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Preface

Although the Second Edition of my textbook, *Evidence: A Problem-Based and Comparative Approach*, and the Second Edition of the Statutory Supplement were published only a year ago, several key developments in evidence law have occurred since then. This supplement—which is designed for use in conjunction with both of these publications—incorporates those developments. This supplement includes the following:

- **New decisions regarding hearsay and the Confrontation Clause** – This supplement includes an edited version of *Melendez-Diaz v. Massachusetts*, the U.S. Supreme Court’s latest decision addressing the admissibility of hearsay evidence post-*Crawford*. In that decision, the U.S. Supreme Court addressed the question whether affidavits reporting the results of scientific tests are “testimonial” within the meaning of *Crawford*. The supplement also includes notes on several key lower court decisions interpreting *Crawford* and its progeny.

- **A key appeals court decision regarding Rule 606(b)** – This supplement includes an edited version of the First Circuit’s 2009 decision in *U.S. v. Villar* holding that evidence that jurors made ethnically biased comments about the defendant, while barred by Rule 606(b), nonetheless must be admitted pursuant to the Fifth and Sixth Amendments.

- **A key U.S. Supreme Court decision regarding interlocutory appellate review of decisions denying claims of privilege** – This supplement includes an edited version of Justice Sotomayor’s 2009 decision in *Mohawk Industries, Inc. v. Carpenter* abrogating appellate court precedent deeming decisions denying claims of privilege immediately reviewable under the *Cohen* collateral order doctrine.

- **A proposed amendment to the Federal Rules of Evidence** – This supplement contains the latest version of a proposed amendment to Federal Rule of Evidence 804(b)(3), the hearsay exception for statements against interest.

Peter Nicolas  
Seattle, Washington  
July 1, 2010
Chapter 2: Authentication

Page 70, add the following at the end of note 2:

See also Halliburton Energy Services, Inc. v. NL Industries, 648 F. Supp. 2d 840, 894 n.63 (S.D. Tex. 2009) (listing various ways of proving age, including “visible marks of aging and archaic styles of penmanship, spelling or phraseology,” and noting that “the contents of a document might permit an inference as to its age, as where the document refers to events or persons contemporaneous with its creation.”) (quoting 31 Charles A. Wright & Victor Gold, Federal Practice and Procedure § 7113 (2000)).
Chapter 3: Relevance and Prejudice Refined

Page 132, add the following at the end of note 7:

But see State v. Cox, 781 N.W.2d 757 (Iowa 2010) (holding Iowa analogue to Federal Rule 413 unconstitutional under the due process clause of the Iowa constitution as applied to the situation in which evidence of prior incidents involving a different victim are admitted).

Page 132, add the following note after note 8:

9. Given that Rules 413-415 explicitly endorse the relevance of the propensity argument where other acts of sexual assault or child molestation are concerned, what dangers are to be guarded against in conducting Rule 403 balancing? Consider the following:

Rule 413 affects the Rule 403 analysis of past sexual offenses introduced in sexual assault cases....Rule 404(b) identifies the propensity inference as improper in all circumstances, and Rule 413 makes an exception to that rule when past sexual offenses are introduced in sexual assault cases....Because Rule 413 identifies this propensity inference as proper, the chance that the jury will rely on that inference can no longer be labeled as “unfair” for purposes of the Rule 403 analysis. While Rule 403 remains the same, a court’s Rule 403 analysis of prior conduct differs if the evidence falls under Rule 404(b) versus Rule 413; in the former analysis, the rule has decreed that the propensity inference is too dangerous, while in the latter, the propensity inference is permitted for what it is worth.

That said, evidence of prior sexual offenses may still pose significant dangers against which the district court must diligently guard. Even if the evidence does not create unfair prejudice solely because it rests on propensity, it may still risk a decision on the basis of something like passion or bias—that is, an improper basis. Even though Congress has made the propensity inference permissible, it has not said that evidence falling within Rule 413 is per se non-prejudicial. To the contrary, a jury might use such evidence, for example, to convict a defendant because it is appalled by a prior crime the defendant committed rather than persuaded that he committed the crime charged. Or a jury, uncertain of guilt, may convict a defendant because they think the defendant is a bad person generally deserving of punishment. We mention these dangers only as examples; our list does not purport to be exhaustive. Rule 403 remains an important safeguard against the admission of prejudicial evidence, and courts enjoy wide discretion in applying the rule. When exercising that discretion, however, courts must recognize that, for Rule 413 evidence, the propensity inference must be viewed differently.

U.S. v. Rogers, 587 F.3d 816, 822-23 (7th Cir. 2009).
Chapter 4: Witness Qualification, Competency, and Examination

Page 169, add the following at the end of note 3:

See also Litif v. U.S., 682 F.Supp.2d 60, 66-67 & n.5 (D.Mass. 2010) (noting that Massachusetts rule addresses both hearsay and competency, but applying only that portion dealing with competency).

Page 177, insert the following case immediately after Tanner v. United States:

United States v. Villar
586 F.3d 76 (1st Cir. 2009)

SARIS, District Judge.

After a jury trial, Defendant-appellant Richard Villar, a Hispanic man, was convicted of bank robbery. Hours following his conviction, defense counsel received an e-mail message from one of the jurors disclosing that during deliberations another juror said, “I guess we’re profiling but they cause all the trouble.” When defense counsel filed a motion for a court inquiry into the validity of the verdict, the court held a hearing in which the juror was asked only to authenticate the e-mail. Concluding that an allegation of ethnically biased statements within the jury room was not, as Villar argued, an external matter open to post-verdict inquiry, the district court held that Federal Rule of Evidence 606(b) precluded the court from engaging in any further examination beyond the mere authentication of the e-mail.

Appellant now challenges the conviction on the grounds that the district court erred when it ruled that Rule 606(b) prohibited it from taking juror testimony about ethnically biased comments during the course of deliberations, and that the appellant was denied the right to due process and the right to an impartial jury in violation of the Fifth and Sixth Amendments to the Constitution….

1. Rule 606(b)

Contending that the juror’s e-mail created a possibility that the jury was racially or ethnically biased against him, appellant asserts that the district court erred in its legal conclusion that Rule 606(b) barred any inquiry into the possibility of bias within the jury room….

Rule 606(b) contains three exceptions, two of which—“extraneous prejudicial information” and “outside influence”—are relevant to our analysis….

The key case in this area is Tanner v. United States… The “external/internal distinction” employed by the Tanner Court is not a “locational distinction” but rather is “based on the nature of the allegation.” Juror testimony about a matter characterized as “external” to the jury is admissible under Rule 606(b), while testimony about “internal” matters is barred by the Rule….
Using this framework, most courts have concluded that juror testimony about race-related statements made by deliberating jurors does not fall within either the “extraneous prejudicial information” or the “outside influence” exceptions of Rule 606(b), but does fall squarely within Rule 606(b)’s prohibition of post-verdict juror testimony.

We are persuaded by the courts that have held that Rule 606(b), by its express terms, precludes any inquiry into the validity of the verdict based on juror testimony regarding racial or ethnic comments made “during the course of deliberations.”

2. Due Process and Sixth Amendment Rights

Appellant’s more powerful argument is that the application of Rule 606(b) to prevent juror testimony about racial or ethnic statements made in jury deliberations is unconstitutional, violating a defendant’s right to due process under the Fifth Amendment, and to a trial by an impartial jury as guaranteed by the Sixth Amendment.

