SPRING, 2105 UPDATE TO

A Student's Guide to Hearsay

Clifford S. Fishman

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§ 4.16  Rule 801(d)(1)(B): TEXT, RATIONALE AND REQUIREMENTS

Effective December 1, 2014, Fed. R. Evid. 801(d)(1)(B) is divided into two sub-provisions:

(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: ...

(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;

...

Rule 801(d)(1)(B)(i) simply restates the previous text of the rule, with no change other than the addition of the word "or." The Advisory Committee Note specifies that the Supreme Court's interpretation of the rule in *Tome v. United States*, 513 U.S. 150 (1995) (see § 4.21), is left unchanged.

Rule 801(d)(1)(B)(ii), however, is new, and substantially expands the category of a witness-declarant's prior consistent statements that are now admissible as substantive evidence, rather than (if admissible at all) for more limited purposes. Its implications are explained in §4.23.1 and § 4.23.2.
§ 4.23.1 RULE 801(d)(1)(B)(ii)

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

(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; ...

The added material is underlined.

This is a significant change. Previously, statements by a declarant/witness that were consistent with his or her testimony were categorized as hearsay, and therefore presumptively not admissible as substantive evidence, unless they came within what is now Fed. R. Evid. 801(d)(1)(B)(i) (or some other hearsay exception). The new provision considerably expands the kinds of prior consistent statements that are admissible as substantive evidence.

The general exclusion of a witness-declarant's (W/DL's) prior consistent statements is justified on two grounds. First, such statements generally are considered to be less probative than W/DL's in-court testimony, because in-court testimony is given under oath and in the jury's presence. Thus, if W/DL testifies at trial under oath as to certain facts, there is no good reason to permit the offering party to also introduce evidence of the witness/declarant's (presumably) less reliable similar statements in the past. Such evidence would be merely cumulative, and would constitute impermissible bolstering of W/DL's testimony. Second, allowing the introduction of such statements could take up too much time. If W/DL testifies to facts R-S-T, why permit the offering party to call several more witnesses, each of whom would testify to a separate occasion on which W/DL told him or her that the facts were R-S-T?

This rule of exclusion still applies in many circumstances. Even after the amendment. The Advisory Committee Note emphasizes that the new rule "does not allow impermissible bolstering of a witness," because "the trial court has ample discretion [per Fed. R. Evid. 403] to exclude prior consistent statements that are cumulative accounts of an event."

Sometimes, though, W/DL's prior consistent statement is relevant in a way that does more than merely reiterate for the jury what W/DL has already testified to, because it rehabilitates W/DL's testimony after that testimony has been impeached. Justice Breyer, in his dissent in *Tome*, provided several examples:
(a) placing a claimed inconsistent statement in context; (b) showing that an inconsistent statement was not made; (c) indicating that the witness' memory is not as faulty as a cross-examiner has claimed; and (d) showing that the witness did not recently fabricate his testimony as a result of an improper influence or motive.\(^3\)

The original version of Fed. R. Evid. 801(d)(1)(B), now contained in Rule 801(d)(1)(B)(i), codified the fourth situation.

As to statements falling into the first three situations, however, the law has been muddled. Some courts admitted such statements, with a limiting instruction that the statements are not admissible to prove the truth of the matter asserted in the statements, but only to help the jury evaluate W/DL's testimony. Other courts held that since the statements did not satisfy Rule 801(d)(1)(B), they were not admissible at all.

The addition of Fed. R. Evid. 801(d)(1)(B)(ii) appears to codify at least some of the other three situations that Justice Breyer mentioned in his Tome dissent. The Advisory Committee Note offers, as examples, "consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony," and "consistent statements that would be probative to rebut a charge of faulty memory." Such statements, if probative to rebut such impeachment, are now admissible as substantive evidence, not for some limited purpose. Therefore, the adverse party is not entitled to a limiting instruction.

§ 4.23.2 QUESTIONS

**Question 1.** On March 1, Rocky and Apollo argued with each other and eventually started fighting. Both sustained injuries, and each sued the other, claiming self-defense and alleging that the other started it. The parties line up as follows. Rocky is represented by Rose; Rueful is Rose's investigator. Apollo is represented by Albert; Angst is Albert's investigator.

A woman named Warble saw the fight. On March 8, Warble gave Rueful, Rose's investigator, a signed statement that Apollo threw the first punch. On June 1, Warble told Angst, Albert's investigator, that Rocky threw the first punch.

The case goes to trial in December. Warble testifies as a witness for Apollo that Rocky threw the first punch. On cross-examination, Rose, Rocky's attorney, wants to introduce the signed statement that Warble gave Rueful. How should she go about it?

**Ans.** Rose should ask that the statement be marked as an exhibit for identification (let's call

\(^3\) Tome v U.S., 513 U.S. 150, 170 (Breyer J., dissenting), citing U. S. v. Rubin, 609 F. 2d 51, 68 (CA2 1979) (Friendly, J., concurring).
it exhibit 3). After it is marked, she should show it to Warble and ask whether she recognizes it and whether that's her signature on the bottom. Assuming Warble acknowledges that she did in fact sign it, Rose should offer it in evidence.

**Question 2.** Albert, Apollo's attorney, objects: hearsay! How should Rose respond?

**Ans:** Fed. R. Evid. 613(b): exhibit 3 is extrinsic evidence of Warble's prior inconsistent statement. See § 4.6. Objection overruled.

**Question 3a.** What should Albert do next?

**Ans:** Request a limiting instruction: Warble's written statement (Rocky's exhibit 3) is admissible only to impeach Warble's testimony that Rocky threw the first punch; it is not admissible as evidence that Apollo threw the first punch.

**Question 3b.** "Wait a minute, Prof. Didn't you just say Fed. R. Evid. 801(d)(2)(B)(ii) statements are *not* hearsay, and no limiting instruction need be given?"

**Ans:** Yes, I did. But Warble's statement to Rueful is not a Rule (d)(2)(B)(ii) statement—it is not consistent with his testimony on direct, it is *inconsistent* with that testimony, and, if it is admissible only per Rule 613, it is admissible only to impeach his trial testimony, not as substantive evidence.

**Question 4a.** Continuing on cross-examination, Rose, Rocky's attorney, suggests that Warble's memory of the fight must have been better on March 8, when she signed the statement for Rueful, than it is now, in December, 9 months later. Warble nevertheless insists that Rocky threw the first punch.

On redirect, Albert asks Warble:

Q  Did you have a conversation on June 1 about this fight with Angst, my investigator?
A  Yes, I did.
Q  And what did you tell Angst about what happened?

Rose objects: hearsay. Is Warble's statement to Angst admissible per Fed R Evid 801(d)(1)(B)(i)?

**Ans:** No. Rose's impeachment of Warble challenged the accuracy of her memory, but did not, directly or indirectly, accuse Warble of a deliberate, recent fabrication.

**Question 4b.** Is Warble's statement to Angst admissible per Rule 801(d)(1)(B)(ii)?

**Ans:** No, because it is not really relevant to rebut Rose's suggestion that Warble's memory
of the fight was better on March 8 than it is now in December when Warble is testifying. Why? Because Warble's statement to Angst on June 1 does not really rebut Rose's impeachment of Warble. Warble's prior statement consistent with her direct testimony was made on June 1, almost three months after Warble's prior inconsistent statement to Rueful—plenty of time for her memory about the fight to have become faulty.

**Question 5a.** Wombat also saw the fight. On April 1, he gave a signed statement to Angst, Apollo's investigator, that Rocky threw the first punch. On May 10, he told Rueful, Rocky's investigator, that Apollo threw the first punch. At trial, Wombat testifies that Rocky threw the first punch.

