Nebraska Law Review

Volume 53 | Issue 3 Article 9

1974

Criminal Hearsay Rules: Constitutional Issues

David Dow
University of Nebraska College of Law

By David Dow*

Criminal Hearsay Rules: Constitutional Issues

I. INTRODUCTION

The drafters of the Proposed Federal Rules of Evidence (hereinafter "Federal Rule[s]" or "federal proposal") and the Proposed Nebraska Rules of Evidence (hereinafter "Nebraska Rule[s]," "Nebraska proposal" or "Rule[s]") assumed that it was not proper to state rules of constitutional dimensions. Constitutional problems were left entirely to traditional common law development through the adversary process. Therefore, the federal and state drafts in almost all cases relegate discussion of constitutional issues to the commentary and in some instances the draft does not touch these problems at all. With the Nebraska proposal, the state constitution must be considered, but there are very few rules which are perceived as being different because of the Nebraska Constitution.

If the United States Supreme Court adopted or changed a rule of evidence applicable in state courts, it would be confusing to have a contrary rule stated in a Nebraska compilation. This would be true if the change involved a further limitation on admissibility. On the other hand, if, as seems more likely, the United States Supreme Court change involved a lessening of the federal constitutional limitations, the Nebraska committee assumed that Nebraska would follow that lead. A formal compilation of the rule in Nebraska would make that change inapplicable—at least until there were time for legislative action. The need for a statement of such rules of constitutional limitations remains of paramount importance; and their application to different situations and how other courts treat them is important, but this is best handled through the various services which are kept current.

This article will refer to some of these constitutional problems,

* A.B. 1930, J.D. 1936 University of Michigan; Professor, University of Nebraska College of Law.

but it is not intended as an exhaustive collection even though the great majority of them do come within the criminal trial area.

II. BASIC PATTERNS

Clearly, any treatment of the theoretical and practical bases for the proposed rules should make absolutely certain at the start that there is a necessary interrelation among the rules. All of the rules are intended to be governed not only by the specific statement of a particular rule, but also by other rules some of which are automatically effective and others which give counsel opportunities for modifying the way the rule operates.

With respect to Article VIII's hearsay rules, the grand pattern, which must be felt and applied at all times by both counsel and judge, should include the following other rules:

1. Rule 806—the declarant may be impeached as if he were a witness, except that there is no requirement of a foundation on cross for prior inconsistent statements or conduct.
2. Rule 602—the declarant must have spoken from personal knowledge—unless the specific hearsay exception otherwise provides.
3. Rule 403—otherwise admissible evidence (as non-hearsay or hearsay admissible under an exception) may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."
4. Modern Discovery—although criminal discovery is not as broad as civil, *Brady v. Maryland*[1] does give a criminal defendant the constitutional right to know things that may aid in his defense.
5. The Federal Rules continue the traditional right of the judge to comment on the weight of the evidence.[2] The Nebraska Rules do not allow a judge to comment on the weight of the evidence, except for evidence which is limited in its application by the fact-trier where an instruction to that effect may be requested.[3]
6. Rule 513(c)—if a claim of privilege is upheld, any party against whom an adverse inference might be drawn may ask for an instruction that no inference may be drawn therefrom.
7. Rule 303—the power of the judge to enter a verdict of acquittal when no reasonable man could find the defendant guilty of one element of the offense beyond a reasonable doubt. *Caveat*—

1. 373 U.S. 83 (1963).
2. This right was deleted by the House Committee on the Judiciary from PROP. FED. R. EVID. 105, but without intending to change the rule. H.R. REP. No. 650, 93d Cong., 1st Sess. 5 (1973). This subject should be left for separate consideration at another time.
3. PROP. NEB. R. EVID. 106 [hereinafter cited as RULE].

> the application of this rule to the defense of insanity is not stated in the rules, although it is the Nebraska rule.[4]

Rule 403 requires some additional comment. In the first place, the words "unfair" and "undue" must be emphasized. After all, any evidence is intended to be prejudicial to the opposing party and will take time. Traditional statements of the rule include the concept of surprise. This concept was deleted from the Federal Rules because discovery, if effectively used, usually negates any unfair surprise in civil cases. In criminal cases, this is not so clear.

Rule 403 has special significance in criminal cases in the hearsay area. There are as many different kinds of hearsay as there are plants in the ground; and like plants, some are edible and some are not. Rule 802 excluding hearsay and Rules 803 and 804 providing for exceptions are based upon the proposition that the fact-trier should in the normal case be able to test the accuracy (truth) of the evidence and the inference which the proponent of the evidence asks the fact-trier to draw. In a criminal case, the "fact-trier" is customarily the jury. This testing logically depends on the jury's assessment of the witness's perception, memory, communicative ability and sincerity. When the witness is in court, this testing is an amalgamation of his oath, demeanor and cross-examination. To these are added the other evidence in the case, the fact-trier's own common sense and the counsel's arguments. Many, if not most, of the hearsay declarations involve situations in which some of these tests cannot be used. The exceptions to the hearsay rule have developed out of a need for that kind of evidence and a decision that there is something in the extrajudicial declaration, in its context and in the context of the trial, that permits one to decide that the jury will not be misled in assessing its accuracy. Obviously, to generalize a hearsay exception leaves some things in each that are highly accurate and some that are highly inaccurate. Rule 403 is designed to permit the latter to be excluded.

