

ORIGINAL

NO. 2007-0755

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE CUYAHOGA COUNTY COURT OF COMMON PLEAS
CASE NO. CR-05-475400

STATE OF OHIO, PLAINTIFF-APPELLEE
VS.
CHARLES MAXWELL, DEFENDANT-APPELLANT

SUPPLEMENTAL MERIT BRIEF OF APPELLEE

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LAW AND ARGUMENT

Pursuant to this Court's March 22, 2013 order, the State of Ohio submits the following supplemental brief addressing Proposition of Law No. XV.

Proposition of Law No. XV:

The admission of the autopsy report and testimony from a doctor who did not perform the autopsy violates the Sixth and Fourteenth Amendments of the Federal Constitution.

Defendant asserts that his right to confrontation of the witnesses against him was violated when the State of Ohio called Chief Deputy Coroner and Forensic Pathologist Dr. Joseph Felo to testify at trial. However, Defendant has not been unconstitutionally deprived of his right to Confrontation. Further, in light of the overwhelming evidence of Defendant's guilt, any infringement upon the right to confront was harmless beyond a reasonable doubt. Accordingly his fifteenth proposition of law fails.

Relevant facts:

Defendant was indicted for the November 27, 2005 murder of Nichole McCorkle who was shot and killed in her home on East 146th Street in the City of Cleveland, Cuyahoga County, Ohio. Dr. D. Dolinak, M.D., of the Cuyahoga County Coroner's Office conducted the victim's autopsy. (Tr. 1454-1455.) Accordingly, Dr. Dolinak was listed as a prosecuting witness in the State's "Response to Request for Discovery Under Rule 16", which was filed in the trial court on April 3, 2006.

Trial in this matter was originally set for June 14, 2006 but it was continued until June 19, 2006, and then continued again until September 6, 2006. Prior to the third scheduled trial date, on August 28, 2006, the State filed with the trial court a "Supplemental Response to Request for Discovery Under Rule 16" via which the Defendant was put on notice that the State would be calling

Dr. Joseph Felo from the Cuyahoga County Coroner's Office. Defendant's trial date was postponed several more times until the case was finally heard in February of 2007.

Ultimately, Dr. Felo was called to testify at Defendant's trial because Dr. Dolinak had left the Cuyahoga County Coroner's Office and had moved to the State of Texas where he began serving as the Medical Examiner for the City of Austin. (Tr. 1455.) Dr. Felo explained that he did not conduct the autopsy of the victim himself and that Dr. Dolinak performed the autopsy and had signed off on the autopsy protocol. (Tr. 1459, 1454-1455.) Dr. Felo testified that he had personally reviewed the autopsy report, the photographs from the autopsy, as well as the x-ray and microscopic slides. (Tr. 1458-1459.) Dr. Felo also testified that, as an expert in his field, he could review these materials and render an opinion with regard to the cause and manner of the victim's death. (Tr. 1459.)

From his own review of the photographs, Dr. Felo testified that there was stipple around both gunshot wounds sustained by the victim. (Tr. 1471.) Dr. Felo explained that, in general, stippling around a wound occurs when the gun muzzle is within eighteen inches of the target. (Tr. 1472.) Dr. Felo testified that the first gunshot wound was not immediately fatal. (Tr. 1473-1475.) Dr. Felo, based on his reading of the report, review of the photographs, and examination of the microscopic slides, testified that his opinion as to the cause of victim's death was gunshot wounds to the head. (Tr. 1478-1479.) Dr. Felo also stated that his opinion as to the manner of the victim's death was homicide. (Tr. 1479.)

Defendant's notice of direct appeal of his conviction was filed in this Supreme Court in April of 2007 with briefing by the parties completed by September of 2008. Presently this matter is scheduled for oral argument on Wednesday, June 5, 2013.

This Court's decision in *Craig* governs the outcome of Defendant's Proposition No. XV:

At Defendant's trial in February of 2007, the governing rule of law promulgated by this Supreme Court clearly allowed: (1) autopsy reports to be admitted as business records, and (2) a coroner to testify as an expert witness whether they personally conducted the victim's autopsy or not. *State v. Craig* (2006), 110 Ohio St.3d 306, 853 N.E.2d 621, 2006-Ohio-4571, ¶ 78-80. The prosecution and the trial court reasonably and justifiably relied on *Craig* in permitting Dr. Felo to testify at Defendant's trial. This Court's precedent in *Craig*, which was binding on the parties at Defendant's trial, is still good law and it commands that Defendant's fifteenth proposition fails.