On cross-examination, Rose seeks to introduce Wombat's May 10th statement that Apollo, not Rocky, started the fight. May she do so?

**Ans.** Yes. What Wombat told Rueful is a prior inconsistent statement, i.e., inconsistent with Wombat's testimony on direct. Therefore it is admissible, per Fed. R. Evid. 613, to impeach Wombat's trial testimony that Rocky started the fight. But that statement satisfies no hearsay exception. Therefore Angst, Apollo's attorney, should ask the judge to instruct the jury that what Wombat told Rueful is admissible only to impeach Wombat's direct testimony; it is not admissible, and they should not consider it, as evidence that Apollo started the fight.

**Question 5b.** Rose proceeds to challenge Wombat: "Wasn't your memory clearer and fresher back on May 10, than it is now, 7 months later?" Wombat insists he remembers clearly that Rocky started the fight.

On redirect, Albert asks Wombat:

**Q** Did you have a conversation on April 1 about this fight with Angst, my investigator?

**A** Yes, I did.

**Q** And what did you tell Angst about what happened?

Rose objects: hearsay. Is Wombat's statement to Angst admissible per Fed. R. Evid. 801(d)(1)(B)(i)?

**Ans:** No. Rose's impeachment of Wombat challenged the accuracy of his memory, but did not, directly or indirectly, accuse Wombat of a deliberate, recent fabrication.

**Question 5c.** Is Wombat's statement to Angst admissible per Rule 801(d)(1)(B)(ii)?

**Ans:** Yes. Wombat's prior consistent statement to Angst (that Rocky started the fight) was made on April 1, forty days before he gave his (inconsistent) statement accusing Apollo. Therefore (unlike the statement in Q. 4), it is relevant to rebut the implication that Wombat now has a faulty memory.
Question 5d. After the judge allows Wombat to testify about Wombat's April 1 statement to Angst, Rose asks the judge to instruct that Wombat's statement to Angst is admissible only to rebut Rose's impeachment of Wombat, but is not admissible as proof that Rocky started the fight. Should the judge give the instruction?

Ans. No. Rose would have been entitled to such an instruction prior to the enactment of Fed. R. Evid. 801(d)(1)(B)(ii). But Rule 801(d)(1)(B)(ii) is an exception to the hearsay definition; therefore it is admissible, over a hearsay objection, as substantive evidence that Rocky started the fight, not merely to rebut the impeachment.
§ 6.8  SUBSEQUENT SUPREME COURT CONFRONTATION CLAUSE DECISIONS

Add at the end of the section:

7. In Williams v. Illinois, 132 S.Ct.2221 (2012), the Court, for a third time, addressed the question of forensic lab reports. A majority of the Court upheld the state's use of a DNA profile prepared by a private laboratory at police request, even though no one from the laboratory testified. The Court divided so sharply, however, that there was no majority opinion, no “holding,” and the law applying the Clause to such reports is murkier than ever. Williams is discussed in §§ 9.53.1 to 9.53.6.

8. In March, 2015, the Supreme Court heard oral argument in State v. Clark, 999 NE2d 592, 137 Ohio St. 3d 346 (2013). The questions presented are as follows: "(1) Whether an individual's obligation to report suspected child abuse makes that individual an agent of law enforcement for purposes of the Confrontation Clause; and (2) whether a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as “testimonial” statements subject to the Confrontation Clause." The case provides the Court with the opportunity to issue a broad, sweeping rejection of Crawford; or to define how the Confrontation Clause should apply to statements to non-law enforcement officers; or to define how the Clause applies to those who are mandated by law to report suspected child abuse; or to establish new procedures when the declarant is a child who is not competent to testify in a formal courtroom setting; or to apply existing post-Crawford case law narrowly without really adding very much to the law; or, quite possibly, leave the law even more muddled and confused than it is already. Clark is discussed in § 8.18.1 and § 8.19.2, infra.

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4 This approach is urged by at least one amicus brief.

5 This approach is urged by at least one amicus brief.
§ 6.10 STATEMENTS TO NON-GOVERNMENTAL OFFICIALS

In *Ohio v. Clark* (see § 8.18.1), the Court heard argument in a case involving a 3½-year old assault victim's statements to his day care teachers. The decision therefore may shed some light on whether statements to non-law enforcement officers, or non-government employees in general, may be categorized as testimonial. Then again, it may not. See §§ 8.19.1 and 8.19.2.
8.19.1 **OHIO v. CLARK: FACTS**

In March, 2015, the Supreme Court heard oral argument in *Ohio v. Clark*, a case whose facts make any decent person cringe, and whose potential Confrontation Clause implications should make a lawyer’s head spin. Clark was convicted of beating his girlfriend’s 3½ year-old son, L.P., and her 2-year-old daughter, A.T. Each child had bruises clearly indicating they had been beaten, frequently, by an adult. The sequence of events leaves it unclear whether that latest beating was by Clark, or by L.P.’s mother, T.T.⁶ The matter came to light when teachers noticed L.P. had been beaten on his head and face. Because the Supreme Court granted cert as to the admissibility of statements L.P. made to two of his teachers, the circumstances as to how those statements were elicited are worth a close look:

{¶ 43}... [A]t approximately 1:00 p.m., Clark dropped L.P. off at his school, William Patrick Day School, which was operated by the Council for Economic Opportunities of Greater Cleveland Head Start. Ramona Whitley, one of L.P.’s teachers, saw L.P. in the lunchroom and noticed that his eye was bloodshot or bloodstained. She asked him, “What happened?” He told her that he had fallen. Whitley then asked, “How did you fall and hurt your face?” L.P. again said that he had fallen. Whitley noted that L.P. was not as talkative as usual and wouldn’t eat.

{¶ 44} When L.P. went into the classroom, he played at a table. In the brighter light of the classroom, Whitley noticed additional injuries. She saw red marks on L.P.’s head “like whips of some sort” and welts on his face. Whitley testified that she was “kind of like in shock” and asked, “Oh, what happened?”

{¶ 45} Whitley then got the attention of the lead teacher, Debra Jones, and asked her to look at L.P. At this time, Jones saw L.P.’s bloodshot or bloodstained eye and some “redness” around his neck. Jones immediately said, “Whoa, what happened?” and “Who did this? What happened to you?” Jones testified that L.P. seemed “kind of bewildered” but then said something like “Dee, Dee.” Jones, wanting to know if L.P. was talking about another child, asked, “Is he big or little?” Jones testified that L.P. said, “Dee is big.” [The teachers did not know at this point that "Dee" was L.P.’s mother's boyfriend's nickname.]

{¶ 46} Because Jones did not want to embarrass L.P. or alarm any of the children, she took L.P. to the office of her supervisor, Ms. Cooper. Jones testified that Cooper asked L.P. if she could see his shirt. When Cooper raised L.P.’s shirt, Jones saw red marks on L.P.’s body. It was only at this point—after the child was taken to the supervisor’s office—that the decision

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⁶ The night before the teachers noticed L.P.’s bruises, T.T. left Ohio to travel to Washington, D.C. to engage in prostitution (something she had apparently done several times in the past), leaving the children with Clark. She stayed away for five months before returning to Ohio. T.T eventually pleaded guilty to child neglect, received an 8-year sentence, and testified against Clark.
was made to report a suspicion that L.P. had been abused. ...\(^7\)

An examination of 2-year old A.T. a few days later revealed that she, too, had been beaten, and burned.

