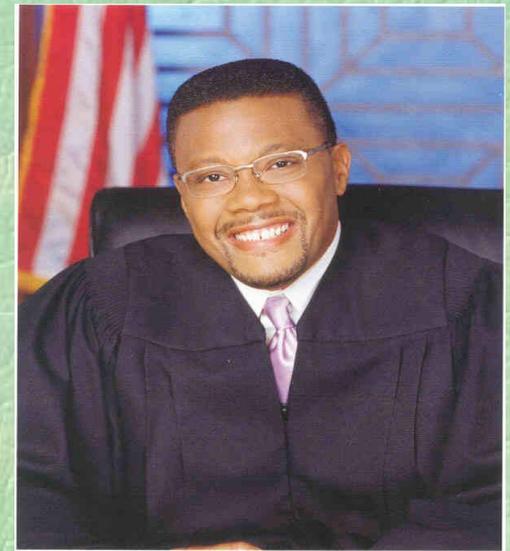
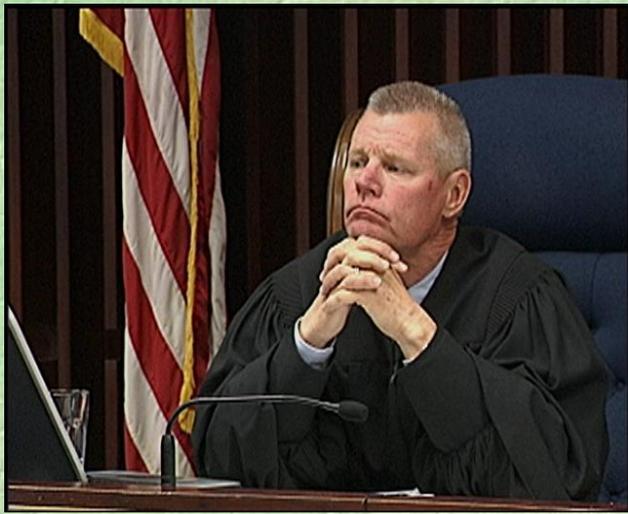
 ***“Objection Sustained”***



PicsCrazy.com



What do you call a lawyer
with an IQ of 50?



Most trial judges are not stupid.

 But sometimes ignorant.

 Of the importance of evidence.

 Of evidence law.

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Rule 801. Definitions

The following definitions apply under this Article:

(a) *Statement*. A “statement” is

(1) An oral or written ***assertion***; or

(2) ***Nonverbal conduct*** of a person, if it is ***intended*** by the person ***as an assertion***.

Assertions

Assertions vs. *Implied Assertions*

Contrast, Wright v. Tatham,

112 Eng. Rep. 488 (Ex. 1837), aff'd, 7 Eng. Rep. 559 (H.L. 1838).

Assertions

Assertions vs. *Implied Assertions*

Contrast, Wright v. Tatham,
112 Eng. Rep. 488 (Ex. 1837), aff'd, 7 Eng. Rep. 559 (H.L. 1838).



In America, words (or conduct) are not
hearsay merely because of the
belief that generated them.

Those words (or conduct) must
constitute an assertion.

Assertions

Assertions vs. *Implied Assertions*.

In general, Assertions are capable of being either true or false.

Assertions generally do not include:

Exclamations

Assertions

Assertions vs. *Implied Assertions*

Contrast, **Wright v. Tatham**, 112 Eng. Rep. 488 (Ex. 1837), aff'd, 7 Eng. Rep. 559 (H.L. 1838).

Words are not hearsay merely because of the belief that generated them. The words or conduct must constitute an assertion.

Assertions vs.. *Implied Assertions.*

In general, Assertions are capable of being either true or false.

Assertions generally do not include:

Exclamations,
Questions (that are not rhetorical)

“An interrogator's questions, unlike a declarant's answers, do not assert the truth of any matter.”

Michigan v. Bryant, 131 S.Ct. 1143 (2011) at 1160, FN 11

Assertions vs.. *Implied Assertions.*

In general, Assertions are capable of being either true or false.

Assertions generally do not include:

Exclamations,

Questions (that are not rhetorical), or

Commands or Orders

Assertions vs.. *Implied Assertions*.

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 *U. S. v. Zenni*, 492 F. Supp. 464 (E.D. Ky, 1980)

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

U. S. v. Harris, 942 F.2d 1125 (7th Cir. 1991)

“[The deceased declarant] was a wealthy widower partial to young women.”