The Constitution guarantees a criminal defendant the right to a “fair trial by a panel of impartial, ‘indifferent’ jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.” One touchstone of a fair trial is an impartial trier of fact—“a jury capable and willing to decide the case solely on the evidence before it.”

Tanner did not address the issue of racial bias but instead involved issues of juror competence. The Supreme Court recognized that a defendant has a Sixth Amendment right to an unimpaired jury, but concluded that, because there were “several aspects of the trial process” that could protect this right, the district court’s invocation of a rule of evidence to bar juror testimony did not amount to a constitutional violation. The Court listed voir dire, observations of the jury by counsel and the court during trial, opportunities for jurors to report inappropriate juror behavior prior to rendering a verdict, and the admissibility of non-juror testimony as to wrongdoing as examples of “other sources of protection” for a defendant's Sixth Amendment rights.

After Tanner, courts have struggled with its application to cases involving the possibility of Sixth Amendment violations during jury deliberations. In two habeas challenges involving state court convictions, two circuits have suggested that the use of juror testimony may be appropriate in the rare case where due process and Sixth Amendment concerns are implicated. In Shillcutt, the Seventh Circuit held that the intent of Rule 606(b) was to preclude post-verdict juror testimony, but nonetheless proceeded to address the constitutional question:

The rule of juror incompetency cannot be applied in such an unfair manner as to deny due process. Thus, further review may be necessary in the occasional case in order to discover the extremely rare abuse that could exist even after the court has applied the rule and determined the evidence incompetent. In short, although our scope of review is narrow at this stage, we must consider whether prejudice pervaded the jury room, whether there is a
substantial probability that the alleged racial slur made a difference in the outcome of the trial.

Many courts have recognized that Rule 606(b) should not be applied dogmatically where there is a possibility of juror bias during deliberations that would violate a defendant’s Sixth Amendment rights.

Recently, the Tenth Circuit held that *Tanner* precluded inquiry into claims that racist statements were made in the jury room during the trial of a Native American defendant for assaulting an officer with a dangerous weapon. Several days after the defendant was convicted, a juror reported to defense counsel that, during deliberations, the foreman insisted that “‘[w]hen Indians get alcohol, they all get drunk’ and that when they get drunk, they get violent.” Several jurors apparently discussed the need to “send a message back to the reservation.” After considering juror affidavits, the trial court held that two jurors lied during voir dire about their experiences with Native Americans and that a new trial was warranted. The Tenth Circuit reversed, asserting that it is “not necessarily in the interest of overall justice” to attempt to cure “defects” such as possible racial prejudice in the jury process….

The Tenth Circuit turned to the four protections the *Tanner* Court characterized as protective of a defendant’s Sixth Amendment rights: the voir dire process, the ability of the court and counsel to observe jurors during the trial, the ability of jurors to make pre-verdict reports of misconduct, and the availability of post-verdict impeachment through non-juror evidence of misconduct. Acknowledging that at least two of *Tanner*’s listed protections might not be effective at identifying racist (as opposed to drunken) jurors, the…court concluded that, because “jury perfection is an untenable goal,” the safeguards noted in *Tanner* were sufficiently protective. The court rejected the defendant’s attempt to distinguish *Tanner* on the grounds that racial bias is a more serious danger to the justice system than intoxicated jurors….

While the issue is difficult and close, we believe that the rule against juror impeachment cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant’s right to due process and an impartial jury. In our view, the four protections relied on by the *Tanner* Court do not provide adequate safeguards in the context of racially and ethnically biased comments made during deliberations. While individual pre-trial voir dire of the jurors can help to disclose prejudice, it has shortcomings because some jurors may be reluctant to admit racial bias. In addition, visual observations of the jury by counsel and the court during trial are unlikely to identify jurors harboring racial or ethnic bias. Likewise, non-jurors are more likely to report inappropriate conduct—such as alcohol or drug use—among jurors than racial statements uttered during deliberations to which they are not privy.

Accordingly, we conclude that the district court here did have the discretion to inquire into the validity of the verdict by hearing juror testimony to determine whether ethnically biased statements were made during jury deliberations and, if so, whether there is a substantial probability that any such comments made a difference in the outcome of the trial….
Although we conclude that the district court erred when it concluded that it had no discretion to hold an inquiry into possible bias in jury deliberations, we emphasize that not every stray or isolated off-base statement made during deliberations requires a hearing at which jury testimony is taken. As courts and commentators have highlighted, the need to protect a frank and candid jury deliberation process is a strong policy consideration. Still, at the other extreme, there are certain rare and exceptional cases involving racial or ethnic prejudice that require hearing jury testimony to determine whether a defendant received a fair trial under the Sixth Amendment. The determination of whether an inquiry is necessary to vindicate a criminally accused’s constitutional due process and Sixth Amendment rights is best made by the trial judge, who is most familiar with the strength of the evidence and best able to determine the probability of prejudice from an inappropriate racial or ethnic comment….

Despite our view that there is a constitutional outer limit, we stress that the policies embodied in Rule 606(b) and underscored in *Tanner* are extremely important; the rule itself is rooted in a longstanding concern about intruding into jury deliberations and the problems that would be caused if jury verdicts could be easily undermined by post-judgment comments volunteered by (or in some cases) coaxed from jurors with second thoughts. In this case, we do not say that we would necessarily have pressed for further inquiry based on the somewhat terse and perhaps ambiguous report of a single juror if the district judge had not indicated his interest in doing so but for the bar of Rule 606(b), which he deemed absolute. But, as we have said, the district judge is in the best position to make the initial judgment. If in this case he thinks further inquiry appropriate, he is free to proceed; if he thinks the passage of time alters that initial disposition, that too is within his province….

**Page 180, replace note 5 with the following:**

5. How persuasive is the *Villar* court’s attempt to distinguish *Tanner* from the case before it? Once decisions such as *Villar* become widely known, will it not likely chill juror deliberation to some extent, in that jurors will be less likely to *openly* express their racial biases? Isn’t there a benefit to a system in which jurors feel free to openly express their biases to one another? After all, putting those biases on the table provides fellow jurors with the opportunity to counter those biased views, doesn’t it? Are criminal defendants who are members of racial minorities best served by a system that encourages *stealth* racism?

**Page 211, replace the first sentence of section G with the following:**

As the Advisory Committee Note to Rule 701(c) illustrates, the rules of evidence draw a sharp distinction between lay and expert witness testimony.

**Page 267, add the following at the end of note 2:**

*Compare U.S. v. Are*, 590 F.3d 499, 512-13 (7th Cir. 2009) (holding that Rule 704(b) places only a “‘slight’ limitation on expert testimony,” and that exclusion is not called for “as long as it is made clear, either by the court expressly or in the nature of the examination, that the opinion is based on the expert’s knowledge of common criminal practices, and not on some special knowledge of the defendant’s mental processes”).
Chapter 5: Privileges

Page 285, replace note 1 with the following:

1. Rule 501 is given an exalted position relative to the other rules of evidence. For example, while the rules of evidence in general are not applicable in proceedings before a grand jury, when judges decide preliminary questions under Rule 104(a), and at sentencing, privileges apply in all stages of civil and criminal actions. Compare Federal Rule of Evidence 1101(d), with Federal Rule of Evidence 1101(c). See also Federal Rule of Evidence 104(a). Furthermore, evidence is subject to pre-trial discovery in civil proceedings notwithstanding that it is subject to exclusion at trial under a rule of evidence unless it is claimed that the evidence is protected by a privilege. See Federal Rule of Civil Procedure 26(b)(1). What justifies the special treatment accorded to privileged evidence?