The trial judge concluded that L.P. was incompetent to testify at trial, but admitted L.P.’s statements to the two teachers--and to child welfare officials, a police officer, and two grandparents, each more-or-less accusing Clark of having beaten him. He was convicted. On appeal, an intermediate appellate court held that all of the statements were inadmissible, either on Confrontation Clause grounds, or hearsay grounds, or both.\(^8\) The state conceded the inadmissibility of most of the statements, but appealed the ruling regarding L.P.’s statements to his teachers, arguing that they fell within a special hearsay exception, and were non-testimonial. The state supreme court, dividing 4-3, rejected the state's arguments and affirmed, holding that the statements to the teachers were testimonial and therefore inadmissible. The court based its decision on an Ohio statute, which makes it mandatory for a wide range of people—including teachers and day care workers—to be report potential child abuse to child welfare officials or to the police. This statute, the court concluded, made L.P.’s teachers agents of the police, for purposes of the Confrontation Clause, and that their questioning of L.P. was primarily investigative in nature; thus, the child's statements were testimonial. Three judges submitted a bitter and impassioned dissent.

8.19.2 **OHIO v. CLARK: POSSIBLE OUTCOMES**

Clark's attorneys urged the Supreme Court to uphold the Ohio Supreme Court's conclusions that (a) the mandatory reporting statute automatically made L.P.'s teachers agents of the police, (b) the teachers' questioning of L.P. were primarily investigative in nature, and therefore (c) L.P.'s answers were inherently testimonial in nature. Prosecutors and child protection professionals warn that if the Supreme Court accepts these arguments, it will be almost impossible to prosecute many of those who abuse children physically or sexually.

The state, by contrast, argued the Court should formally rule, consistent with several statements in post-*Crawford* dicta, that statements made outside court proceedings, depositions and affidavits should be considered testimonial only if they are made to law enforcement officials during "formal" interrogations; that the teachers were not acting as police agents; that, rather, the teachers' primary purpose, during their initial questioning of L.P., was to find out

\(^7\) State v Clark, 999 N.E.2d 592, 602 (2013) (O'Connor, C.J., dissenting). Clark's first name is Darius; he had been known as "Dee" most of his life.

\(^8\) For example, the court held that several of the statements were inadmissible hearsay because the circumstances under which they were made were untrustworthy. Children, particularly young children, are very vulnerable to suggestion. It is altogether possible that once L.P. realized that his teachers (and everyone else who questioned him) was convinced that "Dee" had beat him, L.P. became convinced of that, too.
whether L.P. had been beaten by someone (such as other children) at the school, and therefore was protective, not investigatory; and that L.P’s statements were not testimonial.

The case thus gives the Court the opportunity to issue broad, sweeping statements about the Confrontation Clause. One is that all statements to "mandatory reporters" are inherently testimonial. The other is that statements to non-public officials are never testimonial. Either outcome is plausible; neither, I suspect, is likely, because each sweeps much more broadly than is necessary to decide the case.

Two amicus briefs, each submitted by teams of law professors, are also worth mention. One argues (a) that Crawford was a wrong turn that misconstrued the Confrontation Clause; (b) that, rather, the Clause applies only when the only evidence available to support an element of a crime is testimonial hearsay; and (c) that once the prosecutor offers non-hearsay evidence of each element, the Clause allows hearsay—even "testimonial" hearsay—to corroborate that evidence. The other amicus brief urges the Court (a) to acknowledge that a young child simply is not competent to give "testimony" in any formal way, but that a child's statements may nevertheless be reliable and probative; (b) to endorse a procedure whereby, if the child is not competent to testify, a defense expert should be permitted to question the child declarant in a comfortable, neutral setting, that the questioning be video-recorded; and (c) to rule, and that this procedure serve as an adequate substitute for formal confrontation and cross-examination. Each amicus approach is imaginative, but I don't see a majority of the Court taking the leap to endorse either.

The Court is more likely to look for a narrower ground on which to decide the case. For example, the Court could assume without deciding that the teachers were acting as police agents (much as it made a similar assumption in Davis about 911 operators). Then it could hold that teachers' initial questioning of L.P. was protective, rather than investigatorial in nature—the teachers had to find out whether L.P. had been beaten by another child; but that once L.P. told them that "Dee" is big—presumably an adult—and they discovered that L.P. also had bruises indicative of other, older beatings, their questioning of L.P. became investigative in nature—much like the 911 operator's did in Davis. It could then remand the case to the Ohio courts for further proceedings consistent with that ruling.  

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9 This short summary significantly over-simplifies the positions advocated in the amicus briefs.

10 Translation: the state would try Clark again, at which only L.P.'s initial statements to Whitley and Jones would be admissible.
§ 9.20 [Fed. R. Evid. 803(6)] IN GENERAL

Effective December, 1, 2014, Fed. R. Evid. 803(6)(E) has been amended. The rule now reads:

6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;
(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
(C) making the record was a regular practice of that activity;
(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
(E) neither the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

The purpose of the amendment is to make it clear that if the offering party satisfies Rule 803(6)(A)-(D), the trustworthiness of the record—and therefore its admissibility—is assumed, and the "opponent" (i.e., the party against whom the record is being offered) has the burden of proving lack of trustworthiness. See § 9.35.
§ 9.35  THE "TRUSTWORTHINESS CLAUSE"

Replace the first three paragraphs of the section with:

Fed. R. Evid. 803(6)(E) has been amended, and now explicitly states that a record which apparently satisfies the requirements of Rule 803(6)(A)-(D) is presumed to be trustworthy, and therefore is admissible over a hearsay objection, so long as "(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." The purpose of the amendment is to make explicit what was generally understood: that the burden is the "opponent" (i.e. the party against whom the record is offered) to persuade the judge by a preponderance of the evidence that the record is untrustworthy.

The Advisory Committee Note comments: "The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances."

[The section continues with the first paragraph on p. 195 of the book.]

§ 9.36  THE BUSINESS RECORD EXCEPTION AND THE CONFRONTATION CLAUSE

Replace the final paragraph with:

Melendez-Díaz, and two subsequent lab report decisions, Bullcoming v. New Mexico and Williams v. Illinois, are discussed in §§ 9.50 to 9.53.6, infra.

§ 9.37  INTERPLAY WITH OTHER RULES

Add at the end of the section:

The interplay between the Sixth Amendment Confrontation Clause, the business record or public record exception, and Fed. R. Evid. 703, are discussed in §§ 9.53.5 & 9.53.6.

§ 9.38  FED. R. EVID. 803(7): ABSENCE OF ENTRY IN BUSINESS RECORD

Rule 803(7)(C), the trustworthiness clause, now reads: "(C) the opponent does not show that the possible source of the information or the method or other circumstances indicate a lack of trustworthiness." The purpose of the amendment is to make explicit what was generally understood: if the offering party satisfies Rule803(7)(A)-(B), then evidence of the absence of the
record is admissible to show the "matter did not occur or did not exist," unless the "opponent" (i.e. the party against whom the record is offered) to persuade the judge by a preponderance of the evidence that the absence of the record is untrustworthy and therefore should not be admitted for that purpose. See § 9.35.
§ 9.39  FED. R. EVID. 803(8)

Rule 803(8)(B), the trustworthiness clause, has been amended. The rule now reads:

8) Public Records. A record or statement of a public office if:
(A) it sets out:
   (i) the office's activities;
   (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
   (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

See § 9.41, infra.
§ 9.41 TRUSTWORTHINESS (1)

As of December, 2014, Rule 803(8)(B), the trustworthiness clause, has been amended. The Rule now reads:

8) Public Records. A record or statement of a public office if:
   (A) it sets out:
       (i) the office's activities;
       (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
       (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
   (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

The amendment makes explicit what was generally understood: that a record which apparently satisfies the requirements of Rule 803(8)(A) is presumed to be trustworthy, and therefore is admissible over a hearsay objection, unless the "opponent" (i.e., the party against whom the record is offered) can persuade the judge by a preponderance of the evidence that the record is untrustworthy. The Advisory Committee's comment on this provision is substantively identical to the comment regarding the similar amendment to Rule 803(6)(E). See § 9.35, supra.
§ 9.51  WHO DOES THE PROSECUTOR HAVE TO CALL AS A WITNESS?

