1998

Hearsay: Traps & Problem Issues

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PUBLIC DEFENDER REPORTER

Vol. 20, No. 1 Winter 1998

HEARSAY: TRAPS & PROBLEM ISSUES

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This article highlights a number of current hearsay issues. It is not a comprehensive treatment of the subject but rather a catalog of issues that are important either because they are problematic or because they arise frequently in criminal litigation.

RIGHT TO PRESENT A DEFENSE

Ohio Rule 802 provides that hearsay may be admissible if it fits an exception recognized by the "Constitution of the United States" or by the "Constitution of the State of Ohio." The leading case on this point is Chambers v. Mississippi, 410 U.S. 284 (1973), in which the United States Supreme Court held that state evidentiary rules that precluded the admission of critical and reliable evidence denied the defendant due process. One of the rules in *Chambers* that made defense evidence inadmissible was the hearsay rule, i.e., Mississippi's failure to admit declarations against penal interest. According to the Court, "[i]n these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Id. at 302.

In a later case, the Court again overturned a conviction because the application of the hearsay rule precluded the admission of defense evidence. The Court commented:

> Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial . . . and substantial reasons existed to assume its reliability. Georgia v. Green, 442 U.S. 95, 97 (1979).

Thus, the admission of hearsay evidence offered by the defendant in a criminal case may be constitutionally compelled — provided a showing of reliability is made. See generally 2 McCormick, Evidence § 252, at 129 (4th ed. 1992) ("[T]he due process clause may require the admission of hearsay, though inadmissible under applicable hearsay rules, if of sufficient reliability and importance."); Clinton, The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials, 9 Ind. L. Rev. 711 (1976).

Several Ohio cases have discussed this issue. In State v. Sumlin, 69 Ohio St.3d 105, 107, 630 N.E.2d 681 (1994), the Ohio Supreme Court, citing *Chambers,* recognized that hearsay evidence that does not fall within one of the enumerated exceptions may nevertheless be admissible "pursuant to general principles of due process." The Court went on, however, to rule that *Sumlin* was not such a case. Similarly, the court of appeals recently addressed the issue in State v. Patterson, 110 Ohio App.3d 264, 673 N.E.2d 1001 (1996). The court wrote:

> *Chambers* does not stand for the proposition that a defendant is entitled to introduce *all* exculpatory and inculpatory matter in out-of-court statements; rather, *Chambers* stands for the broad proposition that the hearsay rule "should not be applied mechanistically" to exclude hearsay testimony that is trustworthy in cases where an accused's constitutional rights are implicated. Here, in accordance with the Supreme Court's holding in *Chambers,* the trial court allowed the introduction of Roberts's hearsay statements that were against his penal interest and thus were likely to be trustworthy. Id. at 274 (quoting *Chambers*).

The due process principle recognized in *Chambers* is important in Ohio because Ohio has not adopted a residual hearsay exception, which is found in the Federal Rules and most other states. (As of December 1, 1997, the two residual exceptions found in Federal Rules 803(24) and 804(b)(5) have been combined in a new Federal Rule 807).

The *Chambers* principle arises in other contexts, such as the rape shield law and polygraph evidence. See 1 Giannelli & Snyder, Baldwin's Ohio Practice Evidence § 404.8 (1996) (rape shield law: constitutionality); 1 Giannelli & Imwinkelried, Scientific Evidence § 8.3(D) (2d ed. 1993) (polygraph: constitutional arguments). Indeed, one commentator has observed: "Broadly construed, *[Chambers]* appears to recognize that the accused in a criminal proceeding has a constitutional right to introduce any exculpatory evidence, unless the state can demonstrate that it is so inherently unreliable as to leave the trier of fact no rational basis for evaluating its truth." Westen, The Compulsory

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Process Clause, 73 Mich. L. Rev. 71, 151-52 (1974).

RIGHT OF CONFRONTATION

Objection to prosecution hearsay evidence based on confrontation grounds should specify the Ohio as well as the United States Constitution. In State v. Storch, 66 Ohio St.3d 280, 291, 612 N.E.2d 305 (1993), the Ohio Supreme Court stated that the admission of a statement pursuant to a firmly rooted hearsay exception "may violate our state constitutional right of confrontation." Significantly, the Court indicated that the Ohio Constitution provides greater confrontation protection than that provided by the federal constitution. The Court commented that the current interpretation of the Sixth Amendment by the United States Supreme Court "provides less protection for the accused than the protection provided by the Sixth Amendment as traditionally construed and by the express words of Section 10, Article I of the Ohio Constitution." Id. at 291. The Ohio Constitution, in the Court's view, generally requires a demonstration of the declarant's unavailability before hearsay statements are admissible:

> We construe the right to confrontation contained in Section 10, Article I to require live testimony where reasonably possible. However, circumstances may exist where the evidence clearly indicates that a child may suffer significant emotional harm by being forced to testify in the actual presence of a person he or she is accusing of abuse. In such circumstances, the child may be considered unavailable for purposes of the Rules of Evidence and the out-of-court statements admitted without doing violence to Section 10, Article I, assuming Evid.R. 807 is otherwise satisfied. Id. at 293.

See also State v. Ulis, 91 Ohio App.3d 656, 633 N.E.2d 562 (1993) (following *Storch*); State v. McWhite, 91 Ohio App.3d 508, 513, 632 N.E.2d 1320 (1993) ("While we strongly disagree with the analysis and conclusion of the Ohio Supreme Court in *[Storch],* as to requirements it imposes on the implementation of the Ohio Rules of Evidence through a manufactured interpretation of Section 10, Article I of the Ohio Constitution, that is inconsistent with what is stated in the rules themselves, contrary to its own prior decision, and above and beyond what is required by the Sixth Amendment to the United States Constitution and the United States Supreme Court, we reluctantly agree *Storch* requires this court to reach this result.").