Page 300, add the following at the end of note 4:

Sometimes described more broadly as the “fiduciary exception” to the attorney-client privilege, the balancing test identified in Garner has been applied in other contexts, such as disputes between trustees and beneficiaries. See generally In re U.S., 590 F.3d 1305, 1309-13 (Fed. Cir. 2009).

Page 318, add the following notes after note 4:

5. Throughout, Rule 502 refers to disclosures that are made in a Federal or State proceeding, which arguably means that the rule governs only if the disclosure occurs after a suit has commenced. Is that a fair reading of the rule, and if so, what rule governs if a disclosure is made prior to the commencement of a suit? See Eden Isle Marina, Inc. v. U.S., 89 Fed. Cl. 480, 501 n.20, 503 n.21 (Fed. Cl. 2009) (noting the limiting language of Rule 502, but nonetheless choosing to treat such disclosures as if they were disclosed during the pendency of the litigation); Bickler v. Senior Lifestyle Corp., 266 F.R.D. 379, 384 n.4 (D. Ariz. 2010) (looking to federal common law cases predating Rule 502 when the disclosure is made to a state agency); Clarke v. J.P. Morgan Chase & Co., 2009 WL 970940, at *5 (S.D.N.Y. 2009) (noting that the same factors identified in Federal Rule 502 are applied as a matter of federal common law to extrajudicial disclosures).

Page 334, insert the following after the first sentence in note 10:

Indeed, some courts have construed the child exception to apply more broadly in any situation in which the victim is “the functional equivalent of a child,” such as the situation in which a grandchild is raised by his grandparents. See U.S. v. Banks, 556 F.3d 967, 974-977 (9th Cir. 2009).
Chapter 6: The “Best Evidence” Rule

Page 390, add the following before the citation to U.S. v. Yamin in note 1:

U.S. v. Buchanan, 604 F.3d 517, 522-24 (8th Cir. 2010);

Page 400, add the following at the end of note 1:

The proviso is also applied by courts in situations in which only the original would display features that might allow the party against whom the evidence is offered to prove his lack of culpability. See U.S. v. Burston, 608 F. Supp. 2d 828, 830-32 (E.D. Mich. 2008) (in case in which accused is alleged to have endorsed check, inability to conduct forensic testing—including handwriting analysis or latent fingerprint analysis—on duplicate makes it unfair to admit it in lieu of original).
Chapter 7: The Rule against Hearsay

Page 417, add the following note after note 2:

3. Chapter 4 addressed the complex meaning of Rule 602’s personal knowledge requirement where hearsay evidence falling within an exception to the hearsay rule is involved. See supra p. 200 n.3. In addition, the rule against hearsay and Rule 602 intersect if a witness satisfies Rule 602’s personal knowledge requirement by relying on the truth of an out-of-court statement. “If the testimony of the witness purports to repeat an out-of-court statement, hearsay is the proper objection. If the testimony on its face purports to be based on direct perception of the facts described but is actually based on an out-of-court statement about those facts, the objection should be lack of personal knowledge.”

U.S v. Davis, 596 F.3d 852, 856 (D.C. Cir. 2010).

Page 421, insert the following note after note 2:

3. Would evidence that a particular phone number was displayed on a cellular telephone when an incoming call came in be hearsay if offered to prove that a call was made from that particular number? See People v. Buckner, 228 P.3d 245, 249-50 (Colo. 2009) (holding that such machine-generated information does not involve a “declarant”). Accord Tatum v. Commonwealth, 440 S.E.2d 133, 135-36 (Va. 1994).

Page 428, insert the following note after note 5:

6. Suppose that the accused in a criminal case is charged with, inter alia, perjuring himself at a prior proceeding. Is testimony that the accused made those false statements at a prior proceeding hearsay? See Anderson v. U.S., 417 U.S. 211, 219-20 (1974) (“The [prior] testimony…was not admitted into evidence…to prove the truth of anything asserted therein. Quite the contrary, the point of the prosecutor’s introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false.”).

Page 450, insert the following note after note 8:

9. An element of numerous federal offenses is that there is movement of prohibited items, such as guns or child pornography, in interstate or foreign commerce. Under Snow, could the government offer into evidence the inscription on a product indicating that it was made in a particular state or country to prove its movement in interstate commerce? See U.S. v. Alvarez, 972 F.2d 1000, 1004 (9th Cir. 1992) (so holding). Accord U.S. v. Brown, 2009 WL 2090193, at *10-*11 (S.D. Ind. 2009).
Page 503, insert the following at the end of note 3:

See also U.S. v. Davis, 577 F.3d 660, 669 (6th Cir. 2009) (requiring that “the statement must be made before there is time to contrive or misrepresent”).

Page 556, add the following at the end of note 7:

What basis is there for making such an exception to the proviso? Consider the following:

Drawing a line at routine, non-adversarial documents would best comport with the purpose for which Congress originally approved the exception. The Rule’s enactment history indicates that “the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.” Congress was generally “concerned about prosecutors attempting to prove their cases in chief simply by putting into evidence police officers' reports of their contemporaneous observations of crime.”

Recognizing this intent, those circuits to have considered the issue have all found that the limitation in Rule 803(8)(B) does not exclude routine observations that are inherently non-adversarial.

U.S. v. Dowdell, 595 F.3d 50, 70-71 (1st Cir. 2010).

Page 598, add the following note after note 2:

2A. For criticism of the Second Circuit’s approach in DiNapoli, see U.S. v. McFall, 558 F.3d 951, 962-63 (9th Cir. 2009) (holding that, by focusing on the intensity of the motivation, “the Second Circuit required comparison of motives at a fine-grained level of particularity” that is inconsistent with the rule’s plain text, which requires only a “similar” not an “identical” motive, and preferring instead an approach endorsed by the D.C. Circuit that compares “motives at a high level of generality,” under which no distinction would be made between the government’s motive before the grand jury and at trial since, in both instances, the evidence would be directed at the same issue, to wit, the accused’s guilt or innocence of the crime charged).

Page 598, replace note 4 with the following:

4. Rule 804(b)(1) addresses the hearsay problem that arises when a person who was present when former testimony was given seeks to testify as to what he heard an unavailable declarant testify to at a former proceeding. Yet to the extent that one seeks to introduce an unavailable declarant's former testimony by offering a transcript of those proceedings into evidence, don't you actually have not just a hearsay problem but rather a hearsay-within-hearsay problem? Rule 804(b)(1) addresses only the inner layer of hearsay, namely, the former testimony. Which exceptions to the hearsay rule address the outer layer, the transcript? See Glen Weissenberger,

Page 615, add the following at the end of note 4:

But see In re September 11 Litigation, 621 F. Supp. 2d 131, 160 (S.D.N.Y. 2009) (deeming Rule 804(b)(3) inapplicable to statements made by a terrorist willing to give his life to kill others, on the ground that such a person is not reasonable).

Pages 677-682, replace People v. Rawlins with the following:

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

Justice SCALIA delivered the opinion of the Court.