III. SPECIFIC RULES

Article VIII is divided into three major parts. Rule 801 defines hearsay, but its important provisions are those which state what is *not* hearsay. This does not mean that such evidence is always admissible; much of such evidence will be excluded for other rea-

4. The problem of whether proving other "affirmative defenses" may be cast on the defendant is discussed in MODEL PENAL CODE § 1.13 (Tent. Draft No. 4, 1955).

sons. Rule 803 states a group of exceptions which apply whether the declarant is available or not. Rule 804 states a group of exceptions which apply only when the declarant is unavailable, as therein defined. Again, the exceptions do not automatically admit, if some other rule of exclusion applies. Each of these major parts will be discussed in their application to criminal cases.

A. What is Not Hearsay

1. Operative Facts

It is elementary, and yet often lost sight of in trying to analyze the various problems in this area, that the acts claimed to be criminal when reported in court by an observer do not involve hearsay. This is equally true when the act reported involves verbal conduct of the accused at the time of the alleged crime.[5] Those words may show either a specific intent necessary to the crime charged or a lack of such intent.

Theoretical difficulties arise when the acts or words do not coincide with the precise time of the criminal act charged and when acts or words of somebody other than the accused are offered. Both of these situations, however, are defined as not hearsay (within the limits stated) under the admissions doctrine of 801(d)(2).[6] If the acts or words are those of the defendant on trial, there is no hearsay. There is of course another group of objections, however, contained in the common law and the constitutional objections to confessions.

If the acts or words are those of someone other than defendant on trial, the rule is ambiguous without reference to the comment. It adopts the traditional strict standard for admissibility of co-conspirators' statements in 801(d)(2)(E)—they must have been made during the course and in furtherance of the conspiracy and are admissible only when the defendant's connection with the conspiracy is established by other evidence. The Federal Rule's comment, which is also stated in the Nebraska proposal, makes it clear that there is no intent to extend the vicarious admissions doctrine of other agents stated in 801(d)(2)(D) for civil cases to the criminal area. Nor is there any intent to think of a conspiracy as involving a continuing conspiracy to conceal the original crime—either the

5. State v. Young, 190 Neb. 325, 208 N.W.2d 267 (1973).
6. It is true there has been a long theoretical debate whether admissions are not hearsay or whether they should be classified among the exceptions. It is impossible, however, to discern any practical difference this debate has made in the way the rules operate.

specific crime or the conspiracy to commit it.[7] The concealment or cover-up, however, may be thought of and charged as a different crime, such as obstructing justice.

The comment is not clear on whether a statement by an agent specifically authorized to deal on behalf of the accused should be defined as not hearsay. In the normal situation of an attorney working toward a plea bargain, such statements would be inadmissible under Rule 410.[8] The concept of an adopted admission during the commission of crime was used in *United States v. Lemonakis*.[9] A recorded telephone conversation between defendant and X was admitted without calling X. The jury was instructed that the only statements of X it could consider were those the defendant adopted by his part of the conversation.[10]

A somewhat different kind of statement is what Wigmore classified as "a verbal act"—that is, one which is not offered to prove the truth of the fact asserted. This involves a statement which is relevant to the crime charged solely because it was made *to* someone and that hearer's knowledge (whether accurate or not) is significant. It may be offered by the prosecution, for example, to show knowledge by the driver of a car that the car was stolen or that someone in the car possessed contraband. Or it may be offered by the defense to show the reasonableness of defendant's self-defense claim, as a threat made by the victim.

2. Non-assertive conduct

The traditional development of the non-assertive conduct problem stems from *Wright v. Doe ex dem Tatham*.[11] Issues in this area

7. *See, e.g.*, Dutton v. Evans, 400 U.S. 74 (1970); Krulewitch v. United States, 336 U.S. 440 (1949). It should be pointed out that a conspiracy does not have to be charged as a separate crime in order for this exception to be applied. *See* United States v. Alsondo, 486 F.2d 1339 (2d Cir. 1973); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 646 (2d ed. 1972).
8. The problem is further complicated by RULE 804(b)(4)'s concern with declarations against penal interest.
9. 485 F.2d 941 (D.C. Cir. 1973).
10. The problem of admitting an authorized admission in civil cases is often met with respect to pleadings. NEB. REV. STAT. § 25-824 (Cum. Supp. 1972) specifically states that authorized admissions cannot be used in any criminal action "as proof of a fact admitted or alleged in such pleading." Presumably, they could be used to impeach although there appears to be no Nebraska authority. If so, the statute would override RULE 801(d) and the impeaching statement could not be used substantively. The problem is interwoven with the rules concerning self-incrimination.
11. 7 Eng. Rep. 559 (H.L. 1838).

have had many applications in criminal cases and the admissibility arguments will go on forever. If non-verbal conduct is intended to be assertive of a fact—pointing to X in a line-up, shaking a head up and down or sideways, waving a flag, shaking a fist—then it is hearsay. It is excluded under Rule 802 unless it is admitted under an 803 or 804 exception or unless it is an admission under 801(d).

A serious and perhaps unresolved problem arises when the conduct is ambiguous. It may or may not have been intended as an assertion of the fact for which it is offered, and the fact for which it is offered may or may not be a valid basis for the inference that is sought to be drawn. The comments treat this as a basic problem in judicial determination of a preliminary fact.[12]

There have been some interesting, recent cases involving the often recurring situation of a person being questioned at or near the scene of a crime. Traditional law permitted the prosecution to show that this person remained silent or equivocated in the face of an accusation of a crime, although Nebraska and a number of other jurisdictions required a strong showing that the context of the police-suspect encounter demanded a finding that a reasonable man would not have remained silent.[13] *Miranda v. Arizona*,[14] how-

12. When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. The determination involves no greater difficulty than many other preliminary questions of fact.

PROP. FED. R. EVID. 801, Advisory Committee's Note. Presumably, this preliminary fact determination is for the judge to make under RULE 104(a).

