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## No Explanation Required: A Reply to Jeffrey Bellin's eHearsay

Colin Miller

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## Response

### No Explanation Required? A Reply to Jeffrey Bellin's *eHearsay*

Colin Miller<sup>†</sup>

You see why I tell you I ain't want to be no damn juror. Some dude just come by my house and tell me he going pay me money to say not guilty. Now I don't know what to do, because if I tell the judge they're going to know it's me.

I know, right. Now I scared because I don't want them to do anything to me or [my daughter][. . .]\*\*1

The above were text messages sent by a juror to her sister after Ikim Blackett allegedly threatened and then tried to bribe her in an attempt to convince her to find one of several defendants “not guilty” of various drug crimes.<sup>2</sup> At Blackett's ensuing trial for jury bribery, the juror testified that, while she was on her front porch, Blackett approached her and mentioned the word “nitroglycerin.”<sup>3</sup> The juror then “asked Blackett what ‘nitroglycerin’ meant and he responded ‘not guilty.’”<sup>4</sup> When this threat fell on deaf ears, Blackett offered the juror \$1,500 in exchange for her vote.<sup>5</sup> After again declining, the juror went to her bedroom and sent the above text messages.<sup>6</sup>

Should the text messages have been admissible because the juror took the witness stand and testified at trial? If the juror were “unavailable” at trial, should the text messages have been admissible?<sup>7</sup> According to Professor Jeffrey Bellin's arti-

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<sup>†</sup> Associate Professor, University of South Carolina School of Law; Blog Editor, EvidenceProf Blog, <http://lawprofessors.typepad.com/evidenceprof/>. Copyright © 2013 by Colin Miller.

1. Brief for the Appellee, *United States v. Blackett*, 481 Fed. App'x. 741 (3d Cir. 2012) (No. 2011-1556), 2012 WL 248361, at \*3 (alteration in original).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See FED. R. EVID. 804(a) (describing circumstances under which “[a] declarant is considered to be unavailable as a witness”).

cle, *eHearsay*, the answer to both questions is “yes” as he crafts hearsay rules that cover both situations. This Response Piece agrees with Professor Bellin on the first question but disagrees with him on the second.

I. PRIOR WITNESS STATEMENTS UNDER FEDERAL  
RULE OF EVIDENCE 801(D)(1) AND PROPOSED RULE  
801(D)(1)(D)

A. THE RULE AGAINST HEARSAY

Federal Rule of Evidence 801(c) indicates:

“Hearsay” means a statement that:

the declarant does not make while testifying at the current trial or hearing; and

a party offers in evidence to prove the truth of the matter asserted in the statement.<sup>8</sup>

In turn, Federal Rule of Evidence 802 deems hearsay inadmissible in the absence of an exception, exclusion, or federal statute.<sup>9</sup> Rule 802 deems hearsay evidence presumptively inadmissible both because such evidence is unreliable and because the jury has an inability to assess that unreliability at trial. As the Supreme Court explained in *Williamson v. United States*, Rule 802:

is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements—the oath, the witness’ awareness of the gravity of the proceedings, the jury’s ability to observe the witness’ demeanor, and, most importantly, the right of the opponent to cross-examine—are generally absent for things said out of court.<sup>10</sup>

B. THE RULE 803 AND 804 EXCEPTIONS TO THE RULE AGAINST HEARSAY

Meanwhile, Federal Rules of Evidence 803 and 804 create hearsay exceptions for statements made under circumstances that allow them to “possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the de-

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8. FED. R. EVID. 801(c).

9. FED. R. EVID. 802. Federal Rule of Evidence 802 states, “Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court.”

10. *Williamson v. United States*, 512 U.S. 594, 598 (1994).

clarant in person at the trial.”<sup>11</sup> In other words, a statement qualifying under a Rule 803 or 804 exception speaks for itself, meaning that the declarant need not take the witness stand and submit himself to the crucible of cross-examination concerning the statement.<sup>12</sup> Indeed, for a statement to qualify for admission under Rule 804, the declarant has to be “unavailable” at trial<sup>13</sup> while Rule 803 statements are admissible “regardless of whether the declarant is available as a witness.”<sup>14</sup>

Statements qualifying for admission under hearsay exceptions are thought to be sufficiently trustworthy for an amalgam of defensible and questionable reasons. A dying declaration under Rule 804(b)(2)<sup>15</sup> is admissible because it is thought that a person does not want to die with a lie on his lips.<sup>16</sup> A statement made for purposes of diagnosis or treatment under Rule 803(4)<sup>17</sup> is believed to be truthful under the “selfish motive” theory that a patient fears that a lie to a doctor could lead to misdiagnosis and/or mistreatment.<sup>18</sup> And a business record

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11. See FED. R. EVID. 803 advisory committee’s note.

12. See, e.g., *Bourjaily v. United States*, 483 U.S. 171, 200 (1987) (“This concern is sometimes satisfied when evidence is admitted under a hearsay exception, even where no cross-examination of the declarant occurs at trial.”). If the statement, however, is “testimonial,” the declarant would need to submit himself to cross-examination for the statement to comport with the Sixth Amendment’s Confrontation Clause. See *Crawford v. Washington*, 541 U.S. 36 (2004).

13. See FED. R. EVID. 804(a).

14. FED. R. EVID. 803; see FED. R. EVID. 804 advisory committee’s note (“Rule 803 . . . is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility.”).

15. See FED. R. EVID. 804(b)(2). Rule 804(b)(2) provides an exception to the rule against hearsay: “In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant’s death to be imminent, made about its cause or circumstances.”

16. See *Idaho v. Wright*, 497 U.S. 805, 820 (1990). There are actually two reasons why dying declarations are thought to be reliable. As noted by the Supreme Court of Alaska, “[t]wo basic reasons have been advanced for admission of such testimony: necessity, because of the witness’ death, and a belief that the approach of death removes ordinary motives to misstate.” *Johnson v. State*, 579 P.2d 20, 24 (Alaska 1978).

17. See FED. R. EVID. 803(4). Federal Rule of Evidence 803(4) provides an exception to the rule against hearsay for “[a] statement that: (A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.”

18. See, e.g., *Willingham v. Crooke*, 412 F.3d 553, 562 (4th Cir. 2005) (“This exception to the hearsay rule is premised on the notion that a declarant

qualifying for admission under Rule 803(6)<sup>19</sup> is considered reliable because a company has an incentive to keep accurate records to ensure that it stays in the black or is aware when it dips into the red.<sup>20</sup>

C. RULE 801(D)(2) AND STATEMENTS MADE BY OR ON BEHALF OF A PARTY

Unlike Rules 803 and 804, Federal Rule of Evidence 801(d)(2) defines five statements as nonhearsay under the assumption that the speaker (or the party to whom the statement is attributed) can and, in most cases, will testify at trial. Rule 801(d)(2) defines a statement as nonhearsay if:

The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

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seeking treatment ‘has a selfish motive to be truthful’ because ‘the effectiveness of medical treatment depends upon the accuracy of the information provided.’”).

19. See Fed. R. Evid. 803(6). Federal Rule of Evidence 803(6) provides an exception to the rule against hearsay for:

[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 source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

20. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1175 (2011) (“Hearsay law exempts business records, for example, because businesses have a financial incentive to keep reliable records.”). Federal Rule of Evidence 803(8) provides a similar hearsay exception for:

[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) neither the source of information nor other circumstances indicate a lack of trustworthiness.

The “[j]ustification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record.” FED. R. EVID. 803 advisory committee’s note.

- (B) is one the party manifested that it adopted or believed to be true;  
 (C) was made by a person whom the party authorized to make a statement on the subject;  
 (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or  
 (E) was made by the party's coconspirator during and in furtherance of the conspiracy.<sup>21</sup>

Under Rule 801(d)(2), then, a statement is not hearsay if (1) it is adopted by a party—a criminal defendant, civil defendant, or civil plaintiff—or made by a party or the party's authorizee (e.g., publicist or press secretary), employee, or coconspirator; and (2) it is offered against the party.

Notably, “[n]o guarantee of trustworthiness is required in the case of” a Rule 801(d)(2) statement.<sup>22</sup> Instead, the point is that “[t]here is less concern about trustworthiness, especially in civil cases, because the party against whom the statements are offered generally can take the stand and explain, deny, or rebut the statements.”<sup>23</sup> Civil plaintiffs and defendants likely have to testify at trial while criminal defendants can choose whether to testify or exercise their Fifth Amendment privilege against self-incrimination.<sup>24</sup> Rule 801(d)(2) statements are thus admissible “based . . . upon the identity of the speaker” rather than the trustworthiness of the statement, with a party not being able to “complain about the lack of an opportunity to cross-examine himself.”<sup>25</sup>

#### D. PRIOR WITNESS STATEMENTS UNDER RULE 801(D)(1)

While Rule 801(d)(1) also defines certain statements as nonhearsay, it does not do so based upon the identity of the speaker. Rule 801(d)(1) defines a statement as nonhearsay if:

- The declarant testifies and is subject to cross-examination about a prior statement, and the statement:  
 (A) is inconsistent with the declarant's testimony and was given un-

21. FED. R. EVID. 801(d)(2).

22. FED. R. EVID. 801 advisory committee's note.

23. *Jordan v. Binns*, 712 F.3d 1123, 1128 (7th Cir. 2013).

24. *See* U.S. Const. amend V.

25. *Guest v. Allstate Ins. Co.*, 205 P.3d 844, 860 (N.M. Ct. App. 2009), *aff'd in part, rev'd in part* 244 P.3d 343 (N.M. 2010). The same logic applies to statements by authorizees, employees and co-conspirators under Federal Rules of Evidence 801(d)(2)(C), (D), and (E). As the Supreme Court noted in *Bourjaily v. United States*, 483 U.S. 171, 190 (1987), “it was thought that a party could not complain of the deprivation of the right to cross-examine himself (or another authorized to speak for him) or to advocate his own, or his agents, untrustworthiness.”

der penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

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

(C) identifies a person as someone the declarant perceived earlier.<sup>26</sup>

A statement qualifying for admission under Rule 801(d)(1) can be made by a party or a party's representative, but it can also be made by many other declarants, including alleged victims and innocent bystanders. Therefore, unlike Rule 801(d)(2), Rule 801(d)(1) explicitly requires that the declarant testify at trial for his prior statement to be admissible.<sup>27</sup>

Indeed, the requirement that the declarant testify at trial and be "subject to cross-examination about [the] prior statement" is fundamental to the efficacy of Rule 801(d)(1).<sup>28</sup> The Advisory Committee's Note to Rule 801 indicates that prior witness statements are generally deemed hearsay but then points out the three exclusions created Rules 801(d)(1)(A)-(C).<sup>29</sup> The Advisory Committee did not try to argue that statements falling under the auspices of Rules 801(d)(1)(A), (B), or (C) have sufficient circumstantial guarantees of trustworthiness; instead, the Committee acknowledges that the judgment concerning their classification "is one more of experience than logic."<sup>30</sup> Accordingly, Rule 801(d)(1) "requires in each instance, as a general safeguard, that the declarant actually testify as a witness."<sup>31</sup>

Statements qualifying for admission under Rule 801(d)(1) are thus admissible not because they are thought to be sufficiently reliable when made. Nor are they admissible solely because the declarant testifies at trial; declarant testimony is insufficient to allow for the admission of the vast majority of prior witness statements. Instead, Rule 801(d)(1) statements are admissible because they are (1) likely more reliable than the declarant's testimony at trial; and (2) relevant both to prove the truth of the matter asserted and to impeach and/or bolster the credibility of a declarant who has testified at trial.