U. S. v. Harris, 942 F.2d 1125 (7th Cir. 1991)

*“[The deceased declarant] was a wealthy widower partial to young women. **Two were twin sisters..”***



U. S. v. Harris, 942 F.2d 1125 (7th Cir. 1991)

“[The deceased declarant] was a wealthy widower partial to young women. Two were twin sisters. He gave each more than half a million dollars over the course of several years.”

U. S. v. Harris, 942 F.2d 1125 (7th Cir. 1991)

The IRS charged Harris with knowingly evading income tax.

She claimed that the money was not income, but gifts.

U. S. v. Harris, 942 F.2d 1125 (7th Cir. 1991)

The Government's testimony showed that Harris described her relationship with the deceased as "*a job*" and "*just making a living.*"

She complained that she "*was laying on her back and her sister was getting all the money,*"

U. S. v. Harris, 942 F.2d 1125 (7th Cir. 1991)

Testimony showed that Harris described her relationship with the deceased as "*a job*" and "*just making a living.*"

She complained that she "*was laying on her back and her sister was getting all the money,*" and described how *she disliked his fondling her*, and made other *derogatory statements about sex with him.*

U. S. v. Harris, 942 F.2d 1125 (7th Cir. 1991)

The deceased declarant's letters

☞ *“[s]o far as the things I give you are concerned -- I get as great if not even greater pleasure in giving than you get in receiving.”*

☞ *“I love giving things to you and to see you happy and enjoying them.”*

☞ *[He also] wrote to his insurance company regarding the value of certain jewelry that he had "given to Ms. Harris as a gift."*

U. S. v. Harris, 942 F.2d 1125 (7th Cir. 1991)

The deceased declarant's letters

☞ *“[s]o far as the things I give you are concerned -- I get as great if not even greater pleasure in giving than you get in receiving.”*

☞ *“I love giving things to you and to see you happy and enjoying them.”*

☞ *[He also] wrote to his insurance company regarding the value of certain jewelry that he had "given to Ms. Harris as a gift.”*

Pop Quiz: *Should the letters be admitted?*

 **No, they are hearsay.**

 **Yes, since the declarant is dead, they fall within “*the unavailability exception*”.**

 ***It depends on what they are being offered for.***

U. S. v. Harris, 942 F.2d 1125 (7th Cir. 1991)

“These letters were hearsay if offered for the truth of the matters asserted --



U. S. v. Harris, 942 F.2d 1125 (7th Cir. 1991)

“These letters were hearsay if offered for the truth of the matters asserted -- that the deceased did in fact love Harris, enjoyed giving her things, . . . and gave her the jewelry at issue as a gift. But the letters were not hearsay for the purpose of showing what Harris believed, because her belief does not depend on the actual truth of the matters asserted in the letters. Even if the deceased were lying, the letters could have caused Harris to believe in good faith that the things he gave her were intended as gifts.”

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The IRS charged Harris with
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“These letters were hearsay if offered for the truth of the matters asserted--that Kritzik did in fact love Harris, enjoyed giving her things, . . . and gave her the jewelry at issue as a gift. But the letters were not hearsay for the purpose of showing what Harris believed, because her belief does not depend on the actual truth of the matters asserted in the letters. Even if declarant were lying, the letters could have caused Harris to believe in good faith that the things he gave her were intended as gifts.”

“Not offered for the truth of the matter asserted” means:

The words do constitute an **assertion**, but

It makes no difference whether the assertion is true or false.

Knowingly eluding the police.

☐ *“Dude, that car behind us is a cop – and he’s looking at his computer!”*



Rule 801. Definitions

The following definitions apply under this Article:

 (d) *Statements Which Are Not*

Hearsay. A statement is not hearsay if:

 (1) **Prior Statements by Witness.**

 (2) **Admissions By Party-opponent.**

Rule 801. Definitions

The following definitions apply under this Article:

(d) *Statements Which Are Not Hearsay.* A statement is not hearsay if:

(1) **Prior Statements by Witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

 (A) *inconsistent* with his testimony

 (B) *consistent* with his testimony

 (C) one of *identification*

Rule 801. Definitions The

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 *Owens v. U. S.*, 108 S.Ct. 838 (1988)

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(d) *Statements Which Are Not Hearsay*. A statement is not hearsay if:

(1) **Prior Statements by Witness**. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

 (i) *inconsistent with his testimony, and*

 *was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition*

Pop Quiz: What if the prior statement was not given under oath?

Should the prior inconsistent statements be admitted?