13. *See* Pierce v. State, 173 Neb. 319, 113 N.W.2d 333 (1962):

[T]he effect of the ruling is to admit the officer's testimony on the theory that the silence of the defendant, or, more properly, his failure to give a reason when none was requested, was an admission of guilt, or, at the very least, a circumstance indicating guilt. There is no question it would be so considered by the jury. This appears to be carrying the doctrine of silence a step too far. To require a defendant to anticipate the nature of an accusation and to require him to give reasons without inquiry is to make a farce of the presumption of innocence. Nebraska has gone further than many jurisdictions on the criteria of silence as an admission, but it is still the rule in Nebraska that in the absence of a duty to speak, silence is not an admission.

Id. at 325-26, 113 N.W.2d at 339. State v. Watson, 182 Neb. 692, 157 N.W.2d 156 (1968), appears to be much less strict, but the holding was also based on the statement being part of the *res gestae* and the silence argument was apparently not briefed.

14. 384 U.S. 436 (1966).

ever, specifically held that this was within that rule of exclusion, absent warnings. The cases seek to limit *Miranda* by requiring some specific accusation or at least a focusing of the investigation, and if that is not involved, the old conflict of authority as to silence apparently still exists. In *People v. Bobo*,[15] defendant was stopped by a policeman after a robbery and questioned, but not arrested. The defendant was later charged, and he testified in his own defense that he had seen two other men run past him. On cross, it was brought out that he had said nothing about seeing other men to the policeman who originally questioned him, and the prosecutor stressed this in his closing. The Michigan Supreme Court in a 4-3 decision, relying on prior Michigan case law and the trial of Jesus as reported by Matthew, held it was error to bring out that the defendant originally said nothing about seeing other men.

In *United States ex rel. Burt v. New Jersey*,[16] however, the court held it was proper for the state, after defendant had testified to self-defense in a murder case, to bring out that he had been arrested for a different crime, and he had then made no mention of having shot the deceased. The court, relying on *Harris v. New York*,[17] thought the relevance and inconsistency was clear.[18]

3. Prior Statements by Witness

The Nebraska Rules in 801(d)(1) set out two kinds of prior statements by a declarant who testifies at trial and is subject to cross-examination which are not hearsay:

(A) a prior inconsistent statement

(B) a prior consistent statement offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.

These two types of prior statements are merely a codification of traditional law so far as admissibility to impeach or support is concerned, and the usual foundation requirement is found in Rule 613(b). The Federal Rules define as not hearsay a third type of prior statement—one of identification of a person made soon after perceiving him. The first two parts of the proposed Federal Rule 801(d)(1) originally were the same as the Nebraska rule. The House Committee on the Judiciary amended the Federal Rule so that only prior inconsistent statements made while the declarant was subject to cross-examination at a trial, hearing or deposition

15. 390 Mich. 355, 212 N.W.2d 190 (1973).
16. 475 F.2d 234 (3d Cir. 1973). Three different judges of the same circuit again discussed the problem, reaching conflicting decisions as to pure silence—at least after Miranda warnings. Agnellino v. New Jersey, 493 F.2d 714 (3d Cir. 1974).
17. 401 U.S. 222 (1971).
18. Certiorari was denied with three dissents. 94 S. Ct. 243 (1973).

are not hearsay and are admissible substantively and the House passed the proposal in that form.[19]

The only difference from present law and Nebraska's proposed 801(d)(1) is that such statements, if admitted, are no longer limited to their impeaching effect.[20] The essential idea that the impeachment limitation was never of much real effect on the jury is undoubtedly true, and the proposed rules merely follow the lead of various states in removing the limitation. The use of such statements substantively, however, in some states has not been free of problems.

The constitutionality of those state rules allowing the use of prior statements substantively was upheld in *California v. Green*.[21] Although the justices split as to any distinction between the 14th amendment due process and 6th amendment confrontation concepts, the adoption of the Federal Rules by all of the justices except Douglas suggests that at least where there is an opportunity at the trial for cross-examination with respect to the prior statement, no confrontation difficulties are seen.

This article's analysis has been relatively straight-forward in following the order of presentation of the proposed rules. But there are several other rules concerned with hearsay exceptions which may or may not be a "prior statement of a witness." This raises a number of essential conflicts in theory and in practice, some of which have been considered by the courts and others which are only now appearing. As a matter of fact, most of the Rules 803 and 804 exceptions can be a prior statement of a witness.[22]

What has been discussed so far are prior statements which do not come under any other exception. If they are *inconsistent* with the witness's present testimony, they may be offered by either prosecution or defense and the proponent or the opponent of the witness. However, if prior statements are offered by the prosecution as to its own witness, it must be shown that there is no violation of the due process concepts of *Douglas v. Alabama*[23] and

19. H.R. REP. No. 650, 93d Cong., 1st Sess. 13 (1973); 120 CONG. REC. H559-70 (daily ed. Feb. 6, 1974).
20. It should be noted that the House Committee modification discussed in note 19 *supra* did not provide that prior statements not made while subject to cross could not be used, but only that they cannot be used substantively. Prior inconsistent statements not made at a trial, hearing or deposition can still be used for impeachment purposes under the federal proposal.
21. 399 U.S. 149 (1970).
22. Even a dying declaration under RULE 804(b)(3) could be a prior statement of a witness.
23. 380 U.S. 415 (1965).

Napue v. Illinois[24]—*i.e.* what Harlan called "prosecutorial misconduct" in *Dutton v. Evans.*[25] Moreover, the witness must be "subject to cross-examination concerning the [prior] statement," and the statements must be inconsistent with present testimony. More specifically, if the witness takes the position that he has no present memory or refuses to testify about the prior statement, it should seem clear that one or the other or both of those prerequisites has not been met.