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26. FED. R. EVID. 801(d)(1).

27. *See id.*

28. *Id.*

29. FED. R. EVID. 801 advisory committee's notes.

30. *Id.*

31. *Id.*

### 1. Prior Inconsistent Statements Under Rule 801(d)(1)(A)

As noted, Rule 801(d)(1)(A) deems a witness's prior inconsistent statement to be nonhearsay if that prior statement "was given under penalty of perjury."<sup>32</sup> Certainly, the fact that a Rule 801(d)(1)(A) statement is given under oath makes it more reliable than the run-of-the-mill hearsay statement. Moreover, this "penalty of perjury" requirement distinguishes a Rule 801(d)(1)(A) statement from a prior inconsistent statement not given under oath; such a statement is hearsay and admissible under Federal Rule 613 only to impeach the witness and not to prove the truth of the matter asserted.<sup>33</sup> But the mere fact that the prior statement was given subject to the penalty of perjury would not ordinarily satisfy hearsay concerns.

Federal Rule of Evidence 804(b)(1) sets forth a hearsay exception for former testimony by an unavailable declarant and defines former testimony as:

Testimony that:

- (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
- (B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.<sup>34</sup>

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32. FED. R. EVID. 801(d)(1)(A).

33. See FED. R. EVID. 613. Rule 613 states as follows:

(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

As the First Circuit noted in *United States v. Martin*, 694 F.2d 885, 888 (1st Cir. 1982), a prior inconsistent statement admitted under Rule 613 "is admitted not for the truth of the matter asserted in the prior statement but to impeach the credibility of the witness." Furthermore, the Sixth Circuit pointed out in *United States v. Day*, 789 F.2d 1217, 1222 (6th Cir. 1986), that, "[i]n seeking to limit the admissibility of prior inconsistent statements for substantive purposes, Congress determined that statements given under oath at a 'formal proceeding' were inherently more reliable than statements given in the absence of such formalities."

34. FED. R. EVID. 804(b)(1). See, e.g., *United States v. Burbank*, No. 88-5634, 1990 WL 86147, at \*2 (4th Cir. June 12, 1990) ("Under 804(b)(1), former testimony is admissible in criminal cases only when the party against whom the testimony is offered had an opportunity to cross-examine or otherwise de-

Therefore, for a declarant's former testimony to be admissible under Rule 804(b)(1), it is not enough that the testimony was given under oath and that *some* party had the opportunity to question the declarant; instead, the party against whom that testimony is later offered (or its civil predecessor) must have had that opportunity.<sup>35</sup> Moreover, the opportunity, alone, is insufficient; the opposing party must also have had a similar motive to develop the declarant's testimony at the prior trial, hearing, or deposition.<sup>36</sup>

No such requirement exists under Rule 801(d)(1)(A). Instead, the Rule allows for the admission of prior inconsistent statements given under oath regardless of whether the opposing party had any opportunity to question the declarant when the declarant made those prior statements.<sup>37</sup> Therefore, Rule 801(d)(1)(A) statements are not as reliable as Rule 804(b)(1) statements, but they are admissible for the two reasons applicable to all three of the Rule 801(d)(1) exclusions.

First, Rule 801(d)(1)(A) statements are likely more reliable than the declarant's testimony at trial. According to the Advisory Committee's Note to Rule 801, "[i]n many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation."<sup>38</sup> Moreover, Rule 801(d)(1)(A) was based in large part on "concern about witness intimidation—i.e., witnesses who could be intimidated or were otherwise vulnerable to pressure with the result that their prior statements were a more reliable guide to the fact finder than their testimony in the courtroom."<sup>39</sup>

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velop the witness's testimony.").

35. See FED. R. EVID. 804(b)(1); *United States v. Feldman*, 761 F.2d 380, 385 (7th Cir. 1985) ("In determining whether a party had such a motive, a court must evaluate not only the similarity of the issues, but also the purpose for which the testimony is given.").

36. See *id.*

37. See, e.g., *People v. Farguharson*, 731 N.W.2d 797, 802 (Mich. Ct. App. 2007) ("This Court held that the witnesses' grand jury testimony was properly admitted as a prior inconsistent statement under MRE 801(d)(1)(A), but would have been inadmissible under MRE 804(b)(1) because 'defendant had no 'opportunity . . . to develop the testimony by direct, cross, or redirect examination' in front of the grand jury.").

38. Fed. R. Evid 801 advisory committee's note (quoting Comment, California Evidence Code §1235).

39. *Conley v. N.L.R.B.*, 520 F.3d 629, 636 (6th Cir. 2008) (quoting *Conley Trucking*, 349 NLRB 308 (2007)).

Second, prior inconsistent statements are relevant both to prove the truth of the matter asserted and to impeach the credibility of a declarant who has testified at trial. This relevance is ensured by the fact that, under Rule 801(d)(1)(A), “[t]he declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter.”<sup>40</sup> Assume that William testifies at Dan’s trial for murdering Vince: “I saw Dan fire the fatal shot that killed Vince.” As a result, the jury finds Dan guilty of the murder, and the prosecution later charges Dan’s co-conspirator, Carl, with Vince’s murder. The prosecution again calls William, who now testifies, “I saw Carl fire the fatal bullet that killed Vince.” Under Rule 801(1)(A), the defense can now introduce William’s prior inconsistent statement for two purposes.

First, it can use the statement to impeach William, i.e., to call into question his credibility based upon the contradiction between his two statements. The most classic example of such impeachment is the question, “Were you lying then or are you lying now?”<sup>41</sup> “Forcing a witness to admit to the jury that he is a liar is the Holy Grail of cross-examination,”<sup>42</sup> the assumption being that no “juror would give credence to any statement of”<sup>43</sup> the witness caught in such a contradiction. Second, because the prior inconsistent statement is not hearsay, it can be offered to prove the truth of the matter asserted, i.e., that it was indeed Dan, and not Carl, who fired the fatal bullet.<sup>44</sup>

## 2. Prior Consistent Statements Under Rule 801(d)(1)(B)

Like prior inconsistent statements under Rule 801(d)(1)(A), prior consistent statements under Rule 801(d)(1)(B) are insufficiently reliable when originally uttered to be admissible. Returning to the hypothetical in which Dan is on trial for Vince’s murder, assume again that William testifies, “I saw Dan fire the fatal shot that killed Vince.” Assume that two days after the shooting and six months before trial, William had told his friend, Fred, “I saw Dan fire the fatal shot that killed Vince.” If

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40. FED. R. EVID. 801 advisory committee’s note.

41. *Murdoch v. Castro*, 609 F.3d 983, 1007 (9th Cir. 2010).

42. *Id.*

43. *Murdoch v. Castro*, 489 F.3d 1063, 1071 (9th Cir. 2007), *rev’d en banc*, 609 F.3d 983 (9th Cir. 2010).

44. *See, e.g., United States v. Dietrich*, 854 F.2d 1056, 1061 (7th Cir. 1988) (“If a prior inconsistent statement meets the requirements of Rule 801(d)(1)(A) it may be admitted as substantive evidence to establish the truth of the matter asserted.”).

the defense does not claim that William's trial testimony was a recent fabrication or that it resulted from a recent improper influence or motive, William's statement to Fred would be inadmissible hearsay that fails to qualify for admission under a hearsay exception or exclusion.

Assume, however, that the defense expressly or impliedly claims that William's trial testimony against Dan is a recent fabrication that he rendered in exchange for a favorable plea bargain offered to him by the prosecution a few weeks before trial. In this case, the elements of Rule 801(d)(1)(B) have been satisfied, and the prosecution can now introduce William's prior consistent statement to Fred because it preceded the improper influence or motive—the plea deal—that allegedly caused William to fabricate his trial testimony.

The allegation of recent fabrication by the defense does not make William's statement to Fred any more trustworthy, but it does make that prior statement more reliable than William's testimony at trial, which, in effect, has been labeled the fruit of the poisonous tree. First, "the fact that a witness made a prior consistent statement closer in time to the event can support relevant inferences that the testimony is unlikely to be the product of memory problems."<sup>45</sup> Second, "statements made before a reason to distort the truth arose would be more reliable than those made after such a motive arose."<sup>46</sup> Of course, this means that Rule 801(d)(1)(B) applies only to consistent statements made *before* the improper motive arose because statements made *after* the motive arose would be no more reliable.<sup>47</sup>

As with prior inconsistent statements, prior consistent statements are relevant for dual purposes. While a party introduces a prior inconsistent statement to impeach a witness, a party uses a prior consistent statement to rehabilitate or bolster the credibility of a witness who has been charged with fab-

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45. David M. Paciocco, *The Perils and Potential of Prior Consistent Statements: Let's Get It Right*, 17 CANADIAN CRIM. L. REV. 181, 214 (2013). Cf. *United States v. Coleman*, 631 F.2d 908, 914 (D.C. Cir. 1980) ("Even where the suggestion of contradiction is only imputation of an inaccurate memory, a prior consistent statement is admissible to rebut the inference.").

46. Robert P. Burns, *Foreword: Bright Lines and Hard Edges: Anatomy of a Criminal Evidence Decision*, 85 J. CRIM. L. & CRIMINOLOGY 843, 870 (1995).