For a discussion of the right of confrontation, see 2 Giannelli & Snyder, Baldwin's Ohio Practice, Evidence §§ 802.8 & 9 (1996).

HEARSAY "STATEMENTS": DEFINED

Ohio Rule 801(A) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."

Tape Recordings

Tape recordings, including the audio part of a videotape, often raise hearsay issues because the statements on the tape were made out of court. For example, in State v. Paxton, 110 Ohio App.3d 305, 318, 674 N.E.2d 379 (1995), the court of appeals wrote: "The inclusion of all of the audio portions of the videotapes constituted prejudicial error in this case, as several statements which were played for the jury were . . . outside the scope of a present sense impression [exception] . . . ." Of course, the tape recording is hearsay only if it is offered for the truth of the assertions contained therein. See State v. Kinley, 72 Ohio St.3d 491, 498, 651 N.E.2d 419 (1995) ("The tape was not offered to prove the truth of any statement or assertion contained in the recording.").

Assertive Conduct

Rule 801 also treats nonverbal conduct intended as an assertion (assertive conduct) as hearsay. McCormick observed that "non-verbal conduct may unmistakably be just as assertive in nature as though expressed in words. No one would contend, if, in response to a question 'Who did it?', one of the auditors held up her hand, that this gesture could be treated as different from an oral or written statement." 2 McCormick, Evidence § 250, at 107 (4th ed. 1992). Accord Graham, Federal Rules of Evidence Handbook § 801.2, at 711 (3d ed. 1991) ("Nonverbal conduct may on occasion clearly be the equivalent of an assertive statement, that is, done for the purpose of deliberate communication, and thus classified as hearsay.").

The federal drafters provided another illustration: "Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement." Advisory Committee's Note, Fed. Evid. R. 801. See also United States v. Caro, 569 F.2d 411, 416 n. 9 (5th Cir. 1978) (in response to question where drugs came from, the person pointed to particular vehicle); Stevenson v. Commonwealth, 237 S.E.2d 779 (Va. 1977) (Wife's handing to police of the clothes the defendant was wearing on day of the homicide pursuant to police request is hearsay.).

Nonassertive Conduct: "Implied Assertions"

Conduct that is not intended by the declarant to be an assertion is not encompassed by the definition of "statement" in Rule 801(A). Accordingly, the hearsay rule is not a bar to the admissibility of evidence of nonassertive conduct. For example, evidence of flight from the scene of a crime is not hearsay under Rule 801 because such conduct is not intended to be an assertion. Similarly, in United States v. Zenni, 492 F.Supp. 464 (E.D. 1980), while searching the location of an illegal bookmaking operation, the police received telephone calls from persons attempting to place bets. The court ruled that the bettors did not intend to make an assertion and therefore their conduct was not hearsay.

There are only a few Ohio cases on this issue. In State v. Kniep, 87 Ohio App.3d 681, 685, 622 N.E.2d 1138 (1993), the defendant was accused of physically abusing his infant daughter. At trial, the prosecution showed a videotape of the daughter crying while the defendant held her. The defendant objected on the ground that the depiction of her reaction to him was hearsay. The appellate court found that the daughter's conduct was nonassertive and thus not hearsay. As the court noted, the infant was six months old at the time of the videotaping; "[g]iven her age and concomitant mental abilities, [her] crying cannot be considered conduct intended by her to be an assertion of her belief." The court concluded: "Nonverbal conduct is hearsay only when it is intended by the actor to be an assertion of his belief." While this result correctly addresses the hearsay issue, it ignores the relevance issue. The relevance of the evidence is dubious at best, and should have been inadmissible under Rule 403(A) as unfairly prejudicial.

STATEMENTS NOT OFFERED FOR THE TRUTH

Explaining Police Behavior

It is axiomatic that out-of-court statements are hearsay only if offered to prove the truth of the assertion. This rule, however, is often abused. For example, the admissibility of out-of-court statements explaining police behavior raises significant issues under Rule 403. In State v. Williams, 115 Ohio App.3d 24, 684 N.E.2d 358 (1996), detectives testified to information provided by informants. The court of appeals upheld the admissibility of the informants' statements as nonhearsay evidence: "[T]he purpose of this testimony was not to prove the truth of the matter asserted, but merely to explain what the mind-set of the officers had been when they executed the search warrant. The courts of this state have generally held that testimony concerning the basis or reason for an officer's actions during an investigation is not considered hearsay." Id. at 44. See also State v. Thomas, 61 Ohio St.2d 223, 232, 400 N.E.2d 401 (1980) ("The testimony at issue was offered to explain the subsequent investigative activities of the witnesses. It was not offered to prove the truth of the matter asserted.").

There are several problems with such cases. First, unless the defense makes an issue of how the investigation was conducted, such background information is simply not relevant. See United States v. Lamberty, 778 F.2d 59, 61 (1st Cir. 1985) ("We do not find that the evidence introduced to show the government's motive in setting the trap is in any way relevant to proving the elements of the counts charged. While the jurors may have been curious as to why the inspectors began their operation, enlightenment on this matter had no probative value."); United States v. Taylor, 900 F.2d 779 (4th Cir. 1990) (reason why suspect targeted not relevant to guilt).