... I

In 2001, Boston police officers received a tip that a Kmart employee, Thomas Wright, was engaging in suspicious activity. The informant reported that Wright repeatedly received phone calls at work, after each of which he would be picked up in front of the store by a blue sedan, and would return to the store a short time later. The police set up surveillance in the Kmart parking lot and witnessed this precise sequence of events. When Wright got out of the car upon his return, one of the officers detained and searched him, finding four clear white plastic bags containing a substance resembling cocaine. The officer then signaled other officers on the scene to arrest the two men in the car—one of whom was petitioner Luis Melendez-Diaz. The officers placed all three men in a police cruiser.

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

Melendez-Diaz was charged with distributing cocaine and with trafficking in cocaine in an amount between 14 and 28 grams. At trial, the prosecution placed into evidence the bags seized from Wright and from the police cruiser. It also submitted three “certificates of analysis” showing the results of the forensic analysis performed on the seized substances. The certificates reported the weight of the seized bags and stated that the bags “[h]ave been examined with the following results: The substance was found to contain: Cocaine.” The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as required under Massachusetts law.
Petitioner objected to the admission of the certificates, asserting that our Confrontation Clause decision in *Crawford v. Washington*, 541 U.S. 36 (2004), required the analysts to testify in person. The objection was overruled, and the certificates were admitted pursuant to state law as “prima facie evidence of the composition, quality, and the net weight of the narcotic ... analyzed.”

The jury found Melendez-Diaz guilty. He appealed, contending, among other things, that admission of the certificates violated his Sixth Amendment right to be confronted with the witnesses against him. The Appeals Court of Massachusetts rejected the claim....The Supreme Judicial Court denied review. We granted certiorari.

II

Our opinion [in *Crawford*] described the class of testimonial statements covered by the Confrontation Clause as follows:

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

There is little doubt that the documents at issue in this case fall within the “core class of testimonial statements” thus described. Our description of that category mentions affidavits twice. The documents at issue here, while denominated by Massachusetts law “certificates,” are quite plainly affidavits: “declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.” Black's Law Dictionary 62 (8th ed.2004). They are incontrovertibly a ““solemn declaration or affirmation made for the purpose of establishing or proving some fact.”” *Crawford, supra*, at 51 (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine—the precise testimony the analysts would be expected to provide if called at trial. The “certificates” are functionally identical to live, in-court testimony, doing “precisely what a witness does on direct examination.” *Davis v. Washington*, 547 U.S. 813, 830 (2006) (emphasis deleted).

Here, moreover, not only were the affidavits ““made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,”” *Crawford, supra*, at 52, 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. We can safely assume that the analysts were aware of the affidavits’
evidentiary purpose, since that purpose-as stated in the relevant state-law provision-was reprinted on the affidavits themselves.

In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were “witnesses” for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to “‘be confronted with’” the analysts at trial.1

III

Respondent and the dissent advance a potpourri of analytic arguments in an effort to avoid this rather straightforward application of our holding in *Crawford*….

A

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

The Sixth Amendment guarantees a defendant the right “to be confronted with the witnesses *against him*.” (Emphasis added.) To the extent the analysts were witnesses (a question resolved above), they certainly provided testimony against petitioner, proving one fact necessary for his conviction—that the substance he possessed was cocaine….

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

B

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

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1 Contrary to the dissent's suggestion, we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that “[i]t is the obligation of the prosecution to establish the chain of custody,” this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent's own quotation, from *United States v. Lott*, 854 F.2d 244, 250 (C.A.7 1988), “gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.” It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.
outcry precisely because it flouted the deeply rooted common-law tradition “of live testimony in court subject to adversarial testing.”

In any case, the purported distinctions respondent and the dissent identify between this case and Sir Walter Raleigh's “conventional” accusers do not survive scrutiny. The dissent first contends that a “conventional witness recalls events observed in the past, while an analyst's report contains near-contemporaneous observations of the test.” It is doubtful that the analyst's reports in this case could be characterized as reporting “near-contemporaneous observations”; the affidavits were completed almost a week after the tests were performed. But regardless, the dissent misunderstands the role that “near-contemporaneity” has played in our case law. The dissent notes that that factor was given “substantial weight” in Davis, but in fact that decision disproves the dissent's position. There the Court considered the admissibility of statements made to police officers responding to a report of a domestic disturbance. By the time officers arrived the assault had ended, but the victim's statements-written and oral-were sufficiently close in time to the alleged assault that the trial court admitted her affidavit as a “present sense impression.” Though the witness's statements in Davis were “near-contemporaneous” to the events she reported, we nevertheless held that they could not be admitted absent an opportunity to confront the witness.

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

A third respect in which the dissent asserts that the analysts are not “conventional” witnesses and thus not subject to confrontation is that their statements were not provided in response to interrogation….Respondent and the dissent cite no authority, and we are aware of none, holding that a person who volunteers his testimony is any less a “‘witness against’ the defendant,” than one who is responding to interrogation. In any event, the analysts' affidavits in this case were presented in response to a police request….

C

Respondent claims that there is a difference, for Confrontation Clause purposes, between testimony recounting historical events, which is “prone to distortion or manipulation,” and the testimony at issue here, which is the “result[t] of neutral, scientific testing.” Relatedly, respondent and the dissent argue that confrontation of forensic analysts would be of little value because “one would not reasonably expect a laboratory professional … to feel quite differently about the results of his scientific test by having to look at the defendant.”

This argument is little more than an invitation to return to our overruled decision in Roberts…. 
Respondent and the dissent may be right that there are other ways—and in some cases better ways—to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.

Nor is it evident that what respondent calls “neutral scientific testing” is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation….A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.

Confrontation is one means of assuring accurate forensic analysis….Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony. And, of course, the prospect of confrontation will deter fraudulent analysis in the first place.

Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well….

Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination.…

D

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

The dissent identifies a single class of evidence which, though prepared for use at trial, was traditionally admissible: a clerk's certificate authenticating an official record—or a copy thereof—for use as evidence. But a clerk's authority in that regard was narrowly circumscribed. He was permitted “to certify to the correctness of a copy of a record kept in his office,” but had “no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect.” The dissent suggests that the fact that this exception was “narrowly circumscribed” makes no difference. To the contrary, it makes all the difference in the world. It shows that even the line of cases establishing the one narrow exception the dissent has been able to identify simultaneously vindicates the general rule applicable to the present case. A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant.

Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an
official record under respondent's definition—it was prepared by a public officer in the regular
course of his official duties—and although the clerk was certainly not a “conventional witness”
under the dissent's approach, the clerk was nonetheless subject to confrontation.

Respondent also misunderstands the relationship between the business-and-official-records
hearsay exceptions and the Confrontation Clause. As we stated in Crawford: “Most of the
hearsay exceptions covered statements that by their nature were not testimonial—for example,
business records or statements in furtherance of a conspiracy.” Business and public records are
generally admissible absent confrontation not because they qualify under an exception to the
hearsay rules, but because—having been created for the administration of an entity's affairs and
not for the purpose of establishing or proving some fact at trial—they are not testimonial. Whether
or not they qualify as business or official records, the analysts' statements here-prepared
specifically for use at petitioner's trial—were testimony against petitioner, and the analysts were
subject to confrontation under the Sixth Amendment.

E

Respondent asserts that we should find no Confrontation Clause violation in this case because
petitioner had the ability to subpoena the analysts. But that power—whether pursuant to state law
or the Compulsory Process Clause—is no substitute for the right of confrontation. Unlike the
Confrontation Clause, those provisions are of no use to the defendant when the witness is
unavailable or simply refuses to appear. Converting the prosecution's duty under the
Confrontation Clause into the defendant's privilege under state law or the Compulsory Process
Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More
fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its
witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the
defendant is not replaced by a system in which the prosecution presents its evidence via ex parte
affidavits and waits for the defendant to subpoena the affiants if he chooses.