Under the proposed rules, if the prior statement is inconsistent with his present testimony, but the witness refuses to talk about the prior statement, it can presumably still be used for impeachment though not substantively. There is a line that must be drawn in these cases between an honest effort by the prosecution to get the witness to refresh his memory and a flat device simply to put the prior statement before the jury in a backhanded way.[26] The proposed rules suggest that this should be done in such a way as to avoid the *Douglas* error, as by holding hearings outside the presence of the jury.[27] Certainly, the prosecution should not be artificially deprived of the right to put as much pressure on the witness to testify truthfully as is fair and reasonable.[28]

---

24. 360 U.S. 264 (1959).
25. 400 U.S. 74 (1970).
26. United States v. Miles, 413 F.2d 34 (3d Cir. 1969).
27. *See* RULE 103(c).
28. The strongest recent statement in favor of letting the prosecution put fair and reasonable pressure on the witness to testify truthfully was by Judge Friendly in United States v. Burket, 480 F.2d 568 (2d Cir. 1973).

> The defense's first claim with respect to the examination of Mrs. Bortz and Mrs. Davis is that the government called them although knowing that they would refuse to testify on the ground of self-incrimination. Such action has been held to be error, although not necessarily calling for reversal, either on the theory that the government is guilty of prosecutorial misconduct by seeking to build its case out of an inference from invocation of the privilege or on the view that the defendant is unfairly prejudiced by inability to cross-examine. The short answer to all this in the instant case is that, having learned that the two ladies would refuse to testify unless granted immunity, the prosecutor obtained this and was then advised by their attorneys that they would testify, although not as the prosecutor might anticipate from statements they had given to agents of the FBI shortly after the robbery. This did not make it improper for the prosecutor to call them, see what they would actually do under the sanctity of the oath, and, if necessary, confront them with their previous statements to refresh their memory or, if that failed, to impeach them. Such error as there may have been lay in the prosecutor's endeavor to short-cut "the judicially sanctioned ritual" of first endeavoring to refresh the ladies' recollection of each matter with the relevant passage of their

Other devicies to force the witness to talk are also available such as contempt, immunity and plea bargaining. Where the prosecution is trying to force its own witness to talk, these are all of questionable desirability since they open the witness to the threat of impeachment. And yet, if the defense does impeach by a prior inconsistent statement, the prior consistent statement could come in substantively under 801(d)(1)(B) if the defendant takes the position that the trial testimony is the result of recent fabrication, improper influence or motive, and also assuming the witness will talk about the prior statement on cross by defense. If there were no such claim, the prior statements might be admissible under the doctrine of completeness[29] if they were in some way related.

The problems of the defense offering a prior inconsistent statement of a witness for the prosecution, or of his own witness, or offering a consistent prior statement essentially would be the same except that professional misconduct by defense counsel presumably would not involve due process.

A consideration of prior statements of a trial witness which are admissible as an exception to the hearsay rule, other than by Rule 801(d), involves different problems. Disregarding constitutional problems, it is probably fair to say that prior statements always will be admitted if inconsistent with present testimony and they will be admitted substantively. This is the general rule. If the prior statement is consistent, there is a problem of cumulative evidence and it may be excluded under Rule 403. The traditional rule against supporting one's own witness who has not been impreached sometimes will be stated, but one is never certain that

---

> statements to the FBI agents, then asking whether they had said what was reported and, if this was denied, calling the agents to complete the impeachment. Instead, his method of interrogation in effect placed the statements directly before the jury. But any mistake was fully cured by the judge's speedy and strong instructions that the jury was not to consider the statements to the FBI agents for any purpose other than as affecting the witnesses' credibility and specifically not as evidence of the defendants' guilt.

Id. at 571-72. Unfortunately, it is impossible to judge whether in *Burket* there was anything unfair without a consideration of what the defense counsel was able to do on the cross-examination. None of this is suggested in the opinion. It is interesting to note that when Judge Friendly handled a similar problem in a dissent just four months later, he considered at length the relative effectiveness of the cross-examination and the redirect as well as what he obviously considered prosecutorial misconduct and a failure of the judge to read Harris v. New York, 401 U.S. 222 (1971), correctly. United States ex rel. Cannon v. Montanye, 486 F.2d 263 (2d Cir. 1973).

29. *See* RULE 107.

the court really intended to lay down such a rule.[30]

Constitutonal problems, however, are definitely involved; they will be treated in connection with the hearsay exceptions.

B. Hearsay Exceptions

This portion of the article will discuss various exceptions in proposed Rules 803 and 804, primarily focusing on their application when the declarant is not then testifying.

Rules 803(22), judgement of previous conviction, and 804(b)(4), statement against interest, are the only rules which specifically state a distinction between civil and criminal cases. A judgment of conviction of a felony is not admissible when offered by the government (except for impeachment). This applies only to convictions of persons other than the accused when offered by the government. The conviction of an accused may be *res judicata* if the fact of guilt is an element of the crime now being tried, although it may run afoul of double jeopardy. A declaration against interest exposing the declarant to criminal liability and offered by the defendant must be corroborated.

1. Constitutional Considerations

All of the exceptions, however, are open to the constitutional objections outlined in *Green* and *Dutton* and some of these objections are specifically dealt with by the rules. Prior testimony, 804(b)(1), is covered in *Pointer v. Texas*[31] and *Barber v. Page*[32] and statements against interest in *Roberts v. Russel*[33] (applying *Bruton v. United States*[34] to the states) as modified in *Nelson v. O'Neil*[35] and perhaps other cases.