Second, despite a limiting instruction, the jury will often use the information substantively, thereby raising both hearsay and confrontation issues. McCormick wrote:

> [O]ne area of apparently widespread abuse should be noted. In criminal cases, an arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct. His testimony that he acted "upon information received," or words to that effect, should be sufficient. Nevertheless, cases abound in which the officer is allowed to relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports, on the ground that he was entitled to give the information upon which he acted. The need for the evidence is slight, the likelihood of misuse great. 2 McCormick, Evidence § 249, at 104 (4th ed. 1992) (citations omitted).

See also United States v. Cass, 127 F.3d 1218, 1223 (10th Cir. 1997) ("Courts and commentators have recognized that out-of-court statements should not be admitted to explain why a law enforcement agency began an investigation if the statements present too great a danger of prejudice."); Garrett v. United States, 78 F.3d 1296, 1302-03 (8th Cir.) ("fairness demands that the government find a way to get the background into evidence without the hearsay"), cert. denied, 117 S.Ct. 374 (1996); United States v. Hernandez, 750 F.2d 1256 (5th Cir. 1985) (referral by U.S. Customs of defendant as a drug smuggler inadmissible to explain motivation behind DEA investigation); United States v. Escobar, 674 F.2d 469 (5th Cir. 1982) (error to allow officer to testify that he ran the defendant's name through a computer and the resulting printout read "suspected" narcotics smuggler).

STATEMENTS OF IDENTIFICATION

Under Ohio Rule 801(D)(1)(c), a witness's prior statement "of identification of a person soon after perceiving" that person is admissible as substantive evidence "if the circumstances demonstrate the reliability of the prior identification." For example, an identification made at a lineup, show-up, photographic display, or prior hearing falls within the rule.

Several cases addressing this rule have caused confusion. In State v. Boston, 46 Ohio St.3d 108, 126, 545 N.E.2d 1220 (1989), the Ohio Supreme Court indicated that, in child sexual abuse cases, "Evid.R. 801(D)(1)(c) may be used to admit the out-of-court statement of a child declarant identifying, to a third person, the perpetrator of alleged child abuse." In State v. Storch, 66 Ohio St.3d 280, 292, 612 N.E.2d 305 (1993), the Court commented that this rule would permit the admission of a videotape of a child abuse victim's statements:

> In many instances, Evid.R. 801(D)(1) or other Rules of Evidence would allow for admission of the audio tapes or videotapes. If taping occurs and the tape is actually admitted into evidence, the trier of fact would have the benefit of the child's actual words and at least some insight as to the child's demeanor. The trial court also would have the benefit of the actual questions or conversation which led up to the child's indication that an individual had abused the child. Certainly the questions asked can be a significant factor in determining the reliability of the response . . . .

These cases raise serious problems. First, the rule explicitly requires cross-examination of the declarant "concerning the statement." See United States v. Owens, 484 U.S. 554 (1988). This means the child must testify at trial. Second, only an "identification" is admissible; a discourse about the crime is not admissible. Finally, the legislative history indicates that "stranger" identifications were the focus of the rule. In other words, identifications at lineups, showups, and photographic displays are admissible, because they are more reliable than an in-court identification of the accused.

In State v. Turvey, 84 Ohio App.3d 724, 741, 618 N.E.2d 214 (1992), the court of appeals correctly observed that the rule had been misused in the post-*Boston* cases. The court wrote:

> [A] difference exists between the thirteen pre-*Boston* and the ten post-*Boston* Ohio appellate court cases citing Evid.R. 801(D)(1)(c). The pre-*Boston* cases generally involved identifications made by strangers to law enforcement personnel during the course of investigations conducted shortly after the crime. The stranger often, but not always, identified the defendant among others in a line-up or photo array. In the pre-*Boston* cases, the identifications were necessary to prove no other person committed the crime.
>
> By contrast, the majority of the post-*Boston* cases citing [the rule] involved close relatives — two fathers, three stepfathers, and one uncle — of child victim-declarants. The post-*Boston* identifications generally involved identifications made by children to mothers or doctors weeks or months after the crime. The child observed neither the defendant nor the defendant's photograph during the identification. In the post-*Boston* cases, the identifications addressed not the identity of

the defendant, but rather addressed the fact a crime was committed. Id. at 739-40.

The principal problem is *Boston* itself and not merely the post-*Boston* cases.

ACCUSED'S ADMISSIONS

Under Rule 801(D)(2)(a), statements of a party are admissible as substantive evidence if offered against that party. The confession of a criminal defendant is an admission of a party-opponent.

A party cannot, however, introduce his own statements under this rule. In In re Coy, 67 Ohio St.3d 215, 218, 616 N.E.2d 1105 (1993), the Ohio Supreme Court correctly noted that the party admission rule "applies to statements offered against a party where the statements are the party's own. Here the statements offered were [those of a child sexual abuse victim]. They were offered by [the victim] against her father. They were not her own statements being offered against her."

Corpus Delicti Rule

Like many jurisdictions, Ohio imposes a corroboration requirement on the admissibility of confessions. Under this rule, there must be some independent evidence of the corpus delicti before a confession is admissible. See State v. Black, 54 Ohio St.2d 304, 376 N.E.2d 948 (1978); State v. Edwards, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976), vacated on other grounds, 438 U.S. 911 (1978); State v. Maranda, 94 Ohio St. 364, 114 N.E. 1038 (1916); State v. King, 10 Ohio App.3d 161, 460 N.E.2d 1383 (1983); State v. Duerr, 8 Ohio App.3d 396, 457 N.E.2d 834 (1982), cert. denied, 464 U.S. 816 (1983); State v. Ralston, 67 Ohio App.2d 81, 425 N.E.2d 916 (1979).