F

Finally, respondent asks us to relax the requirements of the Confrontation Clause to
accommodate the “‘necessities of trial and the adversary process.’” It is not clear whence we
would derive the authority to do so. The Confrontation Clause may make the prosecution of
criminals more burdensome, but that is equally true of the right to trial by jury and the privilege
against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is
binding, and we may not disregard it at our convenience.

We also doubt the accuracy of respondent's and the dissent's dire predictions.…

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

The dissent finds this evidence “far less reassuring than promised.” But its doubts rest on two flawed premises. First, the dissent believes that those state statutes “requiring the defendant to give early notice of his intent to confront the analyst,” are “burden-shifting statutes [that] may be invalidated by the Court's reasoning.” That is not so. In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial. Contrary to the dissent's perception, these statutes shift no burden whatever. 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. It is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial, announcing his intent to present certain witnesses. There is no conceivable reason why he cannot similarly be compelled to exercise his Confrontation Clause rights before trial. Today's decision will not disrupt criminal prosecutions in the many large States whose practice is already in accord with the Confrontation Clause.12

…..

Defense attorneys and their clients will often stipulate to the nature of the substance in the ordinary drug case. It is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis. Nor will defense attorneys want to antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion…. Given these strategic considerations, and in light of the experience in those States that already provide the same or similar protections to defendants, there is little reason to believe that our decision today will commence the parade of horribles respondent and the dissent predict….

Justice THOMAS, concurring.

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

12 As the dissent notes, some state statutes, “requir[e] defense counsel to subpoena the analyst, to show good cause for demanding the analyst's presence, or even to affirm under oath an intent to cross-examine the analyst.” We have no occasion today to pass on the constitutionality of every variety of statute commonly given the notice-and-demand label. It suffices to say that what we have referred to as the “simplest form [of] notice-and-demand statutes,” is constitutional; that such provisions are in place in a number of States; and that in those States, and in other States that require confrontation without notice-and-demand, there is no indication that the dire consequences predicted by the dissent have materialized.
Justice KENNEDY, with whom THE CHIEF JUSTICE, Justice BREYER, and Justice ALITO join, dissenting.

The Court sweeps away an accepted rule governing the admission of scientific evidence. Until today, scientific analysis could be introduced into evidence without testimony from the “analyst” who produced it. This rule has been established for at least 90 years.…

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

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

Because _Crawford_ and _Davis_ concerned typical witnesses, the Court should have done the sensible thing and limited its holding to witnesses as so defined.…

I

A

I

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

Consider how many people play a role in a routine test for the presence of illegal drugs. One person prepares a sample of the drug, places it in a testing machine, and retrieves the machine's printout—often, a graph showing the frequencies of radiation absorbed by the sample or the masses of the sample's molecular fragments. A second person interprets the graph the machine prints out—perhaps by comparing that printout with published, standardized graphs of known drugs. Meanwhile, a third person—perhaps an independent contractor—has calibrated the machine and, having done so, has certified that the machine is in good working order. Finally, a fourth
person-perhaps the laboratory's director-certifies that his subordinates followed established procedures.

It is not at all evident which of these four persons is the analyst to be confronted under the rule the Court announces today. If all are witnesses who must appear for in-court confrontation, then the Court has, for all practical purposes, forbidden the use of scientific tests in criminal trials. As discussed further below, requiring even one of these individuals to testify threatens to disrupt if not end many prosecutions where guilt is clear but a newly found formalism now holds sway.

It is possible to read the Court's opinion, however, to say that all four must testify. Each one has contributed to the test's result and has, at least in some respects, made a representation about the test.

And each of the four has power to introduce error.

The Court offers no principles or historical precedent to determine which of these persons is the analyst. All contribute to the test result. And each is equally remote from the scene, has no personal stake in the outcome, does not even know the accused, and is concerned only with the performance of his or her role in conducting the test.

It could be argued that the only analyst who must testify is the person who signed the certificate. Under this view, a laboratory could have one employee sign certificates and appear in court, which would spare all the other analysts this burden. But the Court has already rejected this arrangement. The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second.

Under this logic, the Court's holding cannot be cabined to the person who signs the certificates. If the signatory is restating the testimonial statements of the true analysts-whoever they might be-then those analysts, too, must testify in person.

Today's decision demonstrates that even in the narrow category of scientific tests that identify a drug, the Court cannot define with any clarity who the analyst is. Outside this narrow category, the range of other scientific tests that may be affected by the Court's new confrontation right is staggering.

It is difficult to confine at this point the damage the Court's holding will do in other contexts. Consider just two-establishing the chain of custody and authenticating a copy of a document.

It is the obligation of the prosecution to establish the chain of custody for evidence sent to testing laboratories—that is, to establish “the identity and integrity of physical evidence by tracing its continuous whereabouts.” Meeting this obligation requires representations—that one officer retrieved the evidence from the crime scene, that a second officer checked it into an evidence locker, that a third officer verified the locker's seal was intact, and so forth. The iron logic of
which the Court is so enamored would seem to require in-court testimony from each human link in the chain of custody. That, of course, has never been the law.

It is no answer for the Court to say that “[i]t is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence.” The case itself determines which links in the chain are crucial—not the prosecution. In any number of cases, the crucial link in the chain will not be available to testify and so the evidence will be excluded for lack of a proper foundation.

Consider another context in which the Court's holding may cause disruption: The long-accepted practice of authenticating copies of documents by means of a certificate from the document's custodian stating that the copy is accurate. Under one possible reading of the Court's opinion, recordkeepers will be required to testify. So far, courts have not read Crawford and Davis to impose this largely meaningless requirement. But the breadth of the Court's ruling today, and its undefined scope, may well be such that these courts now must be deemed to have erred. The risk of that consequence ought to tell us that something is very wrong with the Court's analysis….

II

The Court's fundamental mistake is to read the Confrontation Clause as referring to a kind of out-of-court statement—namely, a testimonial statement—that must be excluded from evidence. The Clause does not refer to kinds of statements. Nor does the Clause contain the word “testimonial.” The text, instead, refers to kinds of persons, namely, to “witnesses against” the defendant. Laboratory analysts are not “witnesses against” the defendant as those words would have been understood at the framing. There is simply no authority for this proposition.

Instead, the Clause refers to a conventional “witness”—meaning one who witnesses (that is, perceives) an event that gives him or her personal knowledge of some aspect of the defendant's guilt. Both Crawford and Davis concerned just this kind of ordinary witness—and nothing in the Confrontation Clause's text, history, or precedent justifies the Court's decision to expand those cases.

A

The Court today expands the Clause to include laboratory analysts, but analysts differ from ordinary witnesses in at least three significant ways. First, a conventional witness recalls events observed in the past, while an analyst's report contains near-contemporaneous observations of the test. An observation recorded at the time it is made is unlike the usual act of testifying. A typical witness must recall a previous event that he or she perceived just once, and thus may have misperceived or misremembered. But an analyst making a contemporaneous observation need not rely on memory; he or she instead reports the observations at the time they are made….
Second, an analyst observes neither the crime nor any human action related to it. Often, the analyst does not know the defendant's identity, much less have personal knowledge of an aspect of the defendant's guilt. The analyst's distance from the crime and the defendant, in both space and time, suggests the analyst is not a witness against the defendant in the conventional sense.