Add at the end of the section:

In 2012, in Williams v. Illinois, this question emerged again as a potentially decisive issue – which the Court did not resolve. See § 9.53.3, infra.

§ 9.52  MUST THE PROSECUTOR CALL THE ANALYST, OR MERELY MAKE HIM AVAILABLE TO THE DEFENSE?

Add at the end of the section:

In 2012, in Williams v. Illinois, four Justices again suggested, indirectly, that, at least regarding forensic lab reports, it should satisfy the Confrontation Clause if the defendant could subpoena the analyst and call him or her as a witness. But five Justices rejected that proposition. Williams is discussed in considerable detail in §§ 9.53.1 to 9.53.6, infra.
§ 9.53.1  WILLIAMS V. ILLINOIS: THE FACTS AND A SUMMARY

In 2012, the Supreme Court decided Williams v. Illinois,\textsuperscript{11} episode 3 in its long-running series, "Application of Crawford to Forensic Lab Reports." Like the final episode of The Sopranos, Williams ended without anyone knowing for sure exactly what happened or what it all meant; like the season finale of many TV series, it ended with everyone wondering what's going to happen next.

* * *

The preceding paragraph is an attempt to describe, (I hope) in a humorous way, how the Williams decision took a body of law that was already murky, and made it even more so. There is nothing at all humorous, however, about the crime Williams was convicted of committing.

In February 2000, L.J., a woman in her twenties, was abducted by a stranger as she walked home from work; he forced her into his car and raped her. A rape kit vaginal swab was taken shortly after the crime, and kept in a secure evidence freezer until November 2000, when it was shipped by the Illinois State Police (ISP) crime lab to Cellmark, a DNA research company in Maryland. In April 2001, Cellmark returned the swab to ISP together with a report of a DNA profile\textsuperscript{12} which, according to Cellmark, was the result of its analysis of the semen on the L.J. swab. At this point there were no identifiable suspects in the case; indeed, at that point, L.J. and the police investigating the case apparently did not even know that a man named Sandy Williams existed.

Sandra Lambatos, a forensic scientist at the ISP lab, conducted a computer search comparing the DNA profile she received from Cellmark to profiles in the state DNA database. The computer showed a match with DNA derived by ISP from a blood sample taken from Williams (and analyzed by the ISP lab) after Williams was arrested on unrelated charges on August 3, 2000. Lambatos then did her own comparison of the two profiles, and confirmed the match. On April 17, two weeks after Cellmark sent the rape kit DNA profile to the Illinois authorities, L.J. attended a lineup and identified Williams as her assailant. Williams was indicted.\textsuperscript{13}

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\textsuperscript{11} Williams v Illinois, 132 S Ct 2221 (2012).

\textsuperscript{12} The Cellmark profile consists of a cover letter; a second page, basically reporting what was done, what was found (DNA from one male and one female); and twelve pages of charts and diagrams that only someone reasonably well-versed in DNA could understand. Professor Richard Friedman, of the University of Michigan Law School, has posted a copy of the DNA report at http://www-personal.umich.edu/~rdfrdmn/Cellmark.Report.pdf.

\textsuperscript{13} This summary of the facts is derived from Justice Alito's plurality opinion, Williams v Illinois, 132 S Ct 2221, 2229; the intermediate appellate court decision, State v Williams, 896 NE2d 961, 963; and Justice Kagan's dissenting opinion, Williams v Illinois, 132 S Ct 2221, 2262-2263.
At trial, after the state properly introduced and authenticated Williams' DNA profile from the blood sample taken after his August 2000 arrest, Lambatos testified that the DNA profile from Williams' August 2000 blood sample and the Cellmark DNA profile were “a match.” The state did not call any witness from Cellmark to testify, and thus did not offer any direct evidence (a) that the DNA profile was in fact derived from the semen on the L.J. swab, nor (b) that Cellmark technicians had followed correct procedures in analyzing the DNA and preparing the report. Williams was convicted. After state appellate courts affirmed his conviction, the Supreme Court granted cert. The issues before the Court were: (1) was the Cellmark report testimonial; and (2) if so, was it nevertheless admissible over a Confrontation Clause objection.

The Supreme Court's decision included four opinions totaling more than 29,000 words. Four justices (“the plurality”) argued that for a variety of reasons, the circumstances surrounding the preparation of the profile, and the manner in which it was used at trial, did not violate Williams' Confrontation Clause rights. Five justices – the four dissenting justices (“the dissent”) and Justice Thomas – completely rejected each of the plurality's reasons. (The four dissenters plus Thomas adds up to five Justices – a majority.) Yet Justice Thomas voted to affirm the conviction because in his opinion the report Cellmark sent to the ISP was not a “formal” enough document to be classified as testimonial.

The dissent aptly summarized where this leaves us:

Before today's decision, a prosecutor wishing to admit the results of forensic testing had to produce the technician responsible for the analysis. That was the result of not one, but two decisions this Court issued in the last three years. But that clear rule is clear no longer. The five Justices who control the outcome of today's case agree on very little. ... [T]hey have left significant confusion in their wake. What comes out of four Justices' desire to limit Melendez-Diaz and Bullcoming in whatever way possible, combined with one Justice's one-justice view of those holdings, is—to be frank—who knows what. Those decisions apparently no longer mean all that they say. Yet no one can tell in what way or to what extent they are altered because no proposed limitation commands the support of a majority.14

If I write a law review article about the decision, the title might be: Williams v. Illinois: a Tale, Told by the Supreme Court, Full of Sound and Fury, Signifying Very Little.15

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15 If you are familiar with the line from Shakespeare which this title paraphrases, congratulations. If not, check out Macbeth, Act V, sc. v, lines 26-28. You can also find the line by Googling the phrase “full of sound and fury.” — Actually, maybe that wouldn't be so hot a title after all. Unless a reader was already familiar with Williams, that title wouldn't tell the reader what the article was about. Second, why would a law review publish an article whose title proclaims that it's not important? Maybe I'll call it something like The Confrontation Clause, Forensic Reports, and Williams v. Illinois: Much Ado About ... What?
§ 9.53.2 WILLIAMS V. ILLINOIS: ANALYSIS

The single most important things to realize about the result in Williams v. Illinois\textsuperscript{16} are: (1) there is no majority opinion; (2) there is no “holding” (other than: Williams' conviction is affirmed). Therefore, (3) no rule emerges from it on which anyone can rely with any degree of confidence (unless, I suppose, another case comes along with pretty much exactly the same facts). Instead, there are 3 different factions on the Court.

1. The “rejectionists.” First, there is the Williams plurality: four Justices (Roberts, Kennedy, Breyer and Alito) who dissented in Melendez-Diaz v. Massachusetts,\textsuperscript{17} dissented against the application of the Melendez-Diaz rule in Bullcoming v New Mexico,\textsuperscript{18} and argued in Williams that even if Melendez-Diaz was good law – which they did not really concede – it should not apply in Williams. I call this faction the “rejectionists,” because in all three cases they rejected the idea that forensic lab reports should be considered testimonial.