The corroboration requirement "has traditionally been based upon concern that convictions might result from false confessions." 1 McCormick, Evidence § 145, at 556 (4th ed. 1992). See also 7 Wigmore, Evidence §§ 2070-75 (Chadbourn rev. 1978).

Several recent cases have addressed this issue. The court of appeals in State v. Nobles, 106 Ohio App.3d 246, 665 N.E.2d 1137 (1995), explained the rule as follows:

> The *corpus delicti* rule, as employed in the context of extrajudicial confessions, is informed by a desire to protect unfortunate persons who confess to crimes that they not only did not commit themselves, but which were never committed by anyone. Before the rule was formed, it sometimes happened that a person would confess to killing another, be convicted of that killing and put to death, only to have the supposed murder victim turn up later, alive and healthy. . . .
>
> The rule . . . is applied to all crimes, not homicide alone. Before an extrajudicial confession of a crime is competent to be admitted at the confessor's trial, the state must first introduce evidence *independent of the confession* tending to establish "(1) the act, and (2) the criminal agency of that act." . . . The evidence adduced must meet some essential element of the crime charged, though it need not meet all of them. . . . The evidence need not be so strong that it is capable of persuading a factfinder on some element of the crime beyond a reasonable doubt, but "there must be *some* proof, not necessarily direct and positive, usually but circumstantial, tending to prove the fact that a crime was committed." Id. at 261-62 (quoting State v. Edwards, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976) (syllabus, para. 1a) and State v. Maranda, 94 Ohio St. 364, 371, 114 N.E. 1038 (1916)).

See also State v. Clark, 106 Ohio App.3d 426, 431, 666 N.E.2d 308 (1995) ("The *corpus delicti* rule requires that the state present *'some* evidence outside of the confession that tends to prove *some* material element of the crime charged' in order to admit a confession.") (quoting *State v. Maranda*).

ADOPTIVE ADMISSIONS: BY SILENCE

Under Ohio Rule 801(D)(2)(b), a statement about which a party "has manifested his adoption or belief in its truth" is admissible as substantive evidence if offered against that party. A party may adopt the statement of a third person by failing to deny or correct under circumstances in which it would be natural to deny or correct the truth of the statement — adoption by silence. See Advisory Committee's Note, Fed. Evid. R. 801 ("When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue."); 2 McCormick, Evidence § 262, at 176 (4th ed. 1992).

The silence of an accused after receiving *Miranda* warnings raises constitutional issues. See 1 Giannelli & Snyder, Baldwin's Ohio Practice § 613.10 (1996) (discussing *Doyle v. Ohio*). The adoption-by-silence issue, however, may also arise outside the confession context. See United States v. Beckham, 968 F.2d 47, 52 (D.C. Cir. 1992) ("When Monroe told Officer Dunston that he could get another rock of crack from 'my buddy,' Beckham immediately got up from his chair, walked over to a stash of crack that was packaged for distribution, and began to open it. By that action, Beckham indicated his endorsement of Monroe's statement.").

The Ohio cases have recognized the admission-by-silence rule. See Hoover v. State, 91 Ohio St. 41, 47, 109 N.E. 626 (1914); Murphy v. State, 36 Ohio St. 628 (1881). In Zeller v. State, 123 Ohio St. 519, 523, 176 N.E. 81 (1931), the Ohio Supreme Court stated: "The only theory upon which any confession [admission] by silence is admissible is that the statement of the third person, in the presence of the accused, is made under such circumstances that the silence of the accused gives rise to a natural and reasonable inference of assent thereto . . . ." In Geiger v. State, 70 Ohio St. 400, 413, 71 N.E. 721 (1904), the Supreme Court commented: "We cannot refrain from the observation, that before a court admits this class of confessions, great caution should be exercised. . . . It is not every instance of silence in the hearing of accusation that renders it admissible, as admitting guilt." In many cases the courts have found that the circumstances did not require a response. In other words, silence is not equivalent to assent. See also Griffith v. Zipperwick, 28 Ohio St. 388, 409 (1876); Walker v. State, 37 Ohio App. 540, 175 N.E. 29 (1930).

This is consistent with McCormick's position that "[t]he essential inquiry in each case is whether a reasonable person under the circumstances would have denied the statement." 2 McCormick, Evidence § 262, at 178 (4th ed. 1992). It is not sufficient that the statement was made in the presence of a party. McCormick lists several factors that should be considered in determining admissibility:

> (1) The statement must have been heard by the party claimed to have acquiesced. (2) It must have been understood by the party. (3) The subject matter must have been within the party's knowledge. . . . (4) Physical or emotional impediments to responding must not be

present. (5) The personal makeup of the speaker, e.g., young child, or the person's relationship to the party or the event, e.g., bystander, may be such as to make it unreasonable to expect a denial. (6) Probably most important of all, the statement itself must be such as would, if untrue, call for a denial under the circumstances. 2 McCormick, Evidence § 262, at 177-78 (4th ed 1992).

See also 4 Wigmore, Evidence § 1072 (Chadbourn rev 1972); State v. White, 110 Ohio App.3d 347, 360, 674 N.E.2d 405 (1996) ("A person admits the truth of a statement by adoption when that person hears, understands, and acquiesces in another person's statement when a reasonable person could and would have spoken out in denial.").

AGENT ADMISSIONS: BY ATTORNEYS & POLICE

Under Ohio Rule 801(D)(2)(c), statements made by a person who was authorized by a party to make a statement are admissible as substantive evidence if offered against that party. Significantly, the statement of an attorney may be admissible against the client as either an authorized admission, because the attorney usually has "speaking authority," or as an agent admission. See United States v. GAF Corp., 928 F.2d 1253, 1259 (2d Cir. 1991).