Third, a conventional witness responds to questions under interrogation. But laboratory tests are conducted according to scientific protocols; they are not dependent upon or controlled by interrogation of any sort.

The Court assumes, with little analysis, that *Crawford* and *Davis* extended the Clause to any person who makes a “testimonial” statement.

It is true that *Crawford* and *Davis* employed the term “testimonial,” and thereby suggested that any testimonial statement, by any person, no matter how distant from the defendant and the crime, is subject to the Confrontation Clause. But that suggestion was not part of the holding of *Crawford* or *Davis*. Those opinions used the adjective “testimonial” to avoid the awkward phrasing required by reusing the noun “witness.” The Court today transforms that turn of phrase into a new and sweeping legal rule, by holding that anyone who makes a formal statement for the purpose of later prosecution—no matter how removed from the crime—must be considered a “witness against” the defendant.

B

No historical evidence supports the Court's conclusion that the Confrontation Clause was understood to extend beyond conventional witnesses to include analysts who conduct scientific tests far removed from the crime and the defendant. Indeed, what little evidence there is contradicts this interpretation.

Though the Framers had no forensic scientists, they did use another kind of unconventional witness—the copyist. A copyist's work may be as essential to a criminal prosecution as the forensic analyst's. To convict a man of bigamy, for example, the State often requires his marriage records. But if the original records cannot be taken from the archive, the prosecution must rely on copies of those records, made for the purpose of introducing the copies into evidence at trial. In that case, the copyist's honesty and diligence are just as important as the analyst's here. If the copyist falsifies a copy, or even misspells a name or transposes a date, those flaws could lead the jury to convict. Because so much depends on his or her honesty and diligence, the copyist often prepares an affidavit certifying that the copy is true and accurate.

Such a certificate is beyond question a testimonial statement under the Court's definition: It is a formal out-of-court statement offered for the truth of two matters (the copyist's honesty and the copy's accuracy), and it is prepared for a criminal prosecution.

During the Framers' era copyists' affidavits were accepted without hesitation by American courts….And courts admitted copyists' affidavits in criminal as well as civil trials. supra. This demonstrates that the framing generation, in contrast to the Court today, did not consider the
Confrontation Clause to require in-court confrontation of unconventional authors of testimonial statements.

The Court attempts to explain away this historical exception to its rule by noting that a copyist's authority is “narrowly circumscribed.” But the Court does not explain why that matters, nor, if it does matter, why laboratory analysts' authority should not also be deemed “narrowly circumscribed” so that they, too, may be excused from testifying. And drawing these fine distinctions cannot be squared with the Court's avowed allegiance to formalism. Determining whether a witness' authority is “narrowly circumscribed” has nothing to do with Crawford's testimonial framework….

By insisting that every author of a testimonial statement appear for confrontation, on pain of excluding the statement from evidence, the Court does violence to the Framers' sensible, and limited, conception of the right to confront “witnesses against” the defendant….

III

A

The Court surmises that “[i]t is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis.” This optimistic prediction misunderstands how criminal trials work. If the defense does not plan to challenge the test result, “highlight[ing]” that result through testimony does not harm the defense as the Court supposes. If the analyst cannot reach the courtroom in time to testify, however, a Melendez-Diaz objection grants the defense a great windfall: The analyst's work cannot come into evidence. Given the prospect of such a windfall (which may, in and of itself, secure an acquittal) few zealous advocates will pledge, prior to trial, not to raise a Melendez-Diaz objection. Defense counsel will accept the risk that the jury may hear the analyst's live testimony, in exchange for the chance that the analyst fails to appear and the government's case collapses. And if, as here, the defense is not that the substance was harmless, but instead that the accused did not possess it, the testimony of the technician is a formalism that does not detract from the defense case….

B

As further reassurance that the “sky will not fall after today's decision,” the Court notes that many States have enacted burden-shifting statutes that require the defendant to assert his Confrontation Clause right prior to trial or else “forfeit” it “by silence.” The Court implies that by shifting the burden to the defendant to take affirmative steps to produce the analyst, these statutes reduce the burden on the prosecution.

The Court holds that these burden-shifting statutes are valid because, in the Court's view, they “shift no burden whatever.” While this conclusion is welcome, the premise appears flawed. Even
what the Court calls the “simplest form” of burden-shifting statutes do impose requirements on the defendant, who must make a formal demand, with proper service, well before trial. Some statutes impose more requirements….In a future case, the Court may find that some of these more onerous burden-shifting statutes violate the Confrontation Clause because they “impos[e] a burden ... on the defendant to bring ... adverse witnesses into court.”

Page 696, add the following at the end of note 2:


Page 696, add the following at the end of note 3:

See also Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2539-40 (2009) (“Respondent also misunderstands the relationship between the business-and-official-records hearsay exceptions and the Confrontation Clause….Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.”).

Page 697, add the following at the end of note 4:

To what extent does Melendez-Diaz cast doubt on the admissibility of certifications offered pursuant to Rule 803(10) or its state law equivalents, or to evidence authenticated pursuant to provisions such as 902(11) and 902(12)? Since Melendez-Diaz has been decided, courts have uniformly held (or prosecutors have conceded) that offering certifications pursuant to Rule 803(10) or its state law analogues violates the Confrontation Clause. See U.S. v. Orozco-Acosta, 2010 WL 2293281, at *3 & n.3 (9th Cir. 2010); U.S. v. Martinez-Rios, 595 F.3d 581, 584-86 (5th Cir. 2010); U.S. v. Madarikan, 356 Fed. Appx. 532, 534 (2d Cir. 2009); Tabaka v. District of Columbia, 976 A.2d 173, 175-76 (D.C. 2009). In contrast, courts have viewed evidence authenticated pursuant to Rules 902(11), 902(12) and its state court analogues as falling within the “historical authentication exception” identified in Melendez-Diaz. See U.S. v. Mallory, 2010 WL 1286038, at *1-*4 (E.D. Va. 2010).

Page 698, replace notes 6 and 7 with the following:

6. Does Crawford prevent an expert in a criminal case from basing his opinion on hearsay that would fall within the Crawford Court’s definition of testimonial? See U.S. v. Johnson, 587 F.3d 625, 634-35 (4th Cir. 2009) (holding that there is no Confrontation Clause problem if the expert is applying his training and experience to the sources he has reviewed to reach an independent judgment, but that there is a problem if he serves merely as a conduit for or transmitter of hearsay).
7. After Crawford was decided, lower courts continued to apply the Roberts test to non-testimonial hearsay, reasoning that the Court in Crawford had not expressly addressed the question whether the Confrontation Clause places any limits on the admissibility of nontestimonial hearsay. See, e.g., U.S. v. Holmes, 406 F.3d 337, 348 n.14 (5th Cir. 2005); U.S. v. Hendricks, 395 F.3d 173, 179 n.7 (3d Cir. 2005). As the Court’s subsequent decision in Davis, however, seemed to make clear, the Confrontation Clause is concerned only with testimonial hearsay, and places no limits at all on the admissibility of nontestimonial hearsay. Nonetheless, even after Davis, courts continued to hold that the Roberts test applies to non-testimonial hearsay. See, e.g., U.S. v. Mooneyham, 473 F.3d 280, 287 (6th Cir. 2007); Hodges v. Commonwealth, 272 Va. 418, 433-35 (2006).