47. See generally *Tome v. United States*, 513 U.S. 150, 167 (1995) ("The Rule permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive.").

ricating his trial testimony.<sup>48</sup> Moreover, because the prior consistent statement is nonhearsay and not tainted by any recent improper influence or motive, it is also admissible to prove the truth of the matter asserted, i.e., that Dan in fact fired the fatal shot that killed Vince.<sup>49</sup>

### 3. Prior Statements of Identification Under Rule 801(d)(1)(C)

Both Rule 801(d)(1)(A) and Rule 801(d)(1)(B) are subject to Rule 801(d)(1)'s requirement that the declarant testify at trial, but this requirement is surplusage. A statement can be a prior inconsistent or consistent statement only if it is inconsistent or consistent with the declarant's testimony at trial, which means, of course, that the declarant has to testify for either of these rules to apply. The same is not true of Rule 801(d)(1)(C), which covers prior statements of identification and helps to crystallize the principles unifying the three exclusions contained in Rule 801(d)(1).

Returning again to the hypothetical in which Dan is on trial for Vince's murder, William might pick Dan out of a lineup or pick his picture out of a photo array as the person whom he saw shoot Vince. Like prior inconsistent and consistent statements, such eyewitness identifications are insufficiently reliable when rendered to be admissible. Both "statistical and psychological data has shown that eyewitness identifications, whether lineup or show-up confrontations, produce highly unreliable evidence and frequently are inaccurate."<sup>50</sup> Indeed, seventy-five percent of convictions overturned due to DNA evidence involved eyewitness misidentifications, and reviews of actual police records in four studies revealed that "about one-third of eyewitnesses who made identifications in police investigations wrongly identified a known innocent stand-in."<sup>51</sup>

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48. See, e.g., *United States v. Lindemann*, 85 F.3d 1232, 1242 n.8 (7th Cir. 1996) ("FED. R. EVID. 801(d)(1)(B) contains the bolstering/rehabilitation rule by defining as nonhearsay only those prior consistent statements that are offered 'to rebut an express or implied charge' against a witness of 'recent fabrication or improper influence or motive.'").

49. See, e.g., *Ross v. Saint Augustine's Coll.*, 103 F.3d 338, 341 (4th Cir. 1996) ("Under Federal Rule of Evidence 801(d)(1)(B), a prior out-of-court statement offered for the truth of the matter asserted is admissible . . . .")

50. Christian M. Halliburton, *Race, Brain Science, and Critical Decision-Making in the Context of Constitutional Criminal Procedure*, 47 GONZ. L. REV. 319, 331 (2012).

51. The Honorable Stuart Rabner, *Evaluating Eyewitness Identification Evidence in the 21st Century*, 87 N.Y.U. L. REV. 1249, 1263 (2012).

It is thus not the independent reliability of eyewitness identifications that makes them admissible; instead, such pre-trial identifications are admissible because they are thought to be more reliable than in-court identifications. In essence, “out-of-court identifications made shortly after the crime a[re] of far greater probative value than are in-court ones where the defendant can easily be picked out (he sits at defense counsel’s table) and where the witness testifies months or years after the crime.”<sup>52</sup>

This view of the relative reliability of pre-trial and in-court identifications is corroborated by Rule 801(d)(1)’s requirement that the declarant must testify for a Rule 801(d)(1)(C) identification to be admissible. If William picked Dan out of a lineup and did not testify at trial, his pre-trial identification would not be admissible.<sup>53</sup> It is only the eyewitness’ testimony at trial that justifies the admission of his pre-trial identification so that the jury can compare or contrast the two.

Whenever a party admits a pre-trial statement to prove the truth of the matter asserted in the statement, testimony or evidence concerning the statement “presents issues of ambiguity, insincerity, erroneous memory, and faulty perception.”<sup>54</sup> When the declarant who made such a statement does not testify, “all of these concerns will come to fruition because the jury will not have an opportunity to evaluate the declarant.”<sup>55</sup> This reasoning explains why declarants are required to testify under Rule 801(d)(1) generally and under Rule 801(d)(1)(C) specifically:

[R]ule 801(d)(1)(C)’s requirement that the declarant testify at trial and be subject to cross-examination prevents these traditional hearsay concerns from creating an impediment and affords the jury the opportunity to reach its own determination about a declarant’s credi-

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52. Andrew E. Taslitz, *What Remains of Reliability: Hearsay and Free-standing Due Process After Crawford v. Washington*, 20 CRIM. JUST., Summer 2005, at 39, 50; *see also* *United States v. Owens*, 484 U.S. 554, 562 (1988) (“The premise for Rule 801(d)(1)(C) was that, given adequate safeguards against suggestiveness, out-of-court identifications were generally preferable to courtroom identifications.”).

53. *See, e.g., United States v. Baker*, 432 F.3d 1189, 1210 n.19 (11 Cir. 2005) (“Nor is it classified as a non-hearsay statement of identification under Rule 801(d)(1)(C), because Jetier did not testify at the trial and was not subject to cross-examination concerning that statement.”).

54. Gilbert M. Rein, Note, “*That’s the Guy!*”: *Federal Rule of Evidence 801(d)(1)(C) and Out-of-Court Statements of Identification*, 34 CARDOZO L. REV. 1539, 1563 (2013).

55. *Id.*

bility and the circumstances in which the statement in issue was made.<sup>56</sup>

The requirement that the eyewitness testify at trial also explains why pre-trial identifications admitted under Rule 801(d)(1)(C) have dual relevance. Assume that William picked Dan out of a pre-trial lineup and then pointed to Dan at the defense table at trial when asked who murdered Vince. Thereafter, the prosecution could admit William's pre-trial identification under Rule 801(d)(1)(C) both to bolster the credibility of William's in-court identification and to prove the truth of the matter asserted in his pre-trial identification: that Dan was the murderer.<sup>57</sup>

Alternatively, assume that William picked someone other than Dan out of a pre-trial lineup but then pointed to Dan at the defense table at trial when asked who murdered Vince. In this case, the defense could admit the pre-trial identification under Rule 801(d)(1)(C) both to impeach the credibility of William's in-court identification and to prove the truth of the matter asserted in his pre-trial identification: that someone other than Dan was the murderer.<sup>58</sup>

#### E. THE FIT BETWEEN PROPOSED RULE 801(D)(1)(D) AND THE RULE 801(D)(1) RATIONALES

In his article, *eHearsay*, Professor Jeffrey Bellin proposes a fourth exclusion to Federal Rule of Evidence 801(d)(1). Under Proposed Rule 801(d)(1)(D):

A statement that meets the following conditions is not hearsay: (1) The declarant testifies and is subject to cross-examination about a prior statement, and the statement . . . (D) would qualify as a Recorded Statement of Recent Perception under Rule 804(b)(5) if the declarant were unavailable.<sup>59</sup>

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56. *Id.*

57. *See, e.g.,* State v. Joyner, 107 So.3d 675, 691 (La. Ct. App. 2012) ("Lieutenant Italiano's testimony was independently admissible as nonhearsay, for the truth of the matter of asserted, under La. C.E. art. 801(D)(1)(c).").

58. *See, e.g.,* Miller v. State, 687 So.2d 1281, 1285 (Al. Crim. App. 1996) ("An identification statement could be admissible to show lack of credibility if an in-court identification is inconsistent with an out-of-court one."); *see also* State v. Wright, 730 So.2d 485, 489 (La. Ct. App. 1999) ("Further, multiple federal circuits have held that previous identification testimony admitted into evidence pursuant to FED. R. EVID. 801(d)(1)(C) is available not simply for impeachment, but as substantive evidence.").

59. Jeffrey Bellin, *eHearsay*, 98 MINN. L. REV. 7, 36.

This Proposed Rule would be a good fit with the rest of Federal Rule of Evidence 801(d)(1). Initially, as with statements admissible under the three existing Rule 801(d)(1) exclusions, eHearsay statements would not be admissible under Rule 801(d)(1)(D) based upon their independent reliability when they were made. This conclusion is proven by the fact that Professor Bellin's exclusion covers only "recorded communication."<sup>60</sup> If William orally tells his friend, Fred, "I saw Dan shoot Vince two days ago," Professor Bellin would specifically deem that statement inadmissible under his new eHearsay exclusion while a text message or e-mail containing the same content and written at the same time would be admissible under the exclusion.<sup>61</sup> Obviously, at the time that William composed such a text message or e-mail, it would be no more reliable than his oral statement to Fred, so it must be something other than the independent reliability of the recorded communication that makes it admissible.

This takes us to another similarity between proposed Rule 801(d)(1)(D) and the three existing Rule 801(d) exclusions: the admissibility of eHearsay is premised on it likely being more reliable than the declarant's testimony at trial. Professor Bellin's proposed eHearsay exclusion is based upon the rejected "Statement of Recent Perception" hearsay exception, which requires statements to be made somewhat soon after the declarant perceives an event or condition.<sup>62</sup> The fact that such statements are made much nearer to the event or condition than the declarant's testimony at trial makes them less susceptible to inaccuracy due to memory loss and more likely to be accurate, which, as noted, is also part of the explanation for the admissibility of statements under the three existing Rule 801(d)(1) exclusions.<sup>63</sup>

Moreover, statements admitted under Professor Bellin's eHearsay exclusion would likely be more sincere than testimony rendered at trial. In his article, Professor Bellin indicates that his exclusion would not cover "a statement made in contemplation of litigation or to a person who is investigating, litigating, or settling a potential or existing claim."<sup>64</sup> As noted, this explanation is similar to the explanations supporting the ad-

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60. *Id.* at 38.

61. *Id.* at 38–41.

62. *Id.* at 28.

63. *See supra* notes 38–39, 46, 52 and accompanying text.

64. Bellin, *supra* note 59, at 36.

mission of statements under the three existing Rule 801(d)(1) exclusions.

Prior inconsistent statements admitted under Rule 801(d)(1)(A) are seemingly “less likely [than trial testimony] to be influenced by the controversy that gave rise to the litigation.”<sup>65</sup> The entire point of the Rule 801(d)(1)(B) exclusion is that the prior consistent statement was not influenced by the improper influences and motives that often accompany testimony at trial.<sup>66</sup> And the basis for admitting prior statements of identification under Rule 801(d)(1)(C) is the scripted nature of the in-court identification, in which the eyewitness knows that his role is to point to the accused at the defense table when asked who committed the crime charged.<sup>67</sup>

Of course, both of these rationales apply equally to non-recorded statements of recent perception, which Professor Bellin deems inadmissible under his eHearsay exclusion. It is thus the recording of eHearsay that makes it admissible because, as Professor Bellin notes, “[w]hen an in-court witness relates another person’s hearsay statement, a danger arises that the in-court witness’s testimony is unreliable. The testifying witness may mishear, misremember, miscommunicate, or (worst of all) manufacture the out-of-court speaker’s statement.”<sup>68</sup>

This recording requirement places proposed Rule 801(d)(1)(D) on similar footing with Rules 801(d)(1)(A) and (C). One major reason Rule 801(d)(1)(A) categorizes as nonhearsay only prior inconsistent statements that were given at a trial, hearing, or deposition is that those statements were recorded and can be repeated verbatim at trial.<sup>69</sup> Similarly, under Rule 801(d)(1)(C), jurors are not usually forced to rely upon a police officer’s account of a pre-trial eyewitness identification because “lineups can be and often are photographically recorded.”<sup>70</sup>

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65. See *supra* note 38 and accompanying text.