2. The Melendez-Diaz “purists.” This four-member faction that has consistently argued, in all three cases, that forensic reports are testimonial: Justices Scalia, Ginsberg, Sotomayor and Kagan.\textsuperscript{19} I call this faction the “purists,” because in all three cases, they insist: by all logic, forensic reports are testimonial, and if that causes problems to prosecutors or lab directors, they will simply have to figure out a way to solve those problems.\textsuperscript{20}

3. Justice Thomas. Justice Thomas insists that a forensic report is “testimonial” – and therefore has voted with the purists – where the report was a formal document, such as an affidavit (as in Melendez-Diaz) or a “certification” (as in Bullcoming). But if the report was a less formal document (such as the DNA profile Cellmark sent to the ISP in Williams), then, in his view, it is not testimonial – and in Williams he voted with the rejectionists.

One way to make sense of this case is to compare the facts in Williams to the facts in Melendez-Diaz and Bullcoming, and explain which facts which judges relied on in voting the way they did.

\textit{a. Similarities}

\textsuperscript{16} Williams v Illinois, 132 S Ct 2221 (2012).

\textsuperscript{17} Melendez-Diaz v. Massachusetts, 129 S Ct 2527 (2009).

\textsuperscript{18} Bullcoming v New Mexico, 131 S Ct 2705 (2011).

\textsuperscript{19} In Melendez-Diaz, the four Justices voting this way were Scalia, Ginsberg, Stevens and Souter. By the time Bullcoming was decided, Justices Stevens and Souter had left the Court and were replaced by Justices Sotomayor and Kagan, each of whom has joined the Scalia-Ginsberg "purist" faction.

\textsuperscript{20} This overstates the case somewhat. In Bullcoming, Justice Sotomayor wrote a concurrence, which Justice Kagan joined, suggesting they had some flexibility on some issues. See § 9.53. But they stayed solid with Justices Scalia and Ginsberg in Williams.
Williams is similar to Melendez-Diaz and Bullcoming in the following ways.

1. In Williams, as in Melendez-Diaz and Bullcoming, a laboratory analyzed evidence and prepared a report of the results, with the expectation that eventually it might be used as evidence in a criminal prosecution.

2. In Williams, as in Melendez-Diaz and Bullcoming, the state used the contents of the report at trial without calling any witness who participated in the forensic analysis of the underlying evidence or the preparation of the report.

These similarities, according to the Williams dissent – Justice Kagan, writing also for Justices Scalia, Ginsberg and Sotomayor – were the only significant facts in the case, and mandated the conclusion, consistent with Melendez-Diaz and Bullcoming, that the state had violated Williams' right to confront the technicians who conducted the Cellmark analysis.

b. Differences

Williams differs from Melendez-Diaz and Bullcoming in the following ways.

1. In Melendez-Diaz and Bullcoming, the defendant had already been arrested and charged when the evidence in those cases was analyzed. At the time Cellmark did the DNA profile in Williams, by contrast, no suspect had been identified, let alone arrested and charged. Thus, the initial use that was made of the Cellmark profile in Williams was to attempt to identify the perpetrator; only if that succeeded could it be used at a trial.

2. It is (supposedly, anyhow) much easier to determine whether a DNA sample (as in Williams) has become contaminated, than most other kinds of forensic evidence, such as an analysis to determine whether a powder contains drugs (Melendez-Diaz), or to determine the percentage of alcohol in a blood sample (Bullcoming).

3. Circumstantial evidence strongly corroborated the likelihood that Cellmark had in fact analyzed the semen in the L.J. swab (as opposed to accidently analyzing a different sample and mistakenly reporting it as coming from the L.J. swab), and had done so correctly.21

4. In Melendez-Diaz and Bullcoming, the lab reports were prepared by state crime laboratories which were affiliated with the police. In Williams, the DNA test of the semen presumably found on the swab was performed by Cellmark, a company unaffiliated with any

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21 The plurality emphasized that there is no evidence to suggest that Cellmark had ever received any prior sample of Williams' DNA; thus, Cellmark could not have accidently analyzed a sample of Williams DNA from a different case and mistakenly attributed it to the L.J. swab. The plurality also emphasized that after ISP lab scientist Lambatos found that the swab DNA matched the Williams blood sample DNA, L.J. identified Williams at a lineup.
law enforcement agency.

5. The state did not formally introduce the Cellmark DNA profile into evidence.

6. Williams was tried before a judge, not a jury.

7. The Cellmark report was neither an “affidavit,” nor a “certification.”

The plurality (i.e., the “rejectionists”) – Justice Alito, writing also for Chief Justice Roberts and Justices Kennedy and Breyer – cited the first “difference factor” in arguing that the Confrontation Clause did not apply because the Cellmark DNA profile was not a “witness against” Williams, as the term “witness against” is used in the Confrontation Clause. But a majority of the Court – the four dissenting Justices and Justice Thomas – were unimpressed: in essence, these five Justices responded, “We rejected that argument in Melendez-Diaz, and we reject it again here.” Since 5 of the 9 justices rejected the plurality's “not-a-witness-against” reasoning, that reasoning cannot be the “holding” in the case.

The plurality cited the first three “difference factors” to support their conclusion that the Cellmark DNA profile was so reliable that it should not be considered “testimonial,” for Confrontation Clause purposes. But a majority of the Court – the four dissenting Justices, and Justice Thomas – were unimpressed: “Been there, done that.” In other words: “We rejected that argument in Melendez-Diaz, and we reject it again here.” Since 5 of the 9 justices rejected the plurality's “so-reliable-it's-not-testimonial” reasoning, that reasoning cannot be the “holding” in the case.

The plurality cited the fifth and sixth “difference factors” to support their conclusion that, even if the Cellmark DNA profile was “testimonial,” it was not offered for a hearsay purpose (see § 6.4), and therefore did not violate Williams' rights under the Confrontation Clause. (The plurality conceded that this reasoning would be more problematic in a jury trial, but insisted that it worked just fine in a non-jury trial.) This aspect of the plurality opinion – and the other five Justices' response to it – may be the most difficult for a law student to understand, particularly if you haven't studied Fed. R. Evid. 703. I'll explain this – and as a bonus, explain Rule 703, too – in § 9.53.5 and § 9.53.6. But the most important thing you should understand about this aspect of

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22 To be precise, the majority in Melendez-Diaz insisted that any witness who testifies for the prosecution is a “witness against” the defendant for Confrontation Clause purposes, and the same is true for any hearsay declarant whose “testimonial” statement is offered against a defendant to prove the truth of the matter asserted in the statement.

23 The fourth factor also implicitly supports this argument: that Cellmark is an independent, private company (located several states away from Illinois) presumably makes it less vulnerable to potential police pressure to report the results that the police want to see.

24 Williams at 2275 (Kagan, J., dissenting). (These are Justice Kagan's actual words.)

25 This is my paraphrase of Justice Kagan's discussion of the issue.
the plurality's reasoning is that a majority of the Court – the four dissenting Justices and Justice Thomas – rejected it, insisting that the Cellmark DNA report had been offered for a hearsay purpose, and therefore (all other things being equal\textsuperscript{26}), the Confrontation Clause should apply. Since 5 of the 9 justices rejected the plurality's "not-for-a-hearsay-purpose" reasoning, that reasoning cannot be the "holding" in the case.

Justice Thomas cited the seventh "difference factor" to support his conclusion that the Cellmark DNA report was not testimonial. Starting with \textit{Crawford} and in virtually every Confrontation Clause decision since, Justice Thomas, alone among the nine Justices, has insisted that statements are "testimonial" only if they were marked by "solemnity and formality" – such as testimony, responses to "formal" police interrogation, affidavits, and formal "certifications." Since the Cellmark DNA report was none of these,\textsuperscript{27} according to Justice Thomas, it was not "testimonial"; therefore using it as evidence did not violate Williams' rights under the Confrontation Clause.