Surely any doubt as to the applicability of Roberts to non-testimonial hearsay was clarified by the Supreme Court’s most recent decision in Whorton v. Bockting, 127 S. Ct. 1173, 1183 (2007), in which it stated “[w]ith respect to testimonial out-of-court statements, Crawford is more restrictive than was Roberts, and this may improve the accuracy of fact-finding in some criminal cases….But whatever improvement in reliability Crawford produced in this respect must be considered together with Crawford’s elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements.”

Page 698, add the following at the end of note 8:

The Supreme Court has agreed to review a case designed to clarify the line between the non-testimonial statements at issue in Davis and the testimonial ones at issue in Hammon. See People v. Bryant, 768 N.W.2d 65 (Mich. 2009), cert. granted, 130 S. Ct. 1685 (2010).

Page 700, replace notes 15 and 16 with the following:

15. What does it mean to be “unavailable” for Confrontation Clause purposes? In Barber v. Page, 390 U.S. 719, 724-25 (1968), the Supreme Court held that if a witness fails to appear at trial, he will be deemed “unavailable” for Confrontation Clause purposes so long as the government has made a “good-faith effort” to obtain the declarant’s testimony at trial. Recognized categories of unavailability for Confrontation Clause purposes generally track the categories of unavailability listed in Federal Rule 804(a), and include death, extended illness, failed memory, a claim of privilege, or a refusal to testify, in addition to the failure to appear despite good-faith efforts by the prosecution to procure his attendance. See Ohio v. Roberts, 448 U.S. 56, 74 (1980); California v. Green, 399 U.S. 149, 165-168 (1970); U.S. v. Jacobs, 97 F.3d 275, 282 (8th Cir. 1996). Do these pre-Crawford decisions survive Crawford? See U.S. v. Tirado-Tirado, 563 F.3d 117, 123 n.3 (5th Cir. 2009) (so holding). See also Crawford, 541 U.S. at 57 (citing, with approval, Barber and Green).

16. Is it clear post-Melendez-Diaz who qualifies as the “analyst” for Confrontation Clause purposes? Compare Pendergrass v. State, 913 N.E.2d 703, 707-08 (Ind. 2009), cert. denied, 78 U.S.L.W. 3447 (2010) (holding it sufficient that the laboratory supervisor appeared at trial), with id. at 711 (Rucker, J., dissenting) (holding that, under Melendez-Diaz, the accused has a “right to confront at the very least the analyst that actually conducted the tests”).
Chapter 8: Judicial Notice

Page 721, add the following note after note 11:

12. What is the relationship between Rule 605 and Rule 201? Consider the following:

First, a few words on the relationship between Rules 605 and 201. Rule 605 prohibits the judge presiding at the trial from testifying in that trial as a witness. Rule 201 permits a judge to take judicial notice of certain types of facts. Logically, then, if a fact is of a kind that a judge may properly take judicial notice of it, then he is not improperly “testifying” at trial by noting that fact. Any other conclusion would lead to Rule 605 effectively subsuming Rule 201. If, after all, a judge was improperly testifying at trial each time he took judicial notice of a fact, it would be effectively impermissible to take judicial notice of any fact. Accordingly, we must first consider whether the judge was taking permissible judicial notice of a fact, pursuant to Rule 201. If he could not have taken judicial notice of that fact within the bounds of Rule 201—because, for example, it was not a “matter[ ] of common knowledge”—then we consider whether the judge violated Rule 605.

*U.S. v. Bari*, 599 F.3d 176, 179 n.4 (2d Cir. 2010).
Chapter 10: Impeachment and Rehabilitation of Witnesses

Page 786, add the following at the end of note 13:

Accord U.S. v. Commanche, 577 F.3d 1261, 1270-71 (10th Cir. 2009); U.S. v. Osazuwa, 564 F.3d 1169, 1175 (9th Cir. 2009).

Page 786, add the following at the end of note 15:

But see U.S. v. Osazuwa, 564 F.3d 1169, 1173-75 (9th Cir. 2009) (describing this as a “back door” way to circumvent Rule 609, and concluding that Rule 608(b) “permits impeachment only by specific acts that have not resulted in a criminal conviction.”) (emphasis added).

Page 796, note 5:

This note should appear immediately following note 4 on page 799.

Page 799, add the following note after note 5:

6. If a witness testifies on direct that he has never committed any crime (or any category of crimes), is evidence that he was convicted of certain crimes governed by Rule 609 or is it instead governing by the common law rules governing impeachment by contradiction? See U.S. v. Gilmore, 553 F.3d 266, 270-73 (3d Cir. 2009) (holding that Rule 609, including its restrictive balancing test for older convictions, is inapplicable in this situation, reasoning that “Rule 609 controls the use of prior felony convictions to impeach a witness’ general character for truthfulness, but impeachment by contradiction concerns the use of evidence to impeach a witness’ specific testimony”).

Page 805, add the following note after note 9:

10. Rule 608(b), which governs impeachment using specific instances of conduct, bars the use of extrinsic evidence to prove that the impeaching conduct occurred, while Rule 613(b) permits the use of extrinsic evidence of a witness’s prior inconsistent statement to impeach him. Where the “conduct” at issue involves the making of a statement (such as engaging in perjury or making a false statement), can one circumvent the restrictions of Rule 608(b) by recourse to Rule 613(b)? Consider the following effort to distinguish the two:

Rule 613(b) applies when two statements, one made at trial and one made previously, are irreconcilably at odds. In such an event, the cross-examiner is permitted to show the discrepancy by extrinsic evidence if necessary—not to demonstrate which of the two is true but, rather, to show that the two do not jibe (thus calling the declarant’s credibility into question). In short, comparison and contradiction are the hallmarks of Rule 613(b). As one treatise puts it:
The theory of attack by prior inconsistent statements is not based on the assumption that the present testimony is false and the former statement true but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold, and raises a doubt as to the truthfulness of both statements.

In contrast, Rule 608(b) addresses situations in which a witness’s prior activity, whether exemplified by conduct or by a statement, in and of itself casts significant doubt upon his veracity. Thus, Rule 608(b) applies to, and bars the introduction of, extrinsic evidence of specific instances of a witness’s misconduct if offered to impugn his credibility. So viewed, Rule 608(b) applies to a statement, as long as the statement in and of itself stands as an independent means of impeachment without any need to compare it to contradictory trial testimony.

_U.S. v. Winchenbach_, 197 F.3d 548, 558 (1st Cir. 1999).
Chapter 11: Appellate Review of Evidentiary Rulings

Pages 826, add the following case immediately after Ohler v. United States:

Mohawk Industries, Inc. v. Carpenter
130 S. Ct. 599 (2009)

Justice SOTOMAYOR delivered the opinion of the Court.

Section 1291 of the Judicial Code confers on federal courts of appeals jurisdiction to review “final decisions of the district courts.” 28 U.S.C. § 1291. Although “final decisions” typically are ones that trigger the entry of judgment, they also include a small set of prejudgment orders that are “collateral to” the merits of an action and “too important” to be denied immediate review. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949). In this case, petitioner Mohawk Industries, Inc., attempted to bring a collateral order appeal after the District Court ordered it to disclose certain confidential materials on the ground that Mohawk had waived the attorney-client privilege. The Court of Appeals dismissed the appeal for want of jurisdiction.