66. See *supra* note 47 and accompanying text.

67. See *supra* note 52 and accompanying text.

68. Bellin, *supra* note 59, at 38.

69. See, e.g., *United States v. Jacoby*, 955 F.2d 1527, 1539 (11th Cir. 1992) (“The court permitted Jacoby to impeach Merrill by reading verbatim the transcript of Merrill’s grand jury testimony. Jacoby thus was able to develop fully before the jury the alleged inconsistencies between the witness’ trial and grand jury testimony.”).

70. *United States v. Gallo-Moreno*, 584 F.3d 751, 761 (7th Cir. 2009). *But see* Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329, 353 (2012) (“It may be

Furthermore, as with Rule 801(d)(1)(C) and the other Rule 801(d)(1) exclusions, an essential component of Proposed Rule 801(d)(1)(D) is the declarant's testimony at trial. As noted, the lynchpin of Rule 801(d)(1) is the requirement that the declarant testify at trial because, without the opportunity for cross-examination, the jury lacks the opportunity "to reach its own determination about a declarant's credibility and the circumstances in which the statement in issue was made."<sup>71</sup> For reasons that will be described in Section III, it makes even more sense to require the declarant of eHearsay to testify at trial and be subjected to cross-examination.

Finally, as with evidence admitted under the other hearsay exclusions contained in Rule 801(d)(1), evidence admitted pursuant to Proposed Rule 801(d)(1)(D) would serve twin purposes. Assume that William sends his friend, Fred, a text message that says, "OMG! Dan killed Vince two days ago." If William testifies at trial that he saw Dan kill Vince, his text message would be admissible under Proposed Rule 801(d)(1)(D) for two purposes. First, the prosecution could use the text message to bolster the credibility of William based upon the consistency between his two statements. Basically, this would be similar to a prior consistent statement but with the recording of the prior statement obviating the need for the opposing party to claim that the declarant's trial testimony was a recent fabrication. Second, the text message would be admissible to prove the truth of the matter asserted: that Dan in fact did kill Vince.

Assume instead that William sends his friend, Fred, a text message that says, "OMG! Carl killed Vince two days ago." If William testifies at trial that he saw Dan kill Vince, the text message would also be admissible for dual purposes. First, the prosecution could use the text message to impeach William's credibility based upon the inconsistency between the two statements. Basically, this would be similar to impeachment through a prior inconsistent statement or a prior statement of identification that contradicts the declarant's in-court identification. Second, the text message would be admissible to prove the truth of the matter asserted: that it was in fact Carl who killed Vince.

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common to preserve a photograph of a lineup or the photo array used in a case, but interviews with eyewitnesses have generally not been well documented and certainly have not been electronically recorded. Some jurisdictions have made great strides in this area, but most have not.").

71. See *supra* note 56 and accompanying text.

F. PROPOSED RULE 801(D)(1)(D) AS AN EXTENSION OF RULE 803(5)

1. Why Rule 803(5) Should Be Moved to Rule 801(d)(1)

Another reason to include Professor Bellin's eHearsay exclusion in Federal Rule of Evidence 801(d)(1) is the similarity between Proposed Federal Rule of Evidence 801(d)(1)(D) and Federal Rule of Evidence 803(5). At first, this statement might appear odd because Rule 803(5) is not part of Rule 801(d)(1). This article contends, however, that Rule 803(5) should be a part of Rule 801(d)(1) and that its current location in the Rules is a mere historical relic.

Federal Rule of Evidence 803(5) creates an exception to the rule against hearsay for:

A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.<sup>72</sup>

Because of its placement in Federal Rule of Evidence 803, this "recorded recollection" exception is supposed to apply "regardless of whether the declarant is available as a witness."<sup>73</sup> The recorded recollection exception thus seems like an odd fit with Federal Rule of Evidence 803 because it envisions a witness both being available and testifying at trial, albeit without a complete enough memory to testify fully and accurately.<sup>74</sup> It is the incomplete memory of the witness that confused the issue of where to place the recorded recollection rule.

As noted, hearsay is admissible under Federal Rule of Evidence 804 only if the hearsay declarant is deemed "unavailable"

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72. FED. R. EVID. 803(5).

73. FED. R. EVID. 803.

74. See FED. R. EVID. 803(5)(A). See *United States v. Sawyer*, 607 F.2d 1190, 1193 (7th Cir. 1979) ("[S]ince the hearsay declarant in this case was available for cross-examination, and since the referral report would otherwise qualify as a recorded recollection, we find no reversible error in the admission of the report."); *Smith v. State*, 880 So.2d 730, 736 (Fla. Dist. Ct. App. 2004) ("In order for a memorandum or record to qualify as recorded recollection, the witness must testify that he made an accurate record of the fact or event or that he is confident that the facts would not have been written unless they were true.").

under Federal Rule of Evidence 804(a).<sup>75</sup> One way to prove that a declarant is “unavailable” is with the declarant’s own testimony that he or she cannot “remember[] the subject matter,” pursuant to Federal Rule of Evidence 804(a)(3).<sup>76</sup> The drafters of the recorded recollection exception were thus presented with three placement options:

Locating the exception [in Rule 803] of the rules [wa]s a matter of choice. There were two other possibilities. The first was to regard the statement as one of the group of prior statements of a testifying witness which are excluded entirely from the category of hearsay by Rule 801(d)(1). That category, however, requires that declarant be “subject to cross-examination,” as to which the impaired memory aspect of the exception raises doubts. The other possibility was to include the exception among those covered by Rule 804. Since unavailability is required by that rule and lack of memory is listed as a species of unavailability by the definition of the term in Rule 804(a)(3), that treatment at first impression would seem appropriate. The fact is, however, that the unavailability requirement of the exception is of a limited and peculiar nature. Accordingly, the exception is located at this point rather than in the context of a rule where unavailability is conceived of more broadly.<sup>77</sup>

Basically, the drafters thought that placing the recorded recollection exception in Federal Rule of Evidence 803 was the least of three evils. Placing it in Federal Rule of Evidence 804 did not quite make sense because the declarant’s unavailability under the recorded recollection exception was “of a limited and peculiar nature.”<sup>78</sup> The exception requires that the declarant have enough memory of an event to be able to testify that his recorded recollection accurately reflects his once-existing knowledge of the event but not enough memory to testify fully and accurately about the event.<sup>79</sup> Under Rule 803(5), the declarant must thus have “impaired memory,” which also caused the drafters of the recorded recollection rule not to place it in Rule 801(d)(1) for fear that a declarant with limited memory might not be deemed “subject to cross-examination” as is required under the Rule.<sup>80</sup>

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75. See FED. R. EVID. 804(a).

76. FED. R. EVID. 804(a)(3).

77. FED. R. EVID. 803 advisory committee’s note.

78. *Id.*

79. *Id.*; see, e.g., *State v. Thompson*, 397 N.W.2d 679, 682 (Iowa 1986) (“[I]f the witness remembers an incident—such as an accident—but has forgotten a detail—was the light red or green—the contents of his previous statement relating to traffic signals should be admitted, provided the other tests of Rule 803(5) are met.” (quoting 4 J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE ¶ 803(5)[01], at 159-60 (1985))).

80. FED. R. EVID. 803 advisory committee’s note.

That said, the recorded recollection exception is an uncomfortable fit in Federal Rule of Evidence 803. It seems inaccurate to say, as Rule 803 does, that a recorded recollection is admissible “regardless of whether the declarant is available as a witness.”<sup>81</sup> Instead, as the Advisory Committee noted, the declarant of a recorded recollection must suffer from unavailability “of a limited and peculiar nature,” which, by implication, means that he must also be “available” to some degree. Therefore, rather than the availability of a Rule 803(5) declarant being unimportant, which is the case for all of the other Rule 803 exceptions, it is of the utmost importance.

While the recorded recollection rule seems out of place in Rule 803, Rule 801(d)(1) would now fit the rule like a glove given the Supreme Court’s opinion in *United States v. Owens*.<sup>82</sup> In *Owens*, “John Foster, a correctional counselor at the federal prison in Lompoc, California, was attacked and brutally beaten with a metal pipe.”<sup>83</sup> Owens thereafter identified the defendant as his assailant during a photo array.<sup>84</sup> At the defendant’s trial, Foster testified to severe memory loss such that he could not remember seeing his assailant and could not recall whether any people who visited him at the hospital suggested that the defendant was his assailant.<sup>85</sup> The court thereafter permitted the prosecution to introduce Foster’s identification of the defendant during the photo array pursuant to Federal Rule of Evidence 801(d)(1)(C).<sup>86</sup>

After he was convicted, the defendant appealed, claiming, *inter alia*, that Foster’s memory loss meant that he was not “subject to cross-examination,” as is required by Federal Rule of Evidence 801(d)(1).<sup>87</sup> The Supreme Court disagreed, concluding:

It seems to us that the more natural reading of “subject to cross-examination concerning the statement” includes what was available here. Ordinarily a witness is regarded as “subject to cross-examination” when he is placed on the stand, under oath, and responds willingly to questions. Just as with the constitutional prohibition, limitations on the scope of examination by the trial court or assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination within the intent of the Rule no longer exists. But that effect is not produced by the wit-

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81. FED. R. EVID. 803.

82. 484 U.S. 554 (1988).

83. *Id.* at 556.

84. *Id.*

85. *Id.*

86. *Id.* at 557.