None of the other eight Justices in \textit{Williams} endorsed Justice Thomas' reasoning. Justice Kagan, for the four dissenting Justices (the "purists"), protested that the Thomas approach to the Confrontation Clause "grant[ed] constitutional significance to minutia, in a way that can only undermine the Confrontation Clause's protection."\textsuperscript{28} It would permit prosecutors to avoid the demands of the Confrontation Clause "by using the right kind of forms with the right kind of language," and added, parenthetically: "(It would not take long to devise the magic words and rules principally, never call anything a 'certificate.')"\textsuperscript{29} Justice Thomas replied, "the Confrontation Clause reaches bad-faith attempts to evade the formalized process."\textsuperscript{30} Justice Kagan replied, in essence, "Oh, yeah? How?"\textsuperscript{31}

The plurality (the "rejectionists"), understandably, said nothing in criticism of Justice Thomas' concurring opinion. Why would they? Justice Thomas' vote gave the plurality the fifth vote they needed to affirm Williams' conviction and to prevent the dissenting Justices from expanding the scope and application of \textit{Melendez-Diaz}. Unless and until they are able to overturn \textit{Melendez-Diaz} completely, they'll settle for what they can get.

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\textsuperscript{26} We haven't gotten to difference number 7 yet.

\textsuperscript{27} Remember, you can view the Cellmark profile at http://www-personal.umich.edu/~rdfrdman/Cellmark.Report.pdf.

\textsuperscript{28} Williams, 132 S Ct 2221, 2276 (Kagan, J., dissenting). She also complained that the features of the Cellmark report Justice Thomas relied upon "amount to (maybe) a nickel's worth of difference," because "[t]he similarities of form, function and purpose dwarf the distinctions."

\textsuperscript{29} Id.

\textsuperscript{30} Williams at 2261 (Thomas, J., concurring in the result).

\textsuperscript{31} This is my paraphrase of what of what Justice Kagan said. Williams at 2276 n 7 (Kagan, J., dissenting).
The bottom line is this: so long as the rest of the Court remains evenly split between the four Melendez-Diaz “purists” vs. the four Melendez-Diaz “rejectionists,” the outcome of Confrontation Clause cases involving forensic reports may depend on whether Justice Thomas considers the report “solemn” and “formal” enough to be testimonial. But who knows? Change one of the “differences” on which the plurality relied, and maybe one or more rejectionists will join the purists. Or maybe a case will come along which will persuade a purist or two to join the rejectionists in some circumstances.32

§ 9.53.3 JUSTICE BREYER'S CONCURRENCE: THE GHOSTBUSTERS QUESTION

So far I've described three of the opinions written by Justices in Williams – Justice Alito's plurality opinion, Justice Kagan's dissent, and Justice Thomas' “concurring only in the result.” Justice Breyer, who signed Justice Alito's plurality decision, also filed a separate concurrence, which deserves a look, because Breyer's concurrence continues a dialogue which began with Melendez-Diaz. That dialogue in Melendez-Diaz and Bullcoming can be summed up as follows:33

M-D purists:34 If the government wants to introduce the results of a forensic examination of evidence, it must call the “analyst” who performed the tests recorded in the lab report.

Rejectionists:35 You purists talk about calling ‘the analyst.’ But you never specify who that might be. Suppose four people were involved in different steps of an analysis, or six, or even more. By your logic, the prosecutor might have to call every single one of them—which would take up hours of trial time and would require lab technicians and scientists to spend more time in court than they do in the lab. That's a waste of time, money and resources and serves no real purpose.

In essence, the rejectionists demand to know: “Who you going to require the prosecutor to call?” I call this the ‘Ghostbusters question.”36

32 The “purist” faction may not be as solid as the three lab report cases make them appear. For example, in Michigan v. Bryant, which concerned statements a shooting victim made during “informal” police questioning, Justice Sotomayor voted with the “rejectionists” and Justice Thomas, and against Justices Scalia and Ginsberg; in fact, Justice Sotomayor wrote the majority opinion in that case. Bryant is discussed in § 8.13 and 8.14.

33 To make sure everyone understands: nothing in this section is an actual quote from any judicial opinion. This is my brief, informal summary of the conflicting positions.

34 That is, Justices Scalia, Ginsberg, Sotomayor and Kagan, the four Justices who have voted in favor of the Melendez-Diaz rule in all three cases.

35 That is, the four Justices who voted against this rule in Melendez-Diaz and Bullcoming, and comprised the plurality in Williams that refused to apply Melendez-Diaz in that case: Chief Justice Roberts and Justices Kennedy, Breyer and Alito.

36 In the 1984 movie Ghostbusters, various paranormal ghosties and beasties invade New York
Justice Breyer's concurrence\(^{37}\) and Justice Kagan's dissent in \textit{Williams} continued the dialogue:\(^{38}\)

Breyer: You still haven't answered the question: which analyst(s) does the government have to call? In a typical DNA case, for example, anywhere from 6 to 12 technicians and scientists participate in the preparation and analysis of the evidence and the preparation of the report of the results. Does the prosecutor have to call all of them? This will be so impractical and so expensive that many prosecutors simply won't be able to use DNA or other hi-tech forensic evidence anymore. – And if the government doesn't have to call them all, what's the principle that defines who \textit{does} have to call?

Kagan: OK, that's a legitimate question, and I agree, we'll have to address it – when we get a case in which at least \textit{one} of the technicians who participated in the testing actually testified at trial. But why do you harp on it in \textit{Williams}? In \textit{Williams}, like \textit{Melendez-Diaz} and \textit{Bullcoming}, nobody who participated in the analysis testified. You should decide \textit{Williams} on the merits, and leave the "\textit{Ghostbuster} question" aside until we take a case that actually requires us to decide it!

Breyer: We rejectionists are afraid you purists will back the Court into a corner that will make it almost impossible for prosecutors to use DNA evidence and other evidence requiring multiple-step, multiple-participant analyses.

It's impossible to know how this will turn out; but if the Court grants cert on a case in which some participants in the analysis testified, the purists will have a chance to satisfy Justice Breyer's concerns (and maybe some of the other purists’ concerns, too) – in which case, Justice Thomas may no longer be the swing vote.

\footnote{You may be wondering: “Breyer concurred in \textit{Williams}, but he's still part of the plurality; Thomas concurred in \textit{Williams}, too, but he's \textit{not} part of the plurality. How come? What's the difference?” The difference is that Breyer, in essence said, “I agree with the plurality opinion. Williams' conviction should be upheld for the reasons spelled out in the plurality opinion. I'm just adding these extra thought of my own.” Thomas, on the other hand, in essence said, “Even though I agree with the plurality that Williams' conviction should be upheld, the plurality's reasoning is bogus, and I reject it. I'm voting to uphold based on my own, superior reasoning." That's why the Breyer concurrence is captioned, “Justice Breyer, concurring,” while the Thomas concurrence is captioned, “Justice Thomas, concurring in the judgment”—i.e., \textit{only} in the judgment, not in the plurality's reasoning.}

\footnote{What follows are not actual quotations from any judicial opinion, but my own brief, informal summary of the Breyer and Kagan opinions.}
§ 9.53.4  “SO WHAT DO I NEED TO KNOW FOR THE EXAM?”

Each professor chooses what to ask about and what to expect as an answer. If (when?) I test my students about Williams, I might do so in one of two ways.