Defense Opening Statement. In United States v. McKeon, 738 F.2d 26 (2d Cir. 1984), a prosecution expert concluded that a xerox machine located at the place of employment of the accused's wife made photocopies associated with the crime. In his opening statement, the defense counsel stated that a defense expert would testify that this machine did not make these copies. The trial terminated in a mistrial during the prosecution case-in-chief, and the defense expert subsequently learned that his former teacher would be a substitute prosecution expert at the retrial. At the retrial, the defense position changed significantly. The defense opening statement in the earlier trial was introduced by the prosecution in the later trial as an admission: "The expert testimony about the xerox machine promised by Kennedy [defense counsel] in the opening statement at the [earlier] trial was in support of a factual claim that Olive McKeon had not copied the documents. Kennedy's opening argument at the [later] trial, stating that Olive McKeon had indeed copied the documents at the request of her husband, was facially and irreconcilably at odds with the earlier assertion." Id. at 33.

Police Admissions. Generally, the agent-admission rule does not apply to law enforcement officers. Most federal cases have held that the statements of government agents are not admissible against the prosecution under Federal Rule 801(d)(1)(D). E.g., United States v. Prevatte, 16 F.3d 767, 779 n. 9 (7th Cir. 1994); United States v. Kampiles, 609 F.2d 1233, 1246 (7th Cir. 1979), cert. denied, 446 U.S. 954 (1980); United States v. Durrani, 659 F. Supp. 1183, 1185 (D. Conn. 1987), aff'd, 835 F.2d 410 (2d Cir. 1987). The leading case is United States v. Santos, 372 F.2d 177 (2d Cir. 1967).

This position, however, has been challenged. See Imwinkelried, Of Evidence and Equal Protection: The Unconstitutionality of Excluding Government Agents' Statements Offered as Vicarious Admissions Against the Prosecution, 71 Minn. L. Rev. 269 (1986). In addition to the equal protection argument, this rule should be attacked under the right-to-present-a-defense line of cases discussed earlier.

Prosecutor's Admissions. In contrast, the agent-admission rule applies to the prosecuting attorney. See United States v. Morgan, 581 F.2d 933, 937 n. 10 (D.C. Cir. 1978) ("The Federal Rules clearly contemplate that the federal government is a party-opponent of the defendant in criminal cases . . . ."). In addition to agent admissions, these statements may also be adoptive admissions. In United States v. Kattar, 840 F.2d 118 (1st Cir. 1988), the First Circuit ruled that a government brief in a civil case, which contradicted a prosecution witness, constituted an adoptive admission:

> The Justice Department here has, as clearly as possible, manifested its belief in the substance of the contested documents; it has submitted them to other federal courts to show the truth of the matter contained therein. We agree with Justice (then Judge) Stevens that the assertions made by the government in a formal prosecution (and, by analogy, a formal civil defense) "establish the position of the United States and not merely the views of its agents who participate therein. Id. at 131 (citing United States v. Powers, 467 F.2d 1089, 1097 n. 1 (7th Cir. 1972) (Stevens, J., dissenting)).

See also United States v. Blood, 806 F.2d 1218, 1221 (4th Cir. 1986) (statements by the prosecution during voir dire would be binding against the government if they had constituted a clear and unambiguous admission). Other examples include:

(1) Affidavits, United States v. Morgan, 581 F.2d 933, 938 (D.C. Cir. 1978) ("[W]here . . . the government has indicated in a sworn affidavit to a judicial officer that it believes particular statements are trustworthy, it may not sustain an objection to the subsequent introduction of those statements on grounds that they are hearsay.").

(2) Search warrants, United States v. Ramirez, 894 F.2d 565, 570 (2d Cir. 1990) ("[W]hen the government advances a statement of its agent in a judicial proceeding to obtain a search warrant, the government has adopted the content of the statement, and a criminal defendant may introduce the statement as a party admission under Fed. R. Evid. 801(d)(2)(B).").

(3) Bill of particulars, United States v. GAF Corp., 928 F.2d 1253, 1260-61 (2d Cir. 1991) ("Confidence in the justice system cannot be affirmed if any party is free, wholly without explanation, to make a fundamental change in its version of the facts between trials, and then conceal this change from the final trier of the facts. . . . A bill of particulars . . . is prepared, reviewed, and presented by an agent of the United States."), and

(4) Government manuals. United States v. Van Griffin, 874 F.2d 634, 638 (9th Cir. 1989) ("We do not say that every publication of every branch of government . . . can be treated as a party admission by the United States under Fed. R. Evid. 801(d)(2)(D). In this case the government department charged with the development of rules for highway safety was the relevant and competent section of the government: its pamphlet on sobriety testing was an admissible party admission.").

CONSPIRATOR STATEMENTS

Under Ohio Rule 801(D)(2)(e), a statement made by a coconspirator of a party during and in furtherance of the conspiracy is admissible as substantive evidence if offered against that party. The crime of conspiracy need not be charged in the indictment or information. Indeed, the rule also applies in civil cases.

Independent Proof Requirement

In contrast to the federal rule, the Ohio rule expressly requires that the conspiracy, as well as the declarant's and defendant's participation, be established "upon independent proof of the conspiracy." In other words, the statement itself cannot be used to establish the existence of the conspiracy. The independent proof requirement is based on Michigan Rule 801(d)(2)(E) and pre-Rules Ohio law. See State v. Weind, 50 Ohio St.2d 224, 240, 364 N.E.2d 224 (1977) (conspiracy established by "other evidence"), vacated on other grounds, 438 U.S. 911 (1978); State v. Osborne, 49 Ohio St.2d 135, 143, 359 N.E.2d 78 (1976), vacated on other grounds, 438 U.S. 911 (1978); State v. Carver, 30 Ohio St.2d 280, 287, 285 N.E.2d 26 (1972), cert. denied, 409 U.S. 1044 (1972).