87. *Id.* at 561.

ness' assertion of memory loss—which, as discussed earlier, is often the very result sought to be produced by cross-examination, and can be effective in destroying the force of the prior statement. Rule 801(d)(1)(C), which specifies that the cross-examination need only “concer[n] the statement,” does not on its face require more.<sup>88</sup>

In reaching this conclusion, the Court rejected the argument that this reading of Rule 801(d)(1) created a “substantive inconsistency” with Rule 804(a)(3), finding instead that there was a mere “semantic oddity” or “verbal curiosity.”<sup>89</sup> According to the Court, it would be nonsensical to deem an “unavailable” declarant under Rule 804(a)(3) not “subject to cross-examination” under Rule 801(d)(1) because that would mean that such a declarant could avoid the introduction of a prior inconsistent statement “by simply asserting lack of memory of the facts to which the prior testimony related.”<sup>90</sup> Therefore, the Court concluded that a witness can be:

“subject to cross-examination” under Rule 801 while at the same time “unavailable” under Rule 804(a)(3). Quite obviously, the two characterizations are made for two entirely different purposes and there is no requirement or expectation that they should coincide.<sup>91</sup>

Accordingly, the problem flagged in the Advisory Committee’s Note no longer exists. If a declarant takes the witness stand and admits that he has the impaired memory necessary for application of the recorded recollection exception, he is still “subject to cross-examination” by virtue of taking the witness stand.<sup>92</sup> Therefore, what is currently Federal Rule of Evidence 803(5) could be moved to Federal Rule of Evidence 801(d)(1).

Moreover, this recorded recollection rule should be moved to Federal Rule of Evidence 801(d)(1). Like the statements admitted under the current exclusions under Rule 801(d)(1), recorded recollections are admissible not because they were inherently reliable when made, but instead because they are more reliable than the declarant’s trial testimony. If William sees Dan shoot Vince and sends a text message to his friend, Fred, to that effect two days later, that text message would not be admissible at trial if William takes the witness stand at Dan’s

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88. *Id.* at 561–62.

89. *Id.* at 563.

90. *Id.*

91. *Id.* at 563–64.

92. *See id.*; *see also* United States v. Torres-Ortega, 184 F.3d 1128, 1134 n.3 (10th Cir. 1999) (“*Owens* bolsters its conclusion that the legitimately forgetful witness is subject to cross-examination for purposes of Rule 801(d)(1)(C) by contrasting that evidentiary provision with the definition of ‘unavailability as a witness’ in Rule 804(a).”).

murder trial and testifies that he has “total recall” of the shooting. Instead, for a recorded recollection such as the text message to be admissible as a recorded recollection, the declarant must be unable to testify fully and accurately because of impaired memory.<sup>93</sup> Thus, recorded recollections are admissible because they are more reliable than the declarant’s trial testimony, the same analysis that applies to prior inconsistent statements, prior consistent statements, and prior statements of identification.<sup>94</sup> This reliability is bolstered by the fact that, as with all Rule 801(d)(1) statements,<sup>95</sup> recorded recollections are “made closer in time to when the underlying events happened than a description produced in court at the time of the trial.”<sup>96</sup>

Also, like current Rule 801(d)(1) statements, recorded recollections are admissible for twin purposes. First, they are admissible to corroborate the witness’ testimony and thus bolster his credibility. Recall the *Blackett* case from the introduction.<sup>97</sup> In that case, the defendant allegedly threatened a juror. At trial, the juror testified regarding the encounter but also claimed that she suffered from an impaired memory.<sup>98</sup> As a result, pursuant to Rule 803(5), the court allowed the prosecution to introduce the text messages that the juror sent soon after the encounter, with “the text message[s] corroborat[ing] [the juror]’s testimony and establish[ing] her credibility . . . .”<sup>99</sup> Second, recorded recollections are also admissible to prove the truth of the matter asserted: that the defendant in fact threatened the juror in the *Blackett* case.<sup>100</sup>

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93. See FED. R. EVID. 803(5)(A).

94. See *supra* notes 38–39, 46, 52 and accompanying text.

95. See *id.*

96. Kim Lane Scheppele, *The Ground-Zero Theory of Evidence*, 49 HASTINGS L.J. 321, 329 (1998).

97. See *United States v. Blackett*, 481 Fed.App’x. 741 (3d Cir. 2012).

98. See *id.* As Professor Bellin notes in his article, the juror merely testified that that she did not remember the content of the text message while she appeared to have good recall of Blackett’s intimidation. See Bellin, *supra* note 59, at 38. Therefore, it was questionable whether the text messages qualified as recorded recollections, a question that the Third Circuit did not resolve, finding that any possible error was harmless. See *id.*; see also Colin Miller, *Q: What Does Nitroglycerin Mean? A: Not Guilty; 3rd Circuit Fails To Decide Whether Text Message Was Recorded Recollection*, EVIDENCEPROF BLOG (June 4, 2012), <http://lawprofessors.typepad.com/evidenceprof/2012/06/8035-text-us-v-blackettslip-copy-2012-wl-1925540ca3-virgin-islands2012.html>.

99. See *Blackett*, 481 Fed.App’x at 742.

100. See *id.*

Finally, recorded recollections are similar to Rule 801(d)(1)(A) prior inconsistent statements and most Rule 801(d)(1)(C) statements of identification in that they are recorded and thus can be repeated verbatim at trial.<sup>101</sup> Therefore, unlike the case with other hearsay statements, there is no concern with a recorded recollection that what the jury hears is different from what the defendant said/wrote.<sup>102</sup>

## 2. Why Proposed Rule 801(d)(1)(D) Makes Sense as an Extension of Rule 803(5)

As noted, in the *Blackett* case, the court allowed the prosecution to admit text messages pursuant to Rule 803(5).<sup>103</sup> This decision was not anomalous. Instead, several courts have allowed parties to admit text messages pursuant to the recorded recollection exception. For example, in *Simmons v. Commonwealth*, the victim of various sexual offenses allegedly committed by the defendant was able to read handwritten copies of text messages concerning the crimes under Kentucky's version of Rule 803(5).<sup>104</sup> In *State v. Roseberry*, the prosecution proved that a defendant was guilty of breaking and entering by having the victim, under Ohio's version of Rule 803(5), read handwritten transcriptions of text messages in which the defendant discussed the crime.<sup>105</sup> And, in *State v. Loye*, the victim was allowed to testify concerning text messages pursuant to Minnesota's version of Rule 803(5) to establish that she was the victim of domestic assault.<sup>106</sup> Other courts, meanwhile, have allowed for the introduction of e-mails pursuant to Rule 803(5).<sup>107</sup>

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101. See *supra* notes 69–70 and accompanying text.

102. See, e.g., *United States v. Jacoby*, 955 F.2d 1527, 1539 (11th Cir. 1992) (“The court permitted Jacoby to impeach Merrill by reading verbatim the transcript of Merrill's grand jury testimony. Jacoby thus was able to develop fully before the jury the alleged inconsistencies between the witness' trial and grand jury testimony.”).

103. See *supra* note 97 and accompanying text.

104. See *Simmons v. Commonwealth*, No. 2012–SC–000064–MR, 2013 WL 674721, at \*2 (Ky. Feb. 21, 2013) (“The trial court did, however, allow E.J to read from her diary as during trial, she testified that she could not recall exactly what Appellant had said to her during the message exchange.”).

105. See *State v. Roseberry*, 967 N.E.2d 233 (Ohio Ct. App. 2011) (“[T]he trial court did not abuse its discretion by allowing Adams to read the series of text messages out loud pursuant to Evid.R. 803(5) . . .”).

106. See *State v. Loye*, No. A08-1101, 2009 WL 1684425, at \*2 (Minn. Ct. App. June 16, 2009).

107. See *S.E.C. v. Daifotis*, 874 F. Supp. 870, 878 (N.D. Cal. 2012) (“This email at least is admissible as past recollection recorded and/or under the residual exception.”); *Weatherly v. Alabama State University*, No. 2:10CV192–

Therefore, many of the types of eHearsay that would be admissible under Professor Bellin's Proposed Rule 801(d)(1)(D) are already admissible under Rule 803(5). That said, there are two important limitations in Rule 803(5) that exclude certain eHearsay that Professor Bellin's Proposed Rule would now accommodate.

The first limitation in Rule 803(5) is that the recorded recollection exception applies only if the declarant testifies that he cannot testify fully and accurately about an event due to impaired memory.<sup>108</sup> So, assume that William sees Dan shoot Vince and, two days later, sends his friend, Fred, a text message that says, "OMG! Dan killed Vince two days ago." If, at Dan's murder trial, William testifies that he has total recall of the shooting, his text message would be inadmissible under Rule 803(5).

According to the Advisory Committee's Note, the reason for the requirement of impaired memory is that "[t]he absence of the requirement . . . would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjusters."<sup>109</sup> For instance, it is easy to see Dan's murder case being assigned to a detective, with the detective asking William to make a statement days after the shooting and asking him leading questions that make it seem like William was certain that it was Dan who killed Vince. If Rule 803(5) did not require William to claim impaired memory on the witness stand, the prosecution could always corroborate William's testimony with his police statement, which would hardly seem fair to Dan. Instead, Rule 803(5) is reserved for cases in which a witness such as William

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WHA, 2012 WL 274754, at \*3 (M.D. Ala. Jan. 31, 2012) ("If the Plaintiffs seek to admit the substance of the email pursuant to Rule 803(5), as noted above, that attempt will be subject to objection by the Defendant at trial."); *Broadus v. CSX Transp., Inc.*, No. 08-1201, 2009 WL 1402025, at \*5 (E.D. La. May 14, 2009) (finding that an e-mail would be admissible as a recorded recollection if a witness could not recall the events in the e-mail); *Kitterman v. Michigan Educational Employees Mut. Ins. Co.*, 2004 WL 1459523, No. 247428, at \*4 (Mich. Ct. App. June 29, 2004) (assuming without deciding that e-mails were admissible under Michigan Rule of Evidence 803(5)).

108. FED. R. EVID. 803(5)(A). *See, e.g.*, *Means v. Cullen*, 297 F. Supp. 2d 1148, 1151 (W.D. Wis. 2003) ("The content of defendant's email does not qualify as an admission by a party opponent because it is not offered against defendant, see FED. R. EVID. 801(d)(2)(A), and it does not qualify as a recorded recollection because defendant has not shown that she cannot recall making the statement.").

109. FED. R. EVID. 803 advisory committee's note.

is forgetful and his recorded recollection is thus necessary to get a full accounting of what happened.

Conversely, assume again that, two days after the shooting, William sends his friend, Fred, a text message that says, “OMG! Dan killed Vince two days ago.” This text message, composed outside the shadow of litigation, seems fundamentally different from the police statement in the other example. It also is exactly the type of recorded communication covered by Professor Bellin’s Proposed Rule because it is not “a statement made in contemplation of litigation or to a person who is investigating, litigating, or settling a potential or existing claim.”<sup>110</sup> Therefore, Proposed Rule 801(d)(1)(D) fills a gap left by Rule 803(5): it allows for the admission of eHearsay composed outside the shadow of litigation without the requirement of impaired memory by the declarant.