Green and *Dutton* both were concerned with state rules admitting hearsay evidence which was attacked as violating 6th amendment confrontation rights. Both cases found no constitutional violation in the particular situations presented. They held at least that constitutional confrontation does not exclude all hearsay. In *Green* the Court held that certain prior inconsistent statements of a trial witness given at a preliminary hearing could be used substantively and in *Dutton* the Court held that a particular extra-

30. *See, e.g.*, Mitchell v. American Export Isbrandtsen Lines, Inc., 430 F. 2d 1023 (2d Cir. 1970).
31. 380 U.S. 400 (1965).
32. 390 U.S. 719 (1968).
33. 392 U.S. 293 (1968).
34. 391 U.S. 123 (1968).
35. 402 U.S. 622 (1971).

judicial statement of a co-conspirator could be used even though it was not made "durng the course and in furtherance of the conpiracy."

2. Former Testimony

In *Pointer* the Court held a statement of a declarant at a preliminary hearing, not present at trial, could not be introduced at trial where there had been no opportunity for meaningful cross-examination at the time of the hearing. *Mancusi v. Stubbs*[36] held statements at a prior trial admissible where there had been opportunity for cross and the declarant was proved unavailable at trial. *Barber* held, however, that the state had to make all reasonable efforts to produce the declarant at trial. These cases, of course, put specific limitations on the application of Rule 804(b)(1) in criminal cases. It seems that as the law stands today, testimony by witnesses in a prior trial of the same crime and the same defendant would be admissible if that declarant is in fact unavailable.

If the statement were given at a prior trial of some person other than the present accused, the Nebraska Rule, as did the rule proposed by the Supreme Court, lets these statements in substantively in both civil and criminal cases when it was given at the prior trial "against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered."[37] The federal rule as passed by the House of Representatives goes back to the traditional rule requiring identity of parties in criminal cases and a requirement of privity in civil cases.[38] The original federal comment admitted that it had no case or rule or statutory support, but relied on Professor Falknor's argument that admitting such statements was at least as trustworthy as dying declarations and usually more so since there was once a meaningful

36. 408 U.S. 204 (1972).

37. RULE 804(b)(1).

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

PROP. FED. R. EVID. 804(b)(1), passed by House, 120 CONG. REC. H560, H570 (daily ed. Feb. 6, 1974). *See* H.R. REP. No. 93-650, 93d Cong., 1st Sess. 15 (1973) for committee amendments of rule. The change in civil cases is certainly a major step backward.

opportunity to cross.[39] The comment also noted that the issue was left open in *Mattox v. United States*,[40] which is true; but the case's dictum against admissibility is strong.[41]

The language in *Mancusi* arguably supports Falknor's opinion since the standard used by the majority generalizes the specific prior testimony exception requiring that the hearsay exception "bore sufficient 'indicia of reliability' and afforded 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement'."[42] The inner quotes are from *Dutton*. It appears that a showing of an adequate cross-examination in the prior trial of the now absent declarant on the issues now relevant against the defendant is required. This requirement was specifically argued in *Mancusi* and the Court stated that there had been such a showing. In short, it is seriously doubtful that the Court will uphold the admission of prior testimony given at the trial of a different person.

The admissibility of prior testimony if the "unavailability" at trial involves a simple refusal to testify not supported by a valid claim of the privilege against self-incrimination or a lack of memory about the prior statement also can be assumed. Justice White's opinion in *Green* can be read to hold that meaningful cross either at the time the declaration was made or at the trial is enough. The practical situation at the particular trial, however, clearly must demonstrate that the witness's refusal to testify at trial is not in any way connived in by the prosecutor. The practical situation must also demonstrate that the prior opportunity to cross-examine was meaningful.

The other side of the coin is equally disturbing. Where the witness at trial recants, refuses to testify or simply claims a lack

39. Falknor, *Former Testimony and the Uniform Rules: A Comment*, 38 N.Y.U.L. REV. 651, 655 (1963).

40. 156 U.S. 237 (1895).

41. The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of, and many of the very cases which hold testimony such as this to be admissible also hold that not the substance of his testimony only, but the very words of the witness, shall be proven. We do not wish to be understood as expressing an opinion upon this point, but all the authorities hold that a copy of the stenographic report of his entire former testimony, supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness, such as was produced in this case, is competent evidence of what he said.

Id. at 244.

42. 408 U.S. at 216.

of memory, it may be because of pressure by defendant or by interests he represents. Here the state should be permitted to introduce the prior preliminary hearing testimony. But the judge should require a fair showing by the prosecution that such pressure exists.[43]

An analogous problem concerns depositions which usually have not been subsumed under the hearsay rubric. Although the Nebraska statutes provide for depositions by the state in criminal cases, they may be used only at trial to impeach[44] and where the witness is available at trial for cross. This would appear to be acceptable under any reading of *Green* and other cases. Federal law does permit such depositions to be used substantively where the witness is unavailable.[45] The constitutionality of the federal law was upheld in a 3-2 decision of the second circuit in *United States v. Singleton.*[46] The dissent in *Singleton* contended that confrontation in the constitutional sense involved not only cross-examination but also the right of the jury to see and judge the demeanor of the declarant. Perhaps, this might be alleviated if the deposition were videotaped, but not wholly since the trial environment and the jury's presence are also significant.[47]

3. Declarations Against Interest

Similar problems arise with declarations against interest under 804(b)(4). The Nebraska Rule makes admissible a declaration against penal interest where the declarant is unavailable. In its 1971 form and as now modified by the House, the Federal Rule specifically excludes from this exception a statement or confession of someone other than the accused implicating both himself and the accused. That exclusion from the rule was derived from the previously discussed holding in *Krulewitch* that a co-conspirator's confession must be in the course and in furtherance of the conspiracy —with which Nebraska decisions agree. The exclusion also is based on the *Bruton* and *Roberts* holdings that where two defendants are tried together, defendant A's confession, which is admissible against A, cannot be introduced in either a federal or state trial if it implicates defendant B, even with a lmiting instruction. Although *Krulewitch* was not constitutionally based, both *Bruton*