Federal practice is different. In Bourjaily v. United States, 483 U.S. 171 (1987), the United States Supreme Court ruled that the Federal Rules abolished the independent proof requirement. In contrast to the Ohio rule, the federal rule does not include the "upon independent proof" language. In 1997, the federal rule was amended to codify the *Bourjaily* holding. The following sentence was added to Rule 801(d)(2): "The contents of the statement shall be considered but are not alone sufficient to establish . . . the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E)."

A recent Ohio case recognized this point. See State v. Carter, 72 Ohio St.3d 545, 550, 651 N.E.2d 965 (1995) ("Inclusion of the phrase 'upon independent proof of the conspiracy' in Evid.R. 801(D)(2)(e) distinguishes Ohio practice from practice under the Federal Rules of Evidence, and precludes a finding that the statement itself may be used to establish the existence of the conspiracy. See Giannelli, Ohio Rules of Evidence Handbook (5 Ed.1994) 211, 214."), cert. denied, 116 S.Ct. 575 (1995).

PRESENT SENSE IMPRESSIONS & EXCITED UTTERANCES

Ohio Rule 803(1) recognizes a hearsay exception for present sense impressions, and Rule 803(2) recognizes a hearsay exception for excited utterances. These rules are often used to introduce 911 tapes. For example, in State v. Kinley, 72 Ohio St.3d 491, 651 N.E.2d 419 (1995), cert. denied, 116 S.Ct. 1324 (1996), the Court held that statements of the victim's son to a 911 operator reporting that the defendant and the victim were fighting "'were clearly admissible as "excited utterances" pursuant to Evid.R. 803(2).'" Id. at 497 (quoting the court of appeals). The statements related to a startling event (the fight) and were made while the declarant was under the stress of the excitement caused by the startling event. Although the Court did not discuss Rule 803(1), those statements would also have been admissible as present sense impressions. They were statements describing an event (the fighting of the defendant and the victim) made at the time the declarant was perceiving the event.

See also State v. Smith, 80 Ohio St.3d 89, 107, 684 N.E.2d 668 (1997) (tape of 911 call by victims' son reporting that he had found his parents' bodies properly admitted under 803(2)).

STATE OF MIND

Under Ohio Rule 803(3), statements of presently existing state of mind are excepted from the hearsay rule — provided state of mind is a material issue in the case. See Hong v. Children's Memorial Hospital, 993 F.2d 1257, 1265 (7th Cir. 1993) (The rule "does not authorize receipt of a statement by one person as proof of another's state of mind."), cert. denied, 511 U.S. 1005 (1994).

In State v. Apanovitch, 33 Ohio St.3d 19, 21, 514 N.E.2d 394 (1987), six witnesses testified that the victim was "fearful or apprehensive" of the defendant. The Ohio Supreme Court held that these statements were admissible under Rule 803(3). Similarly, in State v. Wages, 87 Ohio App.3d 780, 789, 623 N.E.2d 193 (1993), a murder victim's statements to her friends were admitted. According to the court of appeals, these statements came within Rule 803(3): "The victim made the statements at a time which reflected her state of mind; that the victim was fearful and scared."

The Ohio Supreme Court revisited the issue in State v. Frazier, 73 Ohio St.3d 323, 338, 652 N.E.2d 1000 (1995), cert. denied, 116 S.Ct. 820 (1996). The Court upheld the trial court's decision to admit the testimony of witnesses about statements of the victim that she feared the defendant:

> The trial court correctly ruled that the statements concerning [the victim's] state of mind, i.e., her fear of appellant, were admissible pursuant to Evid.R. 803(3) and *State v. Apanovitch* . . . . The trial judge went to great lengths to ensure that the witnesses testified only to the fact that [the victim] expressed fear of the appellant. The trial judge did not permit any testimony regarding the basis of [the victim's] fear.

The following year, in State v. Awkal, 76 Ohio St.3d 324, 331, 667 N.E.2d 960 (1996), cert. denied, 117 S.Ct. 776 (1997), the Court noted that, in *Apanovitch,* it had "limited this type of testimony to that reflecting the state of mind of the victim, but not the reasons underlying that state of mind." The Court found the statements were erroneously admitted because they concerned the reasons for the victim's fear, that the defendant had threatened the victim, and thus went beyond the limitation in *Apanovitch.* See also United States v. Joe, 8 F.3d 1488, 1492-93 (10th Cir. 1993) ("Ms. Joe's statement to Dr. Smoker, though indicating her state of mind, also included an assertion of why she was afraid (i.e., because she thought her husband might kill her). This portion of Ms. Joe's statement is clearly a 'statement of memory or belief' expressly excluded by the Rule 803(3) exception."), cert. denied, 510 U.S. 1184 (1994).

The *Apanovitch* decision itself is problematic. The statements did reflect the victim's state of mind, and thus satisfied Rule 803(3). However, that state of mind was not a material issue; the defendant's, not the victim's, state of mind is an element in a homicide case. In contrast, in an extortion case such statements would be relevant because the victim's fear is an element of the crime. See United States v. Adcock, 558 F.2d 397, 404 (8th Cir. 1977), cert. denied, 434 U.S. 921 (1977). McCormick discussed this problem:

> A recurring problem arises in connection with the admissibility of accusatory statements made before

the act by the victims of homicide. If the statement is merely an expression of fear — i.e., "I am afraid of D" — no hearsay problem is involved, since the statement falls within the hearsay exception for statements of mental or emotional condition. This does not, however, resolve the question of admissibility. The victim's emotional state must relate to some legitimate issue in the case. . . .