The second limitation in Rule 803(5) is that it applies only if the declarant testifies that the recorded recollection “accurately reflects the witness’s knowledge.”<sup>111</sup> Returning to the example above involving the police statement, if William testifies at trial that he remembers some but not all details of the fatal shooting, the prosecution could introduce William’s police statement as a recorded recollection as long as William testifies that the statement accurately reflects what he saw.<sup>112</sup> Assume, however, that William surprisingly testifies that he saw Carl, and not Dan, fatally shoot Vince. At this point, the prosecution would want to introduce William’s police statement to contradict what William said on the witness stand.

The prosecution, however, would have a fundamental problem. Presumably, William, who is now claiming that it was Carl who shot Vince, would not testify that his police statement accurately reflected what he saw. In that case, the police statement would not be admissible as a recorded recollection.<sup>113</sup> It would be admissible to impeach William pursuant to Rule

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110. Bellin, *supra* note 59, at 36.

111. FED. R. EVID. 803(5).

112. *See id.*

113. *See, e.g., Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998) (“Taylor never guaranteed that his memory was correctly transcribed or that the factual assertions contained in the statement were true.”); *State v. Hollingsworth*, 337 S.E.2d 674, 676–77 (N.C. Ct. App. 1985) (“Since she testified that when she wrote the letter, it did not correctly reflect her knowledge of the events and she did not know facts that she had forgotten by the time of the trial, the trial court should not have admitted the letter into evidence as a recorded recollection.”).

613,<sup>114</sup> but it would not be admissible to prove the truth of the matter asserted pursuant to Rule 801(d)(1)(A) because it was not given under oath.<sup>115</sup> Professor Bellin's Proposed Rule thus fills another gap that currently exists in Rule 803(5): it allows for the admission of a recorded communication even if the witness does not testify that the communication "accurately reflects the witness's knowledge."<sup>116</sup>

The question, of course, is whether either of these gaps should be filled. The answer seems to be a clear "yes." The only reason that Rule 803(5) requires an impaired memory is to prevent the admission of statements carefully prepared with an eye toward litigation.<sup>117</sup> Proposed Rule 801(d)(1)(D) avoids this problem by requiring that eHearsay not be "made in contemplation of litigation."<sup>118</sup>

Meanwhile, prior inconsistent statements covered by Proposed Rule 801(d)(1)(D) are somewhat less reliable than prior inconsistent statements covered by Rule 801(d)(1)(A) because they are not given under oath. But, as noted, statements covered by Proposed Rule 801(d)(1)(D) are "not made in contemplation of litigation," while statements covered by Rule 801(d)(1)(A) are either given in contemplation of litigation (e.g., affidavits) or given as part of the litigation process (e.g., depositions).<sup>119</sup> Therefore, even if a declarant disavows a prior tweet, text message, or e-mail, that recorded communication seemingly possesses reliability commensurate with the reliability of a prior inconsistent statement given under oath.

## II. HEARSAY EXCEPTIONS AND THE PROBLEM WITH PROPOSED RULE 804(B)(5)

In addition to the proposed eHearsay exclusion that Professor Bellin locates in Rule 801(d)(1), he creates a proposed eHearsay exception to be placed in Federal Rule of Evidence 804(b). That Rule, Proposed Rule 804(a)(5), would create the following hearsay exception in the case of an "unavailable" declarant:

Recorded Statement of Recent Perception. A recorded communication that describes or explains an event or condition recently perceived by

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114. See FED. R. EVID. 613.

115. See FED. R. EVID. 801(d)(1)(A).

116. Cf. FED. R. EVID. 803(5)(C).

117. FED. R. EVID. 803 advisory committee's note.

118. Bellin, *supra* note 59, at 36.

119. See FED. R. EVID. 801(d)(1)(A).

the declarant, but not including: (A) a statement made in contemplation of litigation, or to a person who is investigating, litigating, or settling a potential or existing claim; or (B) an anonymous statement.<sup>120</sup>

This Rule would thus apply if the declarant does not appear on the witness stand because the proponent could not locate him<sup>121</sup> or the declarant passed away before trial.<sup>122</sup> It would also apply if the declarant validly invoked a privilege<sup>123</sup> or simply refused to testify despite being held in contempt of court.<sup>124</sup> The question, then, is whether the declarant's testimony should be a necessary element for the admission of eHearsay or whether the declarant's unavailability is sufficient for its introduction.

#### A. THE RESIDUAL EXCEPTION AND EQUIVALENT CIRCUMSTANTIAL GUARANTEES OF TRUSTWORTHINESS

Federal Rule of Evidence 807 creates a residual hearsay exception for a hearsay statement that is "not specifically covered by a hearsay exception in Rule 803 or 804" but that, *inter alia*, "has equivalent circumstantial guarantees of trustworthiness."<sup>125</sup> Under the logic of Rule 807, then, it would make sense

120. Bellin, *supra* note 59, at 36.

121. See FED. R. EVID. 804(a)(5). Rule 804(a)(5) provides that a declarant is "unavailable" if the declarant:

is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure: (A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or (B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

122. See FED. R. EVID. 804(a)(4). Rule 804(a)(4) provides that a declarant is "unavailable" if the declarant "cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness . . . ."

123. See FED. R. EVID. 804(a)(1). Rule 804(a)(1) provides that a declarant is "unavailable" if the declarant "is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies . . . ."

124. See FED. R. EVID. 804(a)(2). Rule 804(a)(2) provides that a declarant is "unavailable" if the declarant "refuses to testify about the subject matter despite a court order to do so . . . ."

125. FED. R. EVID. 807. In its entirety, Rule 807(a) states:

Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804: (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice.

to create a new hearsay rule only if the new rule covered statements containing circumstantial guarantees of trustworthiness equivalent to those in a comparable existing hearsay exception.<sup>126</sup> Indeed, in the absence of an eHearsay exception, litigants frequently have tried to admit recorded communications under Rule 807, with courts deciding the validity of such attempts by considering comparable existing hearsay exceptions.

For instance, in *Stamm v. New York City Transit Authority*, the plaintiff brought an action pursuant to the Americans with Disabilities Act and related laws, claiming that the New York City Transit Authority (NYCTA) and the Manhattan and Bronx Surface Transit Operating Authority “failed to ensure that their vehicles and facilities are accessible to her and other persons with disabilities who utilize service animals.”<sup>127</sup> Thereafter, the plaintiff brought an ADA retaliation claim against the NYCTA, asserting that it refused to permit her access to an empty articulated bus in response to her initial lawsuit.<sup>128</sup>

In response the NYCTA sought to admit into evidence an e-mail that employee Michael Levy sent on July 19, 2004 denying the plaintiff access to an articulated bus.<sup>129</sup> This e-mail would have helped the NYCTA’s case because the plaintiff did not bring her lawsuit until January 23, 2008, and there is a three-year statute of limitations on retaliation claims under the ADA.<sup>130</sup>

The United States District Court for the Eastern District of New York found that the e-mail was not admissible under the business records exception to the rule against hearsay (Rule 803(6)) because the NYCTA did not “provid[e] sufficient evidence to establish that these e-mails were records ‘kept in the course of regularly conducted activity’ and made as part of ‘the regular practice of that activity.’”<sup>131</sup> That said, the court noted that Levy followed up the e-mail by informing his colleagues of

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126. See, e.g., *S.E.C. v. Daifotis*, 874 F. Supp. 2d 870, 878 (N.D. Cal 2012) (finding that, even if an e-mail was not admissible under the recorded recollection exception, it could still be admissible under the residual exception because it contained equivalent circumstantial guarantees of trustworthiness).

127. *Stamm v. N.Y.C. Transit Auth.*, No. 04-CV-2163, 2013 WL 244793, at \*1 (E.D.N.Y. Jan. 22, 2013).

128. *Id.* at \*8.

129. *Id.* at \*9.

130. *Id.*

131. *Id.* at \*11 (citing FED. R. EVID. 803(6)(B) and (C)).

the denial.<sup>132</sup> Therefore, the court found that the e-mail was admissible under Rule 807, concluding that because “Levy was attempting to be precise and knew his co-workers would rely on his statements, there are circumstantial guarantees of trustworthiness equivalent to those underlying the business records exception.”<sup>133</sup> Conversely, in *Mercer v. Csiky*, the United States District Court for the Eastern District of Michigan found that a business e-mail did not qualify for admission under Rule 807 because it did not contain circumstantial guarantees of trustworthiness equivalent to those of a business record under Rule 803(6).<sup>134</sup>

As Professor Bellin notes, Rule 801(d)(1)(D) is modeled after the “Statement of Recent Perception” hearsay exception that was rejected by Congress in 1973, which would have allowed for the admission of:

[a] statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.<sup>135</sup>

In effect, this rejected hearsay exception would have extended the timeline created by Federal Rule of Evidence 803(1), which provides a hearsay exception for “[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.”<sup>136</sup> This “present sense impression” exception covers statements made by a declarant within seconds or minutes after perceiving an event or condition;<sup>137</sup> the proposed Statement of Recent Perception exception

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132. *Id.* at \*10. Specifically, Levy informed his colleagues that: “I left a message for Ms. Stamm at 9:30 AM today 7-19-04, informing her that the Department of Buses could not provide the training she requested. I referred her to DOB Customer Relations if she had further questions.” *Id.*

133. *Id.*

134. *Mercer v. Csiky*, No. 08-11443-BC, 2010 WL 3565811, at \*5-6. (E.D. Mich. Sept. 13, 2010). The plaintiffs had claimed that the e-mail was “sufficiently trustworthy because, if it [were] intentionally false, it would [have] subject[ed] [the writer] to legal action under state law (e.g., for slander).” *Id.* at \*6.

135. PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR UNITED STATES DISTRICT COURTS AND MAGISTRATES, 46 F.R.D. 161, 377-78 (1969).

136. FED. R. EVID. 803(1).

137. See, e.g., Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907, 919-20 (2001) (“While twenty-three minutes appears to be the longest ‘slight lapse’ allowed, other decisions have approved the admission of present sense impressions uttered a few se-

and Professor Bellin's proposed eHearsay exclusion would cover statements made up to eight days after perceiving an event or condition.<sup>138</sup>

In determining whether Proposed Rule 804(b)(5) passes muster, the question thus becomes whether eHearsay by an unavailable declarant, on the one hand, and a classic present sense impression by an unavailable declarant, on the other, possess equivalent circumstantial guarantees of trustworthiness. In making this determination, consider the following two hypotheticals. In the first hypothetical, William sees Dan shoot Vince and immediately turns to Fred and says, "Oh my god! Brian's brother Dan totally killed Vince! You don't mess with those guys. I feel sick." In the second hypothetical, the day after the shooting, William tweets the following message on his Twitter account: "WTG! Brian's brother Dan totally KILLED Vince in the parking lot behind O'Sullivan's Tavern yesterday! You don't mess with those guys. #SICK"

If William passes away before Dan's trial for murdering Vince, the prosecution would likely try to (1) have Fred testify concerning William's statement in the first hypothetical, and (2) introduce William's tweet in the second hypothetical. Professor Bellin identifies the one reason to prefer the tweet to Fred's testimony: with nonrecorded hearsay such as William's present sense impression, "[t]he testifying witness may mishear, misremember, miscommunicate or (worst of all) manufacture the out-of-court speaker's statement."<sup>139</sup> Conversely, the tweet is recorded, and, if preserved, can be presented to the jury in its original form. In this regard, the tweet could be said to have a greater circumstantial guarantee of trustworthiness than the classic present sense impression.