43. *See, e.g.*, United States v. West, 486 F.2d 468 (6th Cir. 1973).
44. NEB. REV. STAT. § 29-1917(4) (Cum. Supp. 1972).
45. 18 U.S.C. § 3503(f) (Supp. 1973); FED. R. CRIM. P. 15.
46. 460 F.2d 1148, *cert. denied*, 410 U.S. 984 (1972). *See also* 19 N.Y.L. FORUM 198 (1973).
47. *See* Hutchins v. State, 286 So. 2d 244 (Fla. 1973), where a videotape deposition was held admissible.

and *Roberts* were specifically grounded on the confrontation clause and made applicable to the states under the 14th amendment and *Pointer*. The exclusion would be clear, whether stated in the proposed rule or not, except for the fact that the plurality opinion in *Dutton* said *Bruton* was not applicable except where the defendants were tried together. This was somewhat modified in *Mancusi* where the Court said that the *Dutton* case was to be strictly limited to the facts of that case, presumably where the dangers of non-confrontation are relatively small.

In *Nelson* the United States Supreme Court further modified *Bruton* and *Russell* in holding that where two defendants are tried together and make a common defense, A's confession implicating B may be introduced against A if A takes the stand and is thus available for cross-examination by B. The fact that A denied making the prior confession and therefore B found it silly to cross-examine him, made it only that much less a violation of B's confrontation rights. The Nebraska Rule 804(b)(4) should be modified to conform to the present House version.

It also must be remembered that confessions of co-conspirators are subject to the requirement that they were made voluntarily. Whether *Jackson v. Denno*[48] and *Sims v. Goergia*[49] require a prior specific judge and record finding of voluntariness is not clear from the cases, although the latest decision, which collects the bulk of the law in the area, so held.[50]

It is assumed, however, that *Nelson* cannot affect Rule 804(b)(4) since the rule requires the declarant to be unavailable. Furthermore, it should be remembered that 804(b)(4) may be used to admit the prior declaration against penal interest of a now unavailable declarant which exculpates defendant, provided it is corroborated.[51] But if the defendant offers such a statement, the state can offer to impeach by offering any prior inconsistent statement, that is one inculpating defendant, under Rule 806.

4. Business Records

This article has not discussed the almost wholly undefined area of the application of other hearsay exceptions under confrontation

48. 378 U.S. 368 (1964).
49. 385 U.S. 538 (1967).
50. LaFrance v. Bohlinger, 365 F. Supp. 198 (D. Mass. 1973).
51. *See also* United States v. Roberts, 483 F.2d 226 (5th Cir. 1973), where the court held that admission into evidence of a codefendant's extrajudicial confession which appears to exculpate defendant can't possibly prejudice the defendant.

concepts.[52] In *United States v. Williams*[53] the court held it was not a confrontation denial for an expert on valuation to rely on reports and business records so long as the expert was open to cross-examination as to the bases for his opinions. The court had no doubt that admitting the report, without the testimony of the man who made it, would have been a violation.

The fifth circuit followed the *Williams* holding in an almost identical situation in *United States v. Musgrave*[54] and in two cases involving medical experts.[55] In *United States v. Knox*[56] the fifth circuit, again relying on *Williams*, held there was no confrontation violation when an expert relied on business records of oil production. In *United States v. Thompkins*[57] the eighth circuit, concerned with a report to a federal agency, stated that the informant should have been called for cross-examination. The holding, however, was that the failure to call the informant was not prejudicial since the report had been made by a different person (wife) who was a witness.[58]

5. Public Records

The ninth circuit considered proof of non-registration of a firearm by the certificate of the keeper of the records that none existed in *Warren v. United States*.[59] The court admitted the certificate and found no confrontation violation, relying on prior business record and public record cases as well as Wigmore. The court did not mention recent Supreme Court cases casting substantial doubt on Wigmore's broad view that no hearsay exception violated the confrontation clause. The issue focused on in *Warren* is covered by Rule 803(10) which admits a certificate by an authorized person stating that a diligent search failed to disclose a public record or entry.[60]

52. Except dying declarations under RULE 804(b)(3).
53. 447 F.2d 1285 (5th Cir. 1971).
54. 483 F.2d 327 (5th Cir. 1973).
55. United States v. Davila-Nater, 474 F.2d 270 (5th Cir. 1973); United States v. Harper, 460 F.2d 705 (5th Cir. 1972). *See also* United States v. Bohle, 445 F.2d 54 (7th Cir. 1971).
56. 458 F.2d 612 (5th Cir. 1972).
57. 487 F.2d 146 (8th Cir. 1973).
58. In United States v. Blake, 488 F.2d 101 (1973), the fifth circuit excluded business records which were not proved by anyone familiar with their actual compilation. The business records exception is also rampant in anti-trust suits and tax fraud cases although many of these can rely on the non-hearsay statement of the opposing party exception as extended by the statements of authorized agents.
59. 447 F.2d 259 (9th Cir. 1971).
60. *See also* FED. R. CRIM. P. 27.