First, I might ask questions to test whether they understand that none of the theories put forth by the plurality or Justice Thomas is the “holding” in the case; in fact, that a majority of the Court rejected each of those theories.

Second, I might give my students a set of facts similar but not identical to those in Williams – for example, a pattern which duplicates most but not all of the 7 “differences” I discussed in §9.53.2 subsection b. I’d expect my students to recognize that my fact pattern differs from that in Williams in this or that way, and then discuss how an attorney might plausibly argue that the particular difference or differences might change the outcome of the case.

Question 1. Williams holds that if a forensic report is reliable enough and is corroborated by other evidence, it is not subject to a Confrontation Clause objection. True or false?

Ans. False. Although four Justices endorsed this principle Melendez-Diaz and endorsed it again in Williams, a majority of the Court rejected it in both cases.

* * *

The next two sections are the “bonus sections” I referred to earlier. § 9.53.5 is a general explanation of Fed. R. Evid. 703. § 9.53.6 briefly describes how (according to five justices currently on the Supreme Court, and many evidence scholars) Fed. R. Evid. 703 and the Confrontation Clause intersect.

§ 9.53.5  FED. R. EVID. 703

Fed. R. Evid. 703 provides:

Rule 703. Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
Break the rule down into its three sentences.

a. The first sentence: “made aware of or personally observed”

The first sentence reads:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed.

If the expert has “personally observed" something, no problems arise: all things being equal, a witness is permitted to testify about matters on which he or she has personal knowledge. See Fed. R. Evid. 602. Issues arise with regard to “facts or data" that the expert “has been made aware of" other than by "personal observation."

There are two ways an expert may be “made aware of" facts or data. One is the hypothetical question. Suppose we are trying a toxic tort case. Plaintiff became sick and his health is permanently impaired. He alleges the cause was exposure to a toxic product or substance released by TS [“Toxic Substance"] Corp., the defendant. Plaintiff’s lawyer might call Dr. MD as an expert and, after eliciting testimony about her qualifications and experience, ask: “Dr. MD, assume the following facts. [The attorney then spells out the facts favorable to his case, which he hopes he has proven or will prove to the jury's satisfaction.] Based on these facts, do you have an opinion, to a reasonable degree of medical certainly, as to the cause of the plaintiff's condition, and its permanency?"

The second way an expert may be “made aware of" facts or data in the case is for the expert to do her own homework. Suppose a defendant is charged with destruction of property; while in Owner's home, he slashed and tore and threw acid on a painting hanging on Owner's wall. Assume that the severity of the crime depends on the value of the property destroyed – destroying something worth $10,000 or more carries a much heavier penalty than something worth less than $500. The property in this case is a painting called Maid in Mauve that some believe was done by Pablo Picasso in 1899, with a value far in excess of $10,000; but others believe it is a clever forgery by an unknown imitator worth, perhaps, a few hundred dollars at most.

As proof that the painting was worth more than $10,000, the prosecutor calls Henrietta Mathis, a professional art dealer and appraiser. After stating her experience and qualifications, direct examination proceeds:

Q1 Ms Mathis, did you, at my office's request, study Maid in Mauve and form an opinion as to what its value was before it was destroyed?
A1 Yes, I did.
Q2 How did you undertake that study?
A2 I did several things. [a] First, I learn what I can about what we call a painting’s “provenance": it's history. Where did it first appear, who sold it, who bought it. [b] I
examined photographs that had been taken of it before it was destroyed, to evaluate
whether it has the general appearance of the work Picasso did at various stages of his
career. [c] Then I examined what was left of the painting itself. For example, I studied
the surface of what was left of the painting to determine if the brush strokes were
similar to that in Picasso's work. [d] I consulted several learned treatises of art history,
particularly those which focused on Picasso and his contemporaries. [e] And I
consulted several well-respected art dealers and art appraisers. 39

Q3 Are these things that you regularly do when you are asked to appraise a painting?
A3 Yes, although (thank goodness!) it's the first time I've been asked to do so for a great
work of art that has been destroyed.

Q4 And the steps that you've outlined – are these the things that someone in your
profession would normally do when called upon to appraise a work of art?
A4 Oh, yes. We all do these things. We are trained to do it, we study how to do it.

Q5 Based on all of this, do you have an opinion of whether Maid in Mauve was an
original Picasso?
A5 Yes. I am convinced that Maid in Mauve is an original by the master, painted in 1899
during his very brief "mauve period."

Q6 And do you have an opinion as to what Maid in Mauve was worth on the open market,
before it was destroyed?
A6 An original mauve period Picasso? Of this size and brilliant simplicity? Many tens of
thousands of dollars. $50,000 at least. I can think of dozens of serious collectors who
would have gladly paid that much for it; many fine museums, as well.

Q7 And what is it worth now?
A7 The frame might go for a hundred dollars. The painting itself has been so utterly
destroyed that it is worthless.

Some of what Ms Mathis did in forming her opinion (see A2) is clearly admissible:

[b] An art expert can certainly testify directly about what she “personally observed” (in the
language of Rule 703) when she examined a pre-destruction photograph. 40

[c] Similarly, Ms Mathis can certainly testify directly about what she “personally observed"
when she examined what is left of Maid in Mauve.

[d] Under properly structured direct or cross-examination of an expert witness such as Ms
Mathis, an attorney may introduce relevant passages from learned literature. See Fed. R.

39 In the real world, an expert would do much, much more than what I’ve outlined here; but this is
a hearsay book, for law students, not a treatise on the science and art of art authentication and appraisal.
(If you want to know more, when you’ve got a spare moment – hah! – see Elizabeth Williams, Liability
for Sale of Forged Antique or Work of Art, 50 Am. Jur. Proof of Facts 3d 371 (originally published in
1999; updated 2012).

40 The prosecutor would probably also introduce the photograph and have Ms Mathis explain to
the jury why it supports her theory that Maid in Mauve is a genuine Picasso.
Evid. 803(18), covered in §§ 10.9.

But Ms Mathis also acquired “facts or data” that are not, independently, admissible.

[a] How did she study the painting’s “provenance”? Let's assume that (among other things) she talked to Owner and to the dealer who sold it to Owner, if the dealer is still alive and willing to speak to her; and so on. What Owner and the dealer told her would probably be inadmissible hearsay, if offered to prove what they told Ms Mathis was true.

[e] What other experts told Ms Mathis likewise would be inadmissible hearsay if she sought to repeat them as proof that what they said was true.

Is it permissible for her to base her opinion, in part, on inadmissible evidence?

b. The second sentence: the “facts or data” relied on “need not be admissible”

The second sentence of Fed. R. Evid. 703 provides:

If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Even though Ms Mathis relied (in part) on “facts or data” – [a] and [e] – which are inadmissible hearsay, it is permissible for her to base her opinion, in part, on such information, so long as art experts “would reasonably rely on those kinds of facts or data in forming an opinion on the subject.” How do we know that art experts “would reasonably rely,” etc.? Q3-A3 and Q4-A4 of Ms Mathis’ direct examination lay the necessary foundation.

c. Third sentence: disclosing those “facts or data” at trial

Suppose Ms Mathis testifies, “I relied in particular on the judgment of Professor Guggenheim Tate, the highly respected English art historian, who told me that he is firmly convinced that Maid in Mauve was an original Picasso worth at least a hundred thousand dollars.” Defendant's lawyer immediately objects: “Objection! Hearsay! Confrontation Clause!” The prosecutor responds: “Your Honor, I’m not offering what Professor Tate said to Ms Mathis to prove the truth of the matter asserted; I’m only offering it to help the jury evaluate Ms Mathis’ opinion.”