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conds, one minute, three to five minutes, five minutes, seven minutes, five to ten minutes, ten minutes, fourteen and one-half minutes, and at least eighteen minutes after the event.") (citations omitted). As the Supreme Court of New Jersey noted in *State ex rel. J.A.*, 949 A.2d 790, 798 (N.J. 2008):

When considering whether a statement is a present sense impression, it is not hairsplitting to recognize a distinction between a matter of seconds, however many they may be, and an interval of as much as ten minutes separating a recollection from the observation. For purposes of a *present* sense impression, a declarant's statement that "the blue sports car is going through the red light" or that "the blue sports car just went through the red light" (seconds ago) is different from a declarant's statement that "the blue sports car went through the red light ten minutes ago."

138. Bellin, *supra* note 59, at 143 n.137.

139. *Id.* at 38.

Continuing this analysis, however, there are four problems whenever a declarant makes a hearsay statement. That statement is always somewhat unreliable because of possible deficits in “perception, memory, narration, and sincerity.”<sup>140</sup> As noted, hearsay evidence is generally inadmissible both because such evidence is unreliable and because the jury has an inability to assess that unreliability at trial.<sup>141</sup> On the other hand, hearsay that qualifies for admission under a Rule 803 or 804 exception is admissible because it contains circumstantial guarantees of trustworthiness that quell concerns about one or more of the possible deficits. The following four subsections will compare the classic present sense impression from the first hypothetical with the eHearsay in the second hypothetical to see how each fares in this regard.<sup>142</sup>

### 1. Memory

A present sense impression is thought to be reliable primarily because there is little to no problem with the declarant’s memory when he speaks. Under Rule 803(1), a present sense impression must be “made while or immediately after the declarant perceived” an event or condition.<sup>143</sup> Therefore, in the first hypothetical, William would be telling Fred that Dan killed Vince while watching Dan kill Vince or, at most, a few minutes later.<sup>144</sup> As the Ninth Circuit has noted, “[t]he reason present sense impressions are considered inherently reliable is because statements contemporaneously describing an event are unlikely to reflect memory loss or provide an opportunity to lie.”<sup>145</sup>

Professor Bellin’s proposed eHearsay exception, however, would allow for the admission of statements made up to eight

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140. *Williams v. Illinois*, 132 S. Ct. 2221, 2249 (2012).

141. *See supra* note 10 and accompanying text.

142. *See, e.g., Lasnick v. Morgan*, No. 3:10-cv-345, 2011 WL 6300159, at \*2 (D. Conn. Dec. 15, 2011) (“In assessing the trustworthiness of a statement for purposes of Rule 807, a court should be mindful of the ‘four classes of risk peculiar to [hearsay] evidence: those of (1) insincerity, (2) faulty perception, (3) faulty memory, and (4) faulty narration.’”) (quoting *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 232 (2d Cir. 1999)).

143. FED. R. EVID. 803(1).

144. *See supra* note 137 and accompanying text.

145. *United States v. Orm Hieng*, 679 F.3d 1131, 1147 (9th Cir. 2012); *see also United States v. Jones*, 299 F.3d 103, 112 (2d Cir. 2002) (“Such statements are considered to be trustworthy because the contemporaneity of the event and its description limits the possibility for intentional deception or failure of memory.”).

days after a declarant perceives an event or condition.<sup>146</sup> Currently, “courts consistently require substantial contemporaneity”<sup>147</sup> between event/condition and statement under Rule 803(1); Professor Bellin’s new exception would cross this line in the sand by “cover[ing] a declarant’s relatively recent memories.”<sup>148</sup> As noted, such statements about older events and conditions are not admissible under Rule 803(1), and Federal Rule of Evidence 803(3), which contains the “state of mind” hearsay exception, specifically excludes from its auspices “a statement of memory or belief to prove the fact remembered or believed.”<sup>149</sup>

The reason for this line-drawing is obvious: “[s]hort-term memory degrades within minutes or hours.”<sup>150</sup> Therefore, when more than a few minutes have passed after a declarant perceives an event or condition, his “memories decline[] precipitously” as his short-term memory begins to transfer, often imperfectly, into his long-term memory.<sup>151</sup> Therefore, a statement admitted under Proposed Rule 804(b)(5) is more likely to be based on a faulty memory than is a statement admitted under Rule 803(1).

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146. See *supra* note 138 and accompanying text.

147. *United States v. Green*, 556 F.3d 151, 156 (3d Cir. 2009).

148. *United States v. Manfre*, 368 F.3d 832, 840 (8th Cir. 2004) (declining to extend the present-sense-impression exception to “relatively recent memories”).

149. FED. R. EVID. 803(3). Rule 803(3) provides an exception to the rule against hearsay for:

A statement of the declarant’s then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant’s will.

According to the Advisory Committee’s Note to Rule 803:

The exclusion of “statements of memory or belief to prove the fact remembered or believed” is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind.

150. Thomas Earl Geu, *The Tao of Jurisprudence: Chaos, Brain Science, Synchronicity, and the Law*, 61 TENN. L. REV. 933, 958 (1994).

151. Jascha Hoffman, *Suspect Memories*, LEGAL AFF., Jan./Feb. 2005, at 42, 43; see also Aviva Orenstein, “My God!”: A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 CAL. L. REV. 159, 179 n.70 (1997) (“Memory of five minutes ago is linked to long-term memory rather than short-term memory . . .”).

## 2. Sincerity

The second main reason why present sense impressions are admissible is tied to the first. As noted, the Ninth Circuit has concluded that present sense impressions made contemporaneously with events/conditions are “inherently reliable . . . because statements contemporaneously describing an event are unlikely to reflect memory loss *or provide an opportunity to lie.*”<sup>152</sup> The general principle is that the shorter the period of time between event/condition and statement, the more trustworthy the statement because the declarant has little opportunity to fabricate a story about the event/condition; “[t]he longer the time, the less trustworthy, since there is more time and opportunity to fabricate.”<sup>153</sup> Under this test, there would be reason to believe that eHearsay composed hours or days after an event or condition could be less sincere than a present sense impression made during or minutes after that event or condition.

Apart from the timing issue, there are other reasons to believe that eHearsay might be less sincere than a classic present sense impression. Experts in communication have concluded that “people are more likely to lie online especially in social networking sites like Facebook, MySpace and . . . on the dating or ‘search soul mates’ types of websites.”<sup>154</sup> Specifically, “[o]nline communication is a fast process as compared to the authentic ways of communication that we have been accustomed since childhood,” increasing the likelihood of lies.<sup>155</sup>

Moreover, research has revealed that people are *better* at lying in electronic communications than in face-to-face communications.<sup>156</sup> According to forensic psychologist Michael Woodworth:

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152. See *supra* note 145 and accompanying text.

153. *People v. Thomas*, 730 N.E.2d 618, 625 (Ill. Ct. App. 2000), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004). See also *People v. Hendrickson*, 586 N.W.2d 906, 915 (Mich. 1988) (Brickey, J., concurring in part and dissenting in part) (“The statement is likely to be reliable because it is made before the declarant has an opportunity to fabricate, embellish, or forget what is being described.”).

154. Ruben Supramanyam, *More Likely to Lie on Social Network*, AVOIDFACEBOOK (March 7, 2011, 6:15 PM), <http://www.avoidfacebook.com/2011/03/07/more-likely-to-lie-on-social-network/>.

155. *Id.*

156. Raina Ducklow & Bud Mortenson, *What Lies Behind the Online Words?*, 55 U.B.C. REPORTS, April 2, 2009, <http://www.publicaffairs.ubc.ca/ubcreports/2009/09apr02/behind.html>.

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When people are interacting face to face, there is something called the ‘motivational impairment effect,’ where your body will give off some cues as you become more nervous and there’s more at stake with your lie . . . . In a computer-mediated environment, the exact opposite occurs. . . .

. . . .

When telling a lie face-to-face, the higher the stakes of your deception, the more cues you may give out that you’re lying. So, what isn’t in a text message may have advantages for a would-be deceiver: text doesn’t transmit non-verbal cues such as vocal properties, physical gestures, and facial expressions.<sup>157</sup>

Finally, even if a declarant is not consciously lying in a tweet, text message, or e-mail, the declarant may not be conveying what he means to convey. Research has shown “that people are better at communicating and interpreting tone in vocal messages than in text-based ones.”<sup>158</sup> Recall again the prior tweet from William in the second hypothetical: “WTG! Brian’s brother Dan totally KILLED Vince in the parking lot behind O’Sullivan’s Tavern yesterday! You don’t mess with those guys. #SICK.” Was the declarant being serious and sincere when he composed this tweet? Was this tweet a joke about an event that never actually happened? Was the tweet an exaggeration? The research tends to show that William will have more difficulty conveying, and people reading the tweet (including jurors) will have more difficulty interpreting, William’s tone than if William had told Fred that he saw Dan shoot Vince—the classic present sense impression.

All of the above research could call into question the admissibility of any eHearsay. Recall, though, that Proposed Rule 801(d)(1)(D) requires a declarant such as William to testify and subject himself to cross-examination for his recorded communication to be admitted.<sup>159</sup> Was the tweet sincere, a joke, or an exaggeration? By taking the oath, subjecting himself to cross-examination, and being fully on display for the jury, a declarant such as William allows the jury to draw its own conclusions about the sincerity of the tweet.<sup>160</sup> Conversely, under Proposed Rule 804(b)(5), all the jury has is the cold, antiseptic tweet, without any opportunity to judge whether William did a poor job of conveying tone in the tweet or whether the tweet was an outright lie.

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157. *Id.*

158. Lea Winerman, *E-mails and Egos*, 37 MONITOR, Feb. 2006, <http://www.apa.org/monitor/feb06/egos.aspx>.

159. *See supra* note 59 and accompanying text.