The public records exception of Rule 803(8) involves at least two hearsay declarations: the certificate that the record says thus and so, and the report in the record. Probably, no one would be bothered about the first type of declaration. The second declaration is more doubtful, and this exception may cause constitutional problems unless the "facts required to be observed and recorded pursuant to a duty imposed by law"[61] can be shown to have been done so in a significantly trustworthy way, and there is good reason not to require the declarant's presence at trial. Rule 901's authentication provisions permit the entry to be shown by the certificate of the person in charge of the records, but, unlike the business entries exception, Rule 803(8) puts the burden of proving untrustworthiness on the opponent. The rule does require that the proponent give reasonable notice to the opposing party prior to trial.[62] The proof of untrustworthiness may become exceedingly

61. RULE 803(8).

62. The notice requirement is illustrated by the following Iowa statutes setting up a criminalistics laboratory:

> It shall be presumed that any employee or technician of the criminalistics laboratory is qualified or possesses the required expertise to accomplish any analysis, comparison, or identification done by him in the course of his employment in the criminalistics laboratory. Any report, or copy thereof, or the findings of the criminalistics laboratory shall be received in evidence in any court, preliminary hearing, and grand jury proceeding in the same manner and with the same force and effect as if the employee or technician of the criminalistics laboratory who accomplished the requested analysis, comparison, or identification had testified in person. An accused person or his attorney may request that such employee or technician testify in person at a criminal trial on behalf of the state before a jury or to the court, by notifying the proper county attorney at least ten days before the date of such criminal trial.

IOWA CODE ANN. § 794 A.2 (Supp. 1973).

> The county attorney shall give the accused person, or his attorney, after an indictment or county attorney's information has been returned, a copy of each report of the findings of the criminalistics laboratory conducted in the investigation of the indictable criminal charge against him at the time of arraignment, or if such report is received after arraignment, upon receipt, whether or not such findings are to be used in evidence against him. If such report is not given to the accused or his attorney at least four days prior to trial, such fact shall be grounds for continuance.

IOWA CODE ANN. § 749A.4 (Supp. 1973). This Iowa statute is similar to Nebraska's Uniform Composite Reports as Evidence Act, NEB. REV. STAT. § 25-12,115 *et seq.* (Reissue 1964). In both the Nebraska and Iowa statutes, the result of an investigation is made known to the defendant, and the report is made admissible, while defendant has the right to require that the proponent produce any particular member of the investigation team for cross. A somewhat similar notice provision is found in NEW JERSEY R. EVID. 64.

difficult if the record is in a computer.[63]

6. Past Recollection Recorded

Justice Harlan in *Dutton* referred to business records acts, official statements, learned treatises and trade reports as possible examples of hearsay exceptions which might not violate confrontation. He used these in connection with his balancing theory where production of declarants would be unduly inconvenient and of small utility to a defendant. One approach is to carry the requirement of producing the first hand knowledge declarant as far back as is reasonably possible; but at some point in the business records and public records area, there is a declarant—or an entrant—who must rely on the past recollection recorded rule. This declarant has no present recollection, though he may be cross-examined on the basis for his testimony that he now knows that the entry was accurate when made. Or, the declarant may be cross-examined on the custom of accurately proceeding or testing and recording. If the defendant still can demonstrate a questionable accuracy, his confrontation objection, as well as a possible hearsay objection, should be upheld.

The Nebraska Supreme Court specifically applied confrontation requirements to the proof of a transcribed copy of an oral confession in *State v. Harding*.[64] In order to be admissible, the court said that the transcriber must be present and available for cross-examinaton. Since in this case, the secretary who had transcribed the confession had died before trial, the confrontation requirements could not be fulfilled, and the written document was not admissible even though its accuracy was affirmed by other witnesses.

7. Other Exceptions

Rule 803(2)'s excited utterance exception has been used in a number of criminal cases.[65] The only excited utterance case specifically considering the confrontation problem seems to be *Commonwealth v. McLaughlin*[66] where it is stated that the sixth amendment would not exclude.

63. It should be noted that the Nebraska rules are not as broad in admitting reports of investigations as the Federal Rules, although the Federal Rules exclude such reports in criminal cases.
64. State v. Harding, 184 Neb. 159, 165 N.W.2d 723 (1969). A number of past recollection recorded cases are collected in United States v. Davis, 487 F.2d 112, 123 (5th Cir. 1973).
65. *See* State v. Watson, 182 Neb. 692, 157 N.W.2d 156 (1968); Denison v. State, 117 Neb. 601, 221 N.W. 683 (1928); 6 J. WIGMORE, EVIDENCE § 1750 (1940).
66. —Mass. —, 303 N.E.2d 338 (1973).

In the great majority of excited utterance cases, the declarant also testifies at the trial and is therefore available for cross-examination,[67] but availability for cross-examination is not stated as a requirement. Justice Harlan's original position in *Green*, however, was that any available declarant must be produced by the government at trial, and *Barber* makes an honest effort to make production of the declarant a due process requirement before admitting prior testimony. Harlan withdrew from this general proposition in *Dutton*, but it is not inconceivable that other judges would require the prosecution to make the declarant available for cross-examination as a matter of due process fairness where there is no prior opportunity to cross-examine. Such a requirement may be understandable because the principle difficulty with this exception is that the very fact of excitement significantly reduces the perception's validity and the defendant should have the right to bring this out on cross without being forced to call the delcarant as his own witness.

The same due process requirement may exist for Rule 803(3)'s statements of then existing mental, emotional or physical condition. Although the original inability to perceive correctly may not be as apparent, the motive to misrepresent may be even more concealed and not open to argument to the jury without exploration by cross-examination. Rape cases and narcotic cases may involve highly disputed issues of the defendant's identity where the main evidence offered is a declaration of an alleged victim or receiver that she or he intended to meet defendant. This need to explore motives is the basis for the standard statement that the informer's privilege does not apply if the informer "may be able to give testimony necessary to a fair determination of the issue of guilt or innocence."[68]

The pedigree exceptions of Rule 804(b)(5) most often are seen in criminal cases involving incest, bigamy or adultery. Again, a court probably would require the government to produce the declarant if he were available. These exceptions involve both oral and written hearsay and often a combination, but unlike the use of the pedigree exceptions in the normal run of civil cases, there is usually some available, living person with the requisite personal knowledge. There also is available in most cases public entries which might come in under 803(8), (9) and (10) exceptions if the proper foundation is laid.