 **No, they are hearsay.**

 *It depends on what they are being offered for.*

Rules of Evidence

- ❑ I. General Provisions
- ❑ II. Judicial Notice
- ❑ III. Presumptions
- ❑ IV. Relevancy and its Limits
- ❑ V. Privileges
- ❑ VI. Witnesses
- ❑ VII. Opinions and Expert Testimony
- ❑ **VIII. Hearsay**
- ❑ IX. Authentication and Identification
- ❑ X. Contents of Writings, etc.

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Rule 607. Who May *Impeach*



Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

⊘ *You may not argue that the statement should be accepted for its truth.*

📄 *You may need an instruction.*

☑ *You still need some substantive evidence.*

Rule 801. Definitions

The following definitions apply under this Article:

(d) *Statements Which Are Not Hearsay*. A statement is not hearsay if:

(1) **Prior Statements by Witness**. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

□ (i) *inconsistent* with the declarant's testimony, or

📖 How inconsistent does it have to be?

📖 Is “*I don't remember*” **inconsistent**?

Rule 801. Definitions

The following definitions apply under this Article:

(d) *Statements Which Are Not Hearsay*. A statement is not hearsay if:

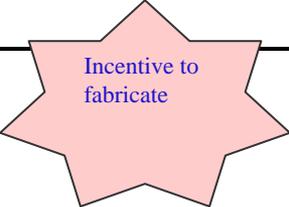
(1) **Prior Statements by Witness**. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

 (B) *consistent* with the declarant's testimony, and

 *offered to rebut* an express or implied charge against the declarant of *recent fabrication or improper influence or motive*,

 **Tome v. U.S.**, 115 S. Ct. 696 (1995).

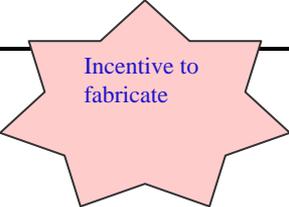
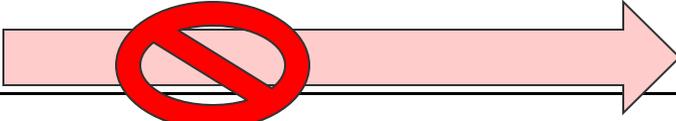
Hearsay

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|-----|-----|-----|---|-----|-----|-----|
| | | | | | 1 | 2 |
| 3 | 4 | 5 | 6 | 7 | 8 | 9 |
| 10 | 11 | 12 |  Incentive to fabricate | 14 | 15 | 16 |
| 17 | 18 | 19 | 20 | 21 | 22 | 23 |
| 24 | 25 | 26 | 27 | 28 | 29 | 30 |
| 31 | | | | | | |

Hearsay

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|---|-----|-----|--|-----|-----|-----|
| | | | | | 1 | 2 |
| 3 | 4 | 5 | 6 | 7 | 8 | 9 |
| 10 | 11 | 12 |  | 14 | 15 | 16 |
|  | 18 | 19 | 20 | 21 | 22 | 23 |
| 24 | 25 | 26 | 27 | 28 | 29 | 30 |
| 31 | | | | | | |

Hearsay

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|-----|-----|-----|--|-----|---|-----|
| | | | | | 1 | 2 |
| 3 | 4 | 5 | 6 | 7 | 8 | 9 |
| 10 | 11 | 12 |  | 14 | 15 | 16 |
| 17 | 18 | 19 |  | 21 |  | 23 |
| 24 | 25 | 26 | 27 | 28 | 29 | 30 |
| 31 | | | | | | |

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The following definitions apply under this Article:

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(1) **Prior Statements by Witness**. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

 (C) *one of identification of a person made after perceiving the person.*

 *It is under this exclusion that the detective testifies about the identification!*

Rule 801. Definitions

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....

(2) Admissions By Party-opponent.

The statement is *offered against a party* and is

Rule 801. Definitions

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(2) Admissions By Party-opponent. The statement is *offered against a party* and is

 (i) *the party's own statement*, in either an individual or a representative capacity,

 (ii) a statement of which the party has manifested his adoption or belief in its truth, Gordon v. State, 273 Ga. 373; 541 S.E.2d 376 (Ga. 2001) (“*Shut up!*”)

 (iii) a statement by a person authorized by the party to make a statement concerning the subject,

 (iv) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

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- or

 (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

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- or

 (v) a statement by a co-conspirator of a party during the course and *in furtherance* of the conspiracy.

The things we have talked about so far are not exceptions to the rule against Hearsay.

They just aren't hearsay

The things we have talked about so far are not exceptions to the rule against Hearsay.