. . . [T]he most likely inference that jurors may draw from the existence of fear . . . is that some conduct of the defendant, probably mistreatment or threats, occurred to cause the fear. The possibility of overpersuasion, the prejudicial character of the evidence, and the relative weakness and speculative nature of the inference, all argue against admissibility as a matter of relevance. 2 McCormick, Evidence § 276, at 243-44 (4th ed. 1992).

The Ohio cases fail to reveal any reason why the victims' state of mind might be relevant.

In another context, the Ohio Supreme Court recognized the problem. In State v. Steffen, 31 Ohio St.3d 111, 119-20, 509 N.E.2d 383 (1987), cert. denied, 485 U.S. 916 (1988), the mother of a victim of rape and murder was permitted to testify that her daughter told her that she intended to remain a virgin. The Court acknowledged that the statement satisfied the requirements of Rule 803(3), but found that "[t]he relevance of [the victim's] statement to the issue of her nonconsent is tenuous at best. . . . The potential for prejudice in [the] statement is considerable. We believe it should not have been admitted."

Objection to such statements on relevance (Rule 401), unfair prejudice (Rule 403(A)), and confrontation grounds should be made in every case.

MEDICAL TREATMENT STATEMENTS

Rule 803(4) recognizes a hearsay exception for statements made for the purposes of medical diagnosis or treatment, including a description of medical history, past or present symptoms, pain, sensations, and the inception or general character of the cause or external source if reasonably pertinent to diagnosis or treatment. Although the rule requires the statement be made for medical diagnosis or treatment, the statement need not be made to a physician. "Statements to hospital attendants, ambulance drivers, or even members of the family might be included." Advisory Committee's Note, Fed. Evid. R. 803. E.g., United States v. Newman, 965 F.2d 206, 210 (7th Cir. 1992) (clinical psychologist), cert. denied, 506 U.S. 976 (1992).

Nevertheless, the basic requirements of the exception still apply. For example, in State v. Jones, 114 Ohio App.3d 306, 321, 683 N.E.2d 87 (1996), the court of appeals observed: "Appellant argues that because Falke is a social worker whose function did not include diagnosis or treatment and that Kimberly Pizzo's statements were not taken for the purpose of treatment or diagnosis, Evid.R. 803(4) is not applicable. This argument, as even appellee concedes, appears to have some force." Similarly, in State v. Chappell, 97 Ohio App.3d 515, 646 N.E.2d 1191 (1994), the court stated that Rule 803(4) does not apply where a social worker's function was neither diagnosis nor treatment.

BUSINESS RECORDS

Ohio Rule 803(6) recognizes a hearsay exception for records of regularly conducted business activities. An issue that has divided some appellate courts in Ohio concerns the admissibility of reports from private DNA laboratories. In State v. Lane, 108 Ohio App.3d 477, 488, 671 N.E.2d 272 (1995), the court of appeals considered the admissibility of a casefile containing results of DNA testing prepared by Cellmark Laboratories. The court stated that, "[w]here a document generally satisfies the elements of Evid.R. 803(6), but was prepared in anticipation of litigation, the underlying rationale of trustworthiness is supplanted by a natural motivation to color the facts in favor of the requesting entity." The court concluded that "[t]he DNA casefile prepared by Cellmark was certainly prepared as part of its business. Yet the casefile was prepared for the sole purpose of litigation and, therefore, lacks the requisite trustworthiness." Id. at 477.

The court noted, however, that in State v. Fontenette, 1991 WL 184324 (unreported) (1991), another court of appeals "held that records of DNA evidence prepared for trial are admissible as a business records exception to the hearsay rule pursuant to Evid.R. 803(6)." 108 Ohio App.3d at 487-88.

PUBLIC RECORDS

Ohio Rule 803(8) recognizes a hearsay exception for public records and reports. These records often contain double hearsay by declarants who are not public officials. For example, in State v. York, 115 Ohio App.3d 245, 685 N.E.2d 261 (1996), the court of appeals held inadmissible an accident report, made by a state highway patrol officer, because the report contained statements of one of the drivers involved in the accident. The court stated that a "police report generally constitutes a public record for purposes of Evid.R. 803(8). . . . However, the statements made therein must be either the firsthand observations of the official making the report or those of one with a duty to report to the public official." Id. at 248 (citing 2 Giannelli & Snyder, Evidence § 801.38, at 148 (1996)). The court noted that it could find "nothing in the law which imposes such an official duty on a party involved in an accident." Id. The court continued:

R.C. 5503.02(A), which requires State Highway Patrol troopers to investigate and report on traffic accidents, places no duty on an accident victim to make such a report. Persons involved in accidents are under a duty to report the accident to the registrar of motor vehicles, R.C. 4509.06, and they are required to stop and give their name, address and vehicle registration number to the other party involved. R.C. 4549.02. However, neither of these statutes places an express official duty on an individual to report his or her preaccident observations to an investigating officer. The absence of any such official duty breaks the link in Evid.R. 803(8)(b) which would make [the driver's] statements admissible into evidence. Those statements could not be admitted as part of [the state trooper's] report, and the trial court properly excluded them below. Id. at 248-49.

See also Pool v. Wade, 115 Ohio App.3d 449, 453-54, 685 N.E.2d 794 (1996) (FDA bulletin held inadmissible under Evid.R. 803(8)(b) because it contained "hearsay statements which were not firsthand observations of the official making the report and . . . evaluative or investigative information from laypersons.").