41 Is this a valid response to defendant's objection?

Consider the third sentence of Fed. R. Evid. 703, which was added by the Advisory Committee in 2000:

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41 You might wonder: why doesn't the prosecutor call Tate as a witness, too? Tate could testify and give his own opinion from the witness stand, thus eliminating the hearsay issue. There are, however, two problems: Tate might not be willing to fly in from London to testify, and even if he was willing, the prosecutor might be reluctant to pay Tate's expert witness fee and travel and living expenses.
But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Two features of this sentence merit inspection.

First, the rule directs that “helping the jury evaluate the [expert's] opinion” does not generally justify allowing such testimony. We know this because the third sentence reverses the normal balancing test between probative value and the risk of unfair prejudice: Fed. R. Evid. 403 directs that “relevant evidence” should be excluded only if “its probative value is substantially outweighed by a danger of ... unfair prejudice.” In other words, the improper impact of the evidence must substantially outweigh the legitimate impact, in order to justify exclusion under Rule 403. Rule 703, by contrast, reverses the assumption: evidence relevant to explain the expert's opinion is admissible only if its probative value for that purpose substantially outweighs the improper (“prejudicial”) effect. (The “prejudice” here is the likelihood that the jury will use the evidence for its inadmissible hearsay purpose.)

In other words, where Rule 403 weighs the balance heavily in favor of admissibility, Rule 703, as amended, weighs the balance heavily against admissibility. Applying this balance, the judge probably should not allow Ms Mathis to repeat, on direct examination, what Professor Tate said to her.

Well, then, when would it be proper to allow Ms Mathis to repeat to the jury what Professor Tate said to her about the painting?

Suppose, after Ms Mathis testified on direct as is set out in the Q & A in subsection a, defense counsel asks on cross-examination:

| Q1 | Are you familiar with The International Journal of Art Appraisal? |
| A1 | Yes, I am. |
| Q2 | Is that considered to be a respected authority in the field of art appraisal? |
| A2 | Yes, it is. |
| Q3 | And do you accept it as authoritative? |
| A3 | Yes, I do. Whatever they publish is worth serious attention. |
| Q4 | And what about Professor Guggenheim Tate. Is he considered an expert in the field of art history and appraising? |
| A4 | Yes, very much so. |
| Q5 | And do you consider him an expert and authority? |
| A5 | Absolutely. |

Some courts might still allow Ms Mathis to repeat Dr. Tate's testimony during her direct examination, despite the third sentence of Fed. R. Evid. 703. What can I say? It's an imperfect world.

This cross-examination is of a kind permitted by Fed. R. Evid. 803(18). See § 10.9.
Q6 Are you familiar with an article by Professor Tate published in the Fall, 2008 edition of The International Journal of Art Appraisal, entitled "Picasso's so-called 'Mauve Period': Myths, Misconceptions and Mistakes"?
A6 Yes, I am.
Q7 In it, Professor Tate rejects the very idea that Picasso had what you referred to as his "mauve period," right?
A7 He makes a very strong argument in support of that view, yes.

Defense counsel here is creating the impression that Prof. Tate disagrees with Ms Mathis's conclusion that Maid in Mauve is in fact a Picasso. Thus, on redirect, the prosecutor should be permitted conduct the following redirect of Ms Mathis:

Q Ms Mathis, is Professor Tate one of the experts you consulted in preparing to form an opinion about Maid in Mauve?
A Yes, he is.
Q What was Professor Tate's opinion about Maid in Mauve?
A He wrote to me – I have his letter right here –

[The prosecutor properly authenticates the letter and offers it into evidence, and then asks:]

Q Please read what Professor Tate wrote.
A He wrote: "I still think you are barking up the wrong tree about a 'mauve period'; there was no such thing. And I'd date Maid in Mauve closer to 1897, not 1899. But there is no doubt in my mind: Maid in Mauve is a genuine, original Picasso. Had it not been destroyed, its value on the open market would be in the neighbourhood of £65,000."\(^{44}\)

This should be permitted, to allow the prosecutor to correct the impression that defense counsel created on cross. (The defense would be entitled to a limiting instruction: "What Prof. Tate wrote to Ms Mathis is not admissible to prove that Maid in Mauve was in fact painted by Picasso; you are to consider it only in evaluating whether Ms Mathis had a valid basis for her own opinion.")

The second noteworthy feature of the third sentence of Fed. R. Evid. 703 is that the Rule 703's concern over the balance between relevance and prejudice applies only in jury trials ("may disclose them to the jury only if ..."). Explanation: even if a judge gives a jury a limiting instruction, a jury may not be able to understand that instruction and may use what Professor Tate said to Ms Mathis as direct evidence that Maid in Mauve is a genuine Picasso. Because judges (presumably) don't make that kind of mistake, there's no reason for concern about misuse of Professor Tate's statements by a judge hearing the case without a jury.\(^{45}\)

\(^{44}\) £ is the symbol for the British pound sterling. A pound is currently (in 2012) worth roughly 1.6 U.S. dollars. (By the way, "neighbourhood" is how the British, and many countries in their former Empire, spell it.)

\(^{45}\) In cases involving an expert forensic report, defense attorneys may be much less likely to waive a jury trial as a result of the Williams plurality's reliance on the absence of a jury as justifying Lambatos'
§ 9.53.6 FED. R. EVID. 703 AND THE CONFRONTATION CLAUSE

The *Williams* plurality argued that when Lambatos compared the Williams blood sample DNA profile produced by the ISP with the Cellmark rape-kit swab DNA profile (see §9.53.1), she simply did what DNA analysts frequently do: they rely on DNA profiles produced by other, certified DNA-qualified laboratories. Thus it was permissible per Fed. R. Evid. 703 for her to testify that the two profiles were a match. And since Williams waived a jury and the case was tried by a judge, there was no concern about a jury’s misuse of her testimony about the Cellmark profile.46

This may sound plausible at first, but a majority of the Court (the four dissenters, and Justice Thomas) rejected it as bogus. They maintained that, properly understood, Fed. R. Evid. 703 allows an expert witness (such as Ms Mathis, in the previous section) to testify to the otherwise inadmissible bases on which she based her opinion, only if it is relevant for the *non-hearsay* purpose of allowing the fact-finder to evaluate her opinion. Many – though perhaps not all -- evidence scholars agree.47

Re-read the description of *Tennessee v. Street* in § 6.4. Once Street testified that the officers who interrogated him forced him to repeat statements made earlier in his codefendant Peele’s confession, what Peele said in *his* confession became relevant for the *non-hearsay* purpose of comparing the two confessions to see if Street’s allegation was true. In other words, the contents of Peele’s confession were relevant even if Peele’s confession was not altogether accurate.48

Now consider the Cellmark DNA profile of the semen found in the rape kit swab. It is relevant *only if the Cellmark DNA profile was in fact taken from the semen in the L. J. swab, and only if Cellmark conducted the DNA profile properly and reported the results accurately*. In other words, the Cellmark profile is relevant only if it is “true”; and therefore, five Justices concluded, the state's use of the report in *Williams* cannot be justified by citing Rule 703.

testimony about the Cellmark DNA profile.

46 Williams was tried in state court, not federal court, so Illinois R. Evid. 703, not the federal rule, applied, but the plurality concluded that state courts interpreted the state rule consistently with the federal rule, and proceeded as if the federal rule had applied to the case.

47 Whichever position your evidence professor takes on this issue is of course absolutely correct, at least until after the exam.

48 Similarly, given defense counsel’s cross-examination of Ms Mathis, what Professor Tate wrote to her after she consulted him is now relevant, *whether or not Professor Tate’s opinion was accurate*, to correct the mis-impression created by that cross-examination.