Autopsy reports constitute business records. Business records are, by definition, non-testimonial. Therefore, autopsy reports do not offend the Confrontation Clause:

This Court's decision in *Craig* must be upheld and applied herein. Autopsy reports do not implicate the accused's right of Confrontation. Rather, as a business record, autopsy reports are admissible in criminal trials as an exception to the hearsay rule because they are non-testimonial in nature.

First, a statement is defined as an assertion made by a declarant. Evid. R. 801(A). It is well-established that non-testimonial statements do not implicate the Confrontation Clause. *State v. Siler*, 116 Ohio St.3d 39, 876 N.E.2d 534, 2007-Ohio-5637, ¶ 21, citing *Crawford v. Washington*, (2004), 541 U.S. 32, 56, 124 S.Ct. 1354, 158 L.Ed.2d 177 1. With regard to the use of non-testimonial statements the United States Supreme Court has specified:

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law *** as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

Crawford v. Washington, supra, 541 U.S. at 51-52. Thus where a statement is non-testimonial in nature, instead of being held to Confrontation Clause standards, it is merely subject to the admissibility requirements of state evidentiary rules.

Under Ohio's Evidence Rule 803 business records are admissible evidence because they are non-testimonial. The rule provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(6) A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Autopsy reports qualify as business records because they are prepared and kept in the regular course of the coroner's business activity. Therefore, autopsy reports are non-testimonial and do not implicate the accused's right of Confrontation.

Ohio law dictates that it is the duty of the coroner to keep a complete record, including cause of death, of all cases coming under their jurisdiction. R.C. § 313.09. "The report of the coroner and the detailed findings of the autopsy shall be attached to the report of each case." *Id.* The duty of the Coroner to conduct autopsies and maintain reports is mandatory and it exists entirely independent of any potential criminal prosecution.

In fact, autopsy reports have purposes other than criminal prosecutions. Of all the autopsies performed in the county each year, a relatively small portion of the resulting reports are used in

criminal prosecutions. For example, in 2006 the Cuyahoga County Coroner's Office (CCCO) accepted three thousand five hundred sixty four (3,564) fatality cases. Of those three thousand five hundred sixty four cases, the CCCO conducted one thousand five hundred and fifty three (1,553) autopsies. Of those one thousand five hundred and fifty three autopsies that the CCCO conducted, one hundred and forty five (145) cases were ruled homicides. Thus, just 4.07% of the CCCO total autopsies conducted in 2006 were homicidal fatalities. Cuyahoga County Medical Examiner, 2006 Coroner's Statistical Report, Cuyahoga County, Ohio, p.25-32, http://medicalexaminer.cuyahogacounty.us/pdf_coroner/en-US/2006StatReport.pdf (accessed April 29, 2013).

Autopsy reports are not created for the purpose, or in anticipation, of litigation. They do not identify suspects. They are not accusatory in nature. Rather, autopsy reports are compilations of data created by the coroner in the course of their regularly conducted business activity. The coroner is statutorily mandated to maintain these business records. These reports are a record of objective facts, including the pathologist's physical and anatomical observations of the condition of the body. "An autopsy report, prepared by a medical examiner and documenting objective findings, is the 'quintessential business record.'" *State v. Craig* (2006), *supra*, ¶ 81, quoting *Rollins v. State* (2005), 161 Md.App. 34, 81, 866 A.2d 926. Since autopsy reports are created and maintained by the coroner in the course of their regularly conducted business activity, they are admissible under Evid. R. 803 and they do not invoke the accused's right of Confrontation.

Even when considered in light of the United States Supreme Court's decisions in *Melendez-Diaz v. Massachusetts* (2009), 129 S.Ct. 2527, 2538-2540, 174 L.Ed.2d 314 and *Bullcoming v. New Mexico* (2011), 131 S.Ct. 2705, 180 L.Ed.2d 610, this Court's 2006 decision in *Craig* holds strong.

For example, in *State v. Monroe*, 8th Dist. No. 94768, 2011-Ohio-3045, at ¶ 56, and in *State v. Zimmerman*, 8th Dist. No. 96210, 2011-Ohio-6156, ¶ 43-47, the Eighth District Court of Appeals considered *Craig* post *Melendez-Diaz* and *Bullcoming* and found that the admission of autopsy reports as business