They just aren't hearsay.



*Exception! Exception!
We don't need no
stinkin' exception!*

Exceptions to the Rule against Hearsay

It is hearsay,

but it is admissible

anyway,

because it falls within an
exception.

“*First Class*” Exceptions
to the Rule Against Hearsay --

Rule 803

Rule 803. Hearsay exceptions -- Availability of declarant immaterial.

- Ⓢ (1) Present sense impression.
- Ⓢ (2) Excited utterance.
- Ⓢ (3) Then existing mental, emotional, or physical condition.
- Ⓢ (4) Statements for purposes of medical diagnosis or treatment.
- Ⓢ (5) Recorded recollection.
- Ⓢ (6) Records of regularly conducted activity.
- Ⓢ (7) Absence of entry in records kept in accordance with the provisions of paragraph (6).
- Ⓢ (8) Public records and reports.
- Ⓢ (9) Records of vital statistics.
- Ⓢ (10) Absence of public record or entry.
- Ⓢ (11) Records of religious organizations.
- Ⓢ (12) Marriage, baptismal, and similar certificates.
- Ⓢ (13) Family records.
- Ⓢ (14) Records of documents affecting an interest in property.
- Ⓢ (15) Statements in documents affecting an interest in property.
- Ⓢ (16) Statements in ancient documents.
- Ⓢ (17) Market reports, commercial publications.
- Ⓢ (18) Learned treatises.
- Ⓢ (19) Reputation concerning personal or family history.
- Ⓢ (20) Reputation concerning boundaries or general history.
- Ⓢ (21) Reputation as to character.
- Ⓢ (22) Judgment of previous conviction.
- Ⓢ (23) Judgment as to personal, family or general history or boundaries.

 **Rule 803. Hearsay exceptions -- Availability of declarant immaterial.**

(1) Present sense impression.

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

 **Rule 803. Hearsay exceptions -- Availability of declarant immaterial.**

(1) Present sense impression.

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

 **Rule 803. Hearsay exceptions -- Availability of declarant immaterial.**

(1) Present sense impression.

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

 **Rule 803. Hearsay exceptions -- Availability of declarant immaterial.**

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

 **Rule 803. Hearsay exceptions -- Availability of declarant immaterial.**

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(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

 **Rule 803. Hearsay exceptions -- Availability of declarant immaterial.**

. (2) Excited utterance. *A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.*

 ***In my opinion,* This exception is more relaxed in sexual assault and assault on children cases,**

Rule 803. Hearsay exceptions -- Availability of declarant immaterial.

. (2) Excited utterance. A *statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.*

 *In my opinion*, This exception is more relaxed in sexual assault and assault on children cases, **but**
you must present evidence of stress due to the event.

 **Rule 803. Hearsay exceptions -- Availability of declarant immaterial.**

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a

 **Rule 803. Hearsay exceptions -- Availability of declarant immaterial.**

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's *then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)*

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including a statement of memory

or belief

fact reme

or

 **Rule 803. Hearsay exceptions -- Availability of declarant immaterial.**

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are not inadmissible or declarant immaterial.
.(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed

Murder Case: Her estranged boyfriend murdered **Delberta**

Declarant.

A week before her death,

Declarant said: "I believe my boyfriend is going

 **Rule 803. Hearsay exceptions -- Availability of declarant immaterial.**

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Declarant said: "I believe Defendant is going to kill me," and

"I am **afraid** of the Defendant."

physical condition. A statement of the declarant's **then existing** state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, **mental feeling**, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed

Victim's state of mind

does fall within this exception,

but usually is ruled

irrelevant

The victim's fear does not logically affect what the

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The **victim's** state of mind is logically relevant to what the victim is going to do.

 **Rule 803. Hearsay exceptions -- Availability of declarant immaterial.**

(4) Statements for purposes of medical diagnosis or treatment. *Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause of external source thereof insofar as reasonably pertinent*

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(4) Statements for purposes of medical diagnosis or treatment. *Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause of external source thereof insofar as reasonably pertinent*

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U.S. v. Renville, 779 F.2d 430 (8 Cir. 1985).

 “. . . *first, the declarant's motive in making the statement must be consistent with the purposes of promoting treatment;*
 *and second, the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis.*” at 436.

treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause of external source thereof **insofar as reasonably pertinent to diagnosis or treatment.**

U.S. v. Renville, 779 F.2d 430 (8 Cir. 1985).