The dying declaration exception, Rule 804(b)(3), remains the

67. *See, e.g.*, State v. Juarez, 187 Neb. 354, 190 N.W.2d 858 (1971).
68. RULE 510(c)(2).

same as always in Nebraska, except it applies in any criminal or civil case. This exception was one of the first to be held not in violation of the confrontation clause.[69] Nor has this been challenged in any of the recent cases.

The above exceptions of Rules 803(2) and (3) and 804(b)(3) and (5) have been considered from the point of view of evidence offered by the government. There would seem to be no objection if the evidence were offered by the defendant.

Rule 803(22)'s exception for judgments of previous felony convictions proposes new law, but where offered by the government, its application in criminal cases is restricted to prior convictions of the present defendant where the relevance is controlled by the rules of *res judicata* or collateral estoppel and double jeopardy. Similarly, the defendant may offer a prior acquittal of himself, if relevant under those concepts, but not under this rule.[70] Such an offer by the defendant would come in under the public records exception.

The 803(22) exception does permit a judgment of felony conviction of another person to be offered by the defendant to prove any fact essential to sustain that other person's judgment. The cases upon which this proposed exception is based involved civil actions, and it is therefore necessary to conjecture how such an offer might arise in a criminal case. The obvious example of the conviction of a different person for the same crime will arise very seldom. The exception does provide a possible method to prove the violent character of the victim of the defendant's crime where the defendant uses self-defense. Furthermore, where the lack of chastity of a prosecutrix in a rape case is a defense, the prosecutrix's prior conviction of a sex crime would be admissible.

It should be emphasized again that these exceptions are subject to the judge's right to exclude any evidence that is unfairly prejudicial or misleading.[71] The likelihood of unfair prejudice most usually is seen in cases where the evidence may have a dual relevance, one admissible and one inadmissible. The usual rule in such cases is to admit the evidence with an instruction, immediately if requested, not to consider the evidence for the inadmissible purpose.[72]

69. Mattox v. United States, 156 U.S. 237 (1895).
70. A discussion of these rules would unduly lengthen this article. *See* Ashe v. Swenson, 397 U.S. 436 (1970); Schaefer, *Unresolved Issues in the Law of Double Jeopardy: Walter and Ashe*, 58 CALIF. L. REV. 391 (1970).
71. RULE 403.
72. RULE 106.

IV. CONCLUSION

The Nebraska Supreme Court case of *State v. Howard*[73] and the federal habeas corpus appeal of *Howard v. Sigler*[74] cut across the entire area of the use of hearsay in criminal cases. The issue in these cases was the unavailability of a witness at the first trial of Howard, thereby laying the foundation for the use of the prior testimony of that witness at Howard's second trial. The unavailability was proved by an affidavit of a medical officer at the Public Health Service Indian Hospital in Rapid City, South Dakota. The affidavit stated that the witness was afflicted with contagious tuberculosis, her condition would be greatly impaired by traveling to Alliance, Nebraska, for the second trial and her disease was infectious. It was admitted that this affidavit was hearsay and apparently it was not argued that the affidavit might come under an exception. The Nebraska court held that it was within the discretion of the second trial court to admit the affidavit as proof of unavailability. The United States Court of Appeals for the Eighth Circuit, which was presented the issue on appeal from a lower federal court decision granting Howard habeas corpus relief,[75] held that the use of the affidavit did not violate either due process or confrontation limitations under *Barber* or *Dutton*. Although *Mancusi* had not yet been decided, the eighth circuit opinion's language forecast *Mancusi*'s position that hearsay which bears sufficient indicia of reliability may not violate the confrontation rule.[76] The circuit court stated: "The fact of trustworthiness of such affidavit can be readily acknowledged in most cases *and in those cases where doubt exists further inquiry could be made.*"[77]

The admissibility problem takes on additional significance in Nebraska because the Nebraska proposal deletes the last sentence of Federal Rule 104(a):[78] "In making his (judge) determination

73. 184 Neb. 461, 168 N.W.2d 370 (1969).
74. 454 F.2d 115 (8th Cir. 1972).
75. Howard v. Sigler, 325 F. Supp. 272 (D. Neb. 1971) (Urbom, J.).
76. The unavailability of the witness in *Mancusi* was proved by the testimony of a witness with personal knowledge.
77. 454 F.2d at 121 (emphasis added). The *Howard* case was followed by a Minnesota case which admitted an affidavit of defendant's prior wife that there had been no divorce, thus preventing the person defendant claimed to be his present wife from being disqualified to testify against him. State v. Martin, 293 Minn. 116, 197 N.W.2d 219 (1972).
78. PROP. FED. R. EVID. 104(a):

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge. . . . In making his determination he is not bound by the rules of evidence except those with respect to privileges.

he is not bound by the rules of evidence except those with respect to privileges."[79] The comment to Nebraska's Rule 104(a), however, suggests that the deletion of the above quoted sentence was not intended to limit the trial judge in the evidence he might use, but rather to discourage the judge from an overly lax approach to the basis for his finding on preliminary facts in either civil or criminal cases.

79. Similarly, PROP. FED. R. EVID. 1101(d)(1) is not proposed in Nebraska. *See* United States v. Matlock, 94 S. Ct. 988, 994 (1974), holding that the same rules of evidence governing criminal jury trials do not govern hearings before a judge to determine evidentiary questions.