The question before us is whether disclosure orders adverse to the attorney-client privilege qualify for immediate appeal under the collateral order doctrine….

II

A

By statute, Courts of Appeals “have jurisdiction of appeals from all final decisions of the district courts of the United States, ... except where a direct review may be had in the Supreme Court.” 28 U.S.C. § 1291. A “final decision” is typically one “by which a district court disassociates itself from a case.” Swint v. Chambers County Comm’n, 514 U.S. 35, 42 (1995). This Court, however, “has long given” § 1291 a “practical rather than a technical construction.” Cohen, 337 U.S., at 546. As we held in Cohen, the statute encompasses not only judgments that “terminate an action,” but also a “small class” of collateral rulings that, although they do not end the litigation, are appropriately deemed “final.” Id., at 545-546. “That small category includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action.” Swint, 514 U.S., at 42.

In applying Cohen’s collateral order doctrine, we have stressed that it must “never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered.”

....

The justification for immediate appeal must therefore be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes. This requirement finds expression in
two of the three traditional *Cohen* conditions. The second condition insists upon “important questions separate from the merits.” More significantly, “the third *Cohen* question, whether a right is ‘adequately vindicable’ or ‘effectively reviewable,’ simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement.”

…..

In making this determination, we do not engage in an “individualized jurisdictional inquiry.” Rather, our focus is on “the entire category to which a claim belongs.” As long as the class of claims, taken as a whole, can be adequately vindicated by other means, “the chance that the litigation at hand might be speeded, or a ‘particular injustic[e]’ averted,” does not provide a basis for jurisdiction under § 1291.

B

In the present case, the Court of Appeals concluded that the District Court’s privilege-waiver order satisfied the first two conditions of the collateral order doctrine-conclusiveness and separateness—but not the third—effective unreviewability. Because we agree with the Court of Appeals that collateral order appeals are not necessary to ensure effective review of orders adverse to the attorney-client privilege, we do not decide whether the other *Cohen* requirements are met…..

We readily acknowledge the importance of the attorney-client privilege, which “is one of the oldest recognized privileges for confidential communications.” *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). By assuring confidentiality, the privilege encourages clients to make “full and frank” disclosures to their attorneys, who are then better able to provide candid advice and effective representation. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). This, in turn, serves “broader public interests in the observance of law and administration of justice.”

The crucial question, however, is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders. We routinely require litigants to wait until after final judgment to vindicate valuable rights, including rights central to our adversarial system…..

In our estimation, postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege. Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.

Dismissing such relief as inadequate, Mohawk emphasizes that the attorney-client privilege does not merely “prohibi[t] use of protected information at trial”; it provides a “right not to disclose the privileged information in the first place.” Mohawk is undoubtedly correct that an order to disclose privileged information intrudes on the confidentiality of attorney-client communications.
But deferring review until final judgment does not meaningfully reduce the *ex ante* incentives for full and frank consultations between clients and counsel.

One reason for the lack of a discernible chill is that, in deciding how freely to speak, clients and counsel are unlikely to focus on the remote prospect of an erroneous disclosure order, let alone on the timing of a possible appeal. Whether or not immediate collateral order appeals are available, clients and counsel must account for the possibility that they will later be required by law to disclose their communications for a variety of reasons—for example, because they misjudged the scope of the privilege, because they waived the privilege, or because their communications fell within the privilege’s crime-fraud exception. Most district court rulings on these matters involve the routine application of settled legal principles. They are unlikely to be reversed on appeal, particularly when they rest on factual determinations for which appellate deference is the norm. The breadth of the privilege and the narrowness of its exceptions will thus tend to exert a much greater influence on the conduct of clients and counsel than the small risk that the law will be misapplied.2

Moreover, were attorneys and clients to reflect upon their appellate options, they would find that litigants confronted with a particularly injurious or novel privilege ruling have several potential avenues of review apart from collateral order appeal. First, a party may ask the district court to certify, and the court of appeals to accept, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The preconditions for § 1292(b) review—“a controlling question of law,” the prompt resolution of which “may materially advance the ultimate termination of the litigation”—are most likely to be satisfied when a privilege ruling involves a new legal question or is of special consequence, and district courts should not hesitate to certify an interlocutory appeal in such cases. Second, in extraordinary circumstances—*i.e.*, when a disclosure order “amount[s] to a judicial usurpation of power or a clear abuse of discretion,” or otherwise works a manifest injustice—a party may petition the court of appeals for a writ of mandamus. While these discretionary review mechanisms do not provide relief in every case, they serve as useful “safety valve[s]” for promptly correcting serious errors.

Another long-recognized option is for a party to defy a disclosure order and incur court-imposed sanctions….Such sanctions allow a party to obtain postjudgment review without having to reveal its privileged information. Alternatively, when the circumstances warrant it, a district court may hold a noncomplying party in contempt. The party can then appeal directly from that ruling, at least when the contempt citation can be characterized as a criminal punishment.…. In short, the limited benefits of applying “the blunt, categorical instrument of § 1291 collateral order appeal” to privilege-related disclosure orders simply cannot justify the likely institutional costs. Permitting parties to undertake successive, piecemeal appeals of all adverse attorney-client rulings would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals.….  

[The concurring opinion of Justice Thomas is omitted.]

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2 Perhaps the situation would be different if district courts were systematically underenforcing the privilege, but we have no indication that this is the case.
Pending Proposed Amendments to the Federal Rules of Evidence

At its May 1-2, 2008 meeting, the Advisory Committee on Evidence Rules met and approved a proposed amendment to Federal Rule of Evidence 804(b)(3) and forwarded the amendment to the Standing Committee on Rules of Practice and Procedure, with a recommendation that it be published for public comment. At its June 9-10, 2008 meeting, the Standing Committee approved the publication of the amendment proposed by the Advisory Committee for public comment. The public comment period on the proposed amendment ended on February 17, 2009. At its April 23-24, 2009 meeting, the Advisory Committee reconsidered and made certain changes to the proposed new rule in light of the public comments, and forwarded its final recommendation to the Standing Committee. At its June 1-2, 2009 meeting, the Standing Committee approved the proposed amendment and forwarded its recommendation to the Judicial Conference. At its September 2009 meeting, the Judicial Conference considered the proposed amendment and transmitted it to the Supreme Court with a recommendation that it be approved. On April 28, 2010, the proposed amendment was approved by the Supreme Court and transmitted to Congress. It will take effect on December 1, 2010 unless rejected, modified, or deferred by Congress.

Rule 804. Hearsay Exceptions; Declarant Unavailable [proposed amendment]*

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

(3) Statement against interest. A statement which that:

(A) a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability, was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so 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

* New material is underlined; matter to be omitted is lined through.
would not have made the statement unless believing it to be true; and

(B) A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless supported by corroborating circumstances that clearly indicate the trustworthiness of the statement, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

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ADVISORY COMMITTEE'S NOTE

Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. See, e.g., United States v. Alvarez, 584 F.2d 694, 701 (5th Cir. 1978) (“by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)’’); United States v. Shukri, 207 F.3d 412 (7th Cir. 2000) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

All other changes to the structure and wording of the Rule are intended to be stylistic only. There is no intent to change any other result in any ruling on evidence admissibility.

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

In assessing whether corroborating circumstances exist, some courts have focused on the credibility of the witness who relates the hearsay statement in court. But the credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the witness’s credibility would usurp the jury’s role of determining the credibility of testifying witnesses.