160. *See supra* note 56 and accompanying text.

### 3. Narration

Any hearsay statement contains the inherent possibility that it contains errors in narration, i.e. “the risk that the declarant may misspeak or be misunderstood.”<sup>161</sup> Obviously, there is some overlap here with the discussion in the previous section about people being better at communicating and interpreting tone in vocal messages than in text-based ones.<sup>162</sup> In this section, however, the focus will solely be on ambiguous and incorrect statements of fact in communications.

Again, in the first hypothetical, William sees Dan shoot Vince and immediately turns to Fred and says, “Oh my god! Brian’s brother Dan totally killed Vince! You don’t mess with those guys. I feel sick.” In the second hypothetical, the day after the shooting, William tweets the following message on his Twitter account: “WTG! Brian’s brother Dan totally KILLED Vince in the parking lot behind O’Sullivan’s Tavern yesterday! You don’t mess with those guys. #SICK”

If William’s tweet is admitted at trial without William testifying, the jury could easily have several problems in analyzing the tweet. Dan’s defense might be that he has another brother named Carl and that William must have meant to say Carl and not Dan because Dan never attacked Vince. Alternately, Dan could claim that when William tweeted that Dan “totally KILLED Vince,” he was talking about a verbal argument that Dan won rather than a physical attack. Or, Dan could claim that by “totally KILLED,” William meant that Dan won a fight with Vince but did not come close to killing him.

Assume that Vince died in the parking lot of a Burger King, with that parking lot being behind the parking lot for O’Sullivan’s Tavern and across the street. When William referred to “the parking lot behind O’Sullivan’s Tavern,” was he referring to the parking lot for O’Sullivan’s Tavern or the Burger King parking lot? And what about William’s statement that “[y]ou don’t mess with those guys”? Does this mean that Vince was the first aggressor? Does William mean that Vince was merely insulting or taunting Dan? Or was William merely assuming that Vince must have done something to anger Dan despite possessing no actual knowledge of a provoking act? And

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161. Peter Nicolas, *But What if the Court Reporter Is Lying? The Right to Confront Hidden Declarants Found in Transcripts of Former Testimony*, 2010 B.Y.U. L. REV. 1149, 1153 (2010).

162. See *supra* note 157 and accompanying text.

who are “those guys”? Is William referring to Dan and his brother Brian or some other guys?

Finally, what is meant by #SICK? People use the #/hashtag to categorize tweets “and help them show more easily in Twitter Search.”<sup>163</sup> But what did William mean when he tweeted #SICK? Was he literally sick, and if so, was he sick at the time that he observed the attack, if it was even an actual attack? If so, was the sickness one that might hinder his perception or memory of the attack? Or, by tweeting #SICK, was William merely signifying that Dan’s act of violence made him feel upset and disturbed?

If William is unavailable to testify, as is required by Proposed Rule 804(b)(5), the jury may never get a good answer to any of these questions. Yes, William could follow up this tweet with other, clarifying tweets on his own. And yes, other Twitter users could reply to William’s tweet, prompting him to tweet follow-up tweets. There is, however, no guarantee of such clarification.

Comparing this hypothetical to the first hypothetical, it is easy to see why the chance of confusion or error is much lower with a classic present sense impression. Again, in that hypothetical, William sees Dan shoot Vince and immediately turns to Fred and makes his statement. Fred then later takes the witness stand and repeats William’s statement to the jury.

Was William literally sick when he made the statement? Fred can testify about whether William appeared to be sick. What did William mean by, “You don’t mess with those guys”? Fred also observed the encounter and can testify as to whether and to what extent Vince was provoking Dan. Fred can also clarify the exact location of the encounter because he was there. Because he was present, Fred can also clarify whether the words “totally killed” referred to a physical altercation and, if so, whether it involved lethal or nonlethal force. Was it Dan or his brother Carl who killed Vince? Fred, as another observer, can state on the witness stand that William likely misspoke or spoke accurately. Moreover, because Fred is present when William makes the statement, he can easily ask William for clarification or correction of his statement if he thinks that William misspoke.

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163. See *Using Hashtags on Twitter*, TWITTER HELP CENTER, <https://support.twitter.com/entries/49309-what-are-hashtags-symbols> (last visited Nov. 2, 2013).

All of these considerations lead to the conclusion that possible errors in narration pose a greater problem when eHearsay is admitted under Proposed Rule 804(b)(5) than when a classic present sense impression is admitted under Rule 803(1). Moreover, there are problems with narration inherent in many of the media used for electronic communications. A person using Twitter can use only 140 characters in a tweet,<sup>164</sup> and a person sending a text message is generally limited to 160 characters.<sup>165</sup> The tweet in the second hypothetical had 140 characters, and it is easy to see how the character limit makes it difficult for a person to include all “material information to ensure the communication is complete and accurate.”<sup>166</sup>

One way that people try to cram an entire message into a tweet or text message is by using acronyms. For example, in the second hypothetical, William used the acronym, “WTG!” The problem is that many acronyms have multiple meanings, which can create confusion. According to the Urban Dictionary, “WTG” can mean “Way to Go,” which would seem to imply that William approved of Dan’s actions.<sup>167</sup> But the Urban Dictionary also states that “WTG” can mean “Wow That’s Great,” but with that phrase often being used sarcastically.<sup>168</sup> So, was William making the sarcastic observation that what happened was not great, or was he using the term literally, again to show approval? Finally, the Urban Dictionary also states that “WTG” can also mean “What the Ghetto.”<sup>169</sup> So, was William commenting that the fight between Dan and Vince was only something that you see in the ghetto? It is easy to see William using “WTG” in any of these three or other ways, and, without his testimony, it is impossible to know exactly what he meant.

The same concerns, of course, apply when a person sending a text or tweet uses an abbreviation to save space, with that abbreviation possibly meaning several things. For example, assume that the tweet in the second hypothetical did not say that

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164. See, e.g., *People v. Harris*, 945 N.Y.S.2d 505, 507 (N.Y. Crim. Ct. 2012) (explaining how Twitter works).

165. *Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1001 (N.D. Ill. 2010) (explaining how SMS text messaging works).

166. Alexis Cairo & Randy L. Dryer, *Emerging Legal and Ethical Issues in the Brave New World of Social Media and Corporate Transparency*, 56 Rocky Mountain Mineral Inst. 3-1 (2010).

167. See *WTG*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=wtg> (last visited Nov. 2, 2013).

168. See *id.*

169. See *id.*

Dan was Brian's brother but that (1) the tweet did mention Brian; and (2) the tweet contained the sentence "What a bther!" In this tweet, the sentence "What a bthr!" could easily mean "What a brother!" or "What a bother!," with each word creating different meanings.

Finally, narration problems are also inherent in text messages and some other electronic media due to cramped keyboards and predictive software like AutoCorrect.<sup>170</sup> As Professor Bellin has noted elsewhere:

Typists working on cramped keypads inevitably mistype important words, simplify complex events, and omit critical details. Software innovations designed to counteract these limitations correct perceived spelling mistakes in real time and even attempt to predict the typist's words, sometimes with limited success.<sup>171</sup>

For instance, assume in the second hypothetical that William sent a text message stating that "Dan killed Vince." If Dan's defense is that a man named Mike Dahn killed Vince, is it possible that, while William was composing his text, his texting software autocorrected Dahn to Dan? Or, assume that the prosecution seeks to use a text message sent by William stating that "Dahn killed Vince" to prove that Dan killed Vince. The question would then be whether William intentionally wrote "Dahn" or whether William accidentally pressed the "h" key, just above the "n" key, in between touching the "a" and "n" keys while trying to type "Dan." If William testifies, he can explain what he meant; if William is absent, as is required by Proposed Rule 804(b)(5), the jurors will get no such explanation. Instead, the jurors will be like college students in a study cited by Professor Bellin in a previous article that:

describe[ed] the increasing popularity of "predictive texting software," and contrast[ed] the widespread errors made by college students asked to interpret text messages from other students with the relative absence of interpretive errors when the texters were forced to write out the same messages without abbreviations and texting shorthand.<sup>172</sup>

#### 4. Perception

Finally, any hearsay statement carries an inherent risk of reflecting errors in perception, i.e., "the risk that the declarant may have inaccurately perceived the events at issue in her

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170. Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 364–65 (2012).

171. *Id.*

172. *Id.* at 365 n.122.

statement.”<sup>173</sup> In either of the two hypotheticals, maybe William thought that Dan had killed Vince despite the fact that Vince was still alive after their encounter. Maybe William thought that the encounter took place in the parking lot behind O’Sullivan’s Tavern when it actually took place in the parking lot behind O’Malley’s Tavern. Or maybe William thought that he saw Dan kill Vince when it was in fact Dan’s brother Carl, who bears a striking resemblance to Dan.

If William turns to Fred during the killing or immediately thereafter and makes his statement, the jury at least has some tools to judge whether William made a perception error. How far away was William from Dan and Vince? Did William arrive after the fight had started, or was he there the whole time? Was William distracted, or was his full attention focused on the encounter? Fred might not be able to answer all of these and similar questions, but he can at least give some indication of William’s vantage point and whether the surrounding circumstances heightened or lessened the chance that William misperceived the encounter.

Conversely, consider again the second hypothetical in which William tweets that Dan killed Vince the day before. Under Proposed Rule 804(b)(5), William is, by definition, “unavailable,” and thus cannot explain his vantage point. In some cases, there might be another witness such as Fred who was at the encounter and who can testify concerning what William likely saw. In many other cases, however, the jury will be left to speculate about just how much William saw and did not see, and thus about the likelihood that his recorded communication was the result of a perception error.

### CONCLUSION

Jeffrey Bellin’s article, *eHearsay*, makes an extraordinarily important contribution to the scant scholarship on the intersection between electronic evidence and the rules of evidence. Crafted in the 1970s out of common law rules that are centuries older, the Federal Rules of Evidence were born out of a world in which the preeminent form of communication occurred face-to-face. Courts understandably have struggled in attempting to retrofit these analog rules to a digital world, and Professor Bellin’s article wisely resurrects the rejected Statement of Recent Perception exception to create a hearsay exclusion cov-

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173. Nicolas, *supra* note 161, at 1153.

ering recorded communications made outside the shadow of litigation when the declarant can take the witness stand and explain what he wrote. Conversely, without the declarant taking the witness stand to explain tone, vantage point, and ambiguities, a recorded communication loses much of its reliability. Therefore, Proposed Rule 801(d)(1)(B), which requires the declarant to testify, should be adopted, but Proposed Rule 804(b)(5), which requires the declarant's unavailability, should not.