 “. . . a declarant's statements relating the **identity** of the individual allegedly responsible for his injuries or condition “would **seldom, if ever,**” be reasonably pertinent to treatment or **diagnosis.**” at 436 {But}

(4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause of external source thereof insofar as reasonably pertinent to diagnosis or treatment.

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“Statements by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household are reasonably pertinent to treatment.”

“First, child abuse involves more than physical injury; the physician must be attentive to treating the emotional and psychological injuries which accompany this crime.” at 437

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U.S. v. Renville, 779 F.2d 430 (8 Cir. 1985).

 “Second, physicians have an obligation, imposed by state law, to prevent an abused child from being returned to an environment in which he or she cannot be adequately protected from recurrent abuse.” at 438.



Rule 803. Hearsay exceptions -- Availability of declarant immaterial.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be

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Rule 803. Hearsay exceptions -- Availability of declarant immaterial.

(6) Records of regularly conducted activity. *A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if: (a) Made at or near the time of the underlying event, (b) by, or from information transmitted by, a person with first hand knowledge acquired in the course of a regularly conducted business activity, (c) made and kept entirely in the course of that regularly conducted business activity, (d) pursuant to a regular practice of that business activity; and (e) all the above are shown by the testimony of the custodian or other qualified witness. However, such evidence shall not be admissible if the source of information or the method of circumstances of preparation indicate a lack of trustworthiness or to the extent that portions thereof lack an appropriate foundation. The term "business" as used in this paragraph includes business, institution,*

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(b) by, or from information transmitted by, a person with first hand knowledge

(c) acquired in the course of a regularly conducted business activity,

(d) made and kept entirely in the course of that regularly conducted business activity,

(e) pursuant to a regular practice of that business activity;

(f) all the above are shown by the testimony

 **Rule 803. Hearsay exceptions -- Availability of declarant immaterial.**

(17) Market reports, commercial publications. *Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular*

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quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

Things like newspaper listings

of closing stock prices

of TV shows.



Rule 803. Hearsay exceptions -- Availability of declarant immaterial.

(18) Learned treatises. *To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony*



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Rule 803. Hearsay exceptions -- Availability of declarant immaterial.

(21) Reputation as to character.

Reputation of a person's character among associates or in the community.

(22) Judgment of previous

conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere or no contest), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the

“*Second Class*” Exceptions
to the Rule Against Hearsay --

Rule 804

Rule 804 Exceptions - Declarant Unavailable

(a) Definition of unavailability.

"Unavailability as a witness" includes situations in which the declarant --

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

Rule 804 Exceptions - Declarant Unavailable

(a) Definition of unavailability.

"Unavailability as a witness" includes situations in which the declarant --

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

(3) *testifies to a lack of memory* of the subject matter

Rule 804 Exceptions - Declarant Unavailable

(a) Definition of unavailability.

"Unavailability as a witness" includes situations in which the declarant --

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

Rule 804 Exceptions - Declarant Unavailable

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

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

reasonable means. A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to

The 804 Exceptions

★ Rule 804 Exceptions - Declarant Unavailable

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

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Rule 804 Exceptions - Declarant Unavailable

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

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

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Dying Declarations: Crawford v. Washington, 124 S. Ct. 1354 (2004) “**Most** of the hearsay exceptions . . . were not testimonial . . .”

“The one deviant we have found involves dying declarations.”

The existence of that exception . . . cannot be disputed.

We need not decide in this case whether the 6th Amendment incorporates an exception for testimonial dying declarations.

If this exception must be accepted on historical grounds, it is sui generis.” *Crawford v. Washington*, 124 S. Ct. 1354 (2004) at 1367, fn 6.

Rule 804 Exceptions - Declarant Unavailable

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

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believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused

corroborating circumstances

clearly indicate

far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

***Lilly v. Virginia*, 119 S.Ct. 1887 (1999).**

Rule 807: Residual Hearsay

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

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If the statement is testimonial, this Rule is not available to the prosecution, unless the declarant testifies. *Crawford v. Washington*, 124 S. Ct. 1354 (2004)

Residual Hearsay is available to civil lawyers and the criminal defense if:

- They follow all the rule's stringent requirements.**

Rule 807: Residual Hearsay

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Rule 805: Hearsay within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules

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Rule 806: Attacking and Supporting Credibility of Declarant:

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

Rule 806: Attacking and Supporting Credibility of Declarant:

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When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

Rule 806: Attacking and Supporting Credibility of Declarant:

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

The Rule Against Hearsay

Christopher J. Munch
Judge
1st Judicial District of Colorado
2013 - Utah