RULE 804: UNAVAILABILITY

Rule 804(A) contains five conditions of unavailability. Federal courts have recognized a sixth, usually called "forfeiture by wrongdoing." In 1997, a new division was added to Federal Rule 804(B)(6): "A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." It applies to actions taken after the event to prevent a witness from testifying. The federal note states: "The wrongdoing need not consist of a criminal act. The rule applies to all parties, including the government.... The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage." Advisory Committee's Note, Fed. Evid. R. 804 (1997).

GRAND JURY TESTIMONY

Ohio Rule 804(B)(1) recognizes a hearsay exception for former testimony. Grand jury testimony is not admissible against a criminal defendant because the opportunity to examine the declarant is lacking. State v. Woods, 48 Ohio App.3d 1, 5, 548 N.E.2d 954 (1988). In contrast, the prosecution is provided that opportunity, and some cases have ruled that grand jury testimony may be admissible against the government. For example, in United States v. Foster, 128 F.3d 949, 955 (6th Cir. 1997), the court noted that "[t]hree Circuits have suggested and the District of Columbia Circuit has affirmatively ruled that the government has the same motive to develop a witness' testimony during a grand jury proceeding as it does at trial." See also United States v. Miller, 904 F.2d 65, 68 (D.C. Cir. 1990); United States v. Henry, 448 F.Supp 819, 821 (D.N.J. 1978).

In United States v. Omar, 104 F.3d 519, 523 (1st Cir. 1997), the First Circuit agreed that grand jury testimony may fall within the purview of the former testimony rule in some cases, but such a case would be rare because the prosecution's motive is often different at the grand jury than at trial. The court wrote: "Grand juries present a different face. Often, the government neither aims to discredit the witness nor to vouch for him. The prosecution may want to secure a small piece of evidence as part of an ongoing investigation or to compel an answer by an unwilling witness or to 'freeze' the position of an adverse witness. In particular, discrediting a grand jury witness is rarely essential, because the government has a modest burden of proof, selects its own witnesses, and can usually call more of them at its leisure." Id. at 523. While this argument has merit, the defense could make a comparable argument concerning preliminary hearing testimony, and yet such testimony has been admitted, even in face of a confrontation challenge. See Ohio v. Roberts, 448 U.S. 56 (1980) (dissent); California v. Green, 399 U.S. 149, 155 (1970) (dissent).

Moreover, the rule requires only that the "opportunity" to develop the testimony by examination has been provided at the former hearing. "Actual cross-examination, of course, is not essential, if the opportunity was afforded and waived." 2 McCormick, Evidence § 302, at 306 (4th ed. 1992). See also State v Jester, 32 O.S.3d 147, 153, 512 N.E.2d 962 (1987), cert. denied, 484 U.S. 1047 (1988); 5 Wigmore, Evidence § 1371 (Chadbourn rev. 1974). Failure to examine the declarant for tactical reasons does not change the result. E.g., Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1506 (11th Cir. 1985) ("[A]s a general rule, a party's decision to limit cross-examination in a discovery deposition is a strategic choice and does not preclude his adversary's use of the deposition at a subsequent proceeding."); United States v. Zurosky, 614 F.2d 779, 791-93 (1st Cir. 1979) ("Defense counsel made a tactical decision not to question Smith [at the suppression hearing]; this does not mean they were denied an opportunity to do so."), cert. denied, 446 U.S. 967 (1980).

This issue was raised but not decided in United States v. Salerno, 505 U.S. 317 (1992), on remand, 974 F.2d 231, 237-41 (2d Cir. 1990).

STATEMENTS AGAINST PENAL INTERESTS

Ohio Rule 804(B)(3) recognizes a hearsay exception for declarations against interest.

Corroboration Requirement

The rule provides that a "statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." In State v. Branham, 104 Ohio App.3d 355, 359, 662 N.E.2d 54 (1995), the court of appeals upheld the trial court's determination that corroboration was lacking for several reasons:

> In this case, the trial court found insufficient corroborating circumstances to establish the trustworthiness of [the declarant's] statements, since [the declarant] had a motive to fabricate, had made at least some of the statements in jest, and had told numerous contradictory stories. The trial court concluded that since appellant and [the declarant] were involved in an intimate relationship, [the declarant] had a motive to make the statements to assist in the acquittal of appellant, her paramour. When the statements were made, the trial court found that [the declarant] was concerned with getting appellant "off the hook," since she believed she had a viable defense, namely battered woman's syndrome, that would exonerate her from all liability for the crime. Therefore, we find sufficient evidence in the record to support the trial court's conclusion that the [corroboration] required by Evid.R. 803(B)(3) was not satisfied.

IMPEACHMENT OF HEARSAY DECLARANTS

Ohio Rule 806 governs the admissibility of evidence relating to the credibility of hearsay declarants. As the federal drafters explained, "The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified." Advisory Committee's Note, Fed. Evid. R. 806. Accordingly, these declarants may be impeached by showing bias, untruthfulness character, evidence of prior convictions, inconsistent statements, and so forth.

If an accused's hearsay statements are elicited by the defense through another witness, Rule 806 applies, and the accused may be impeached with evidence of a conviction. In other words, an accused may be impeached even though he never testified. See United States v. Noble, 754 F.2d 1324, 1330-31 (7th Cir. 1985), cert. denied, 474 U.S. 818 (1985); United States v. Lawson, 608 F.2d 1129, 1130 (6th Cir. 1979), cert. denied, 444 U.S. 1091 (1980). See generally Cordray, Evidence Rule 806 and the Problem of the Nontestifying Defendant, 56 Ohio St. L. J. 495, 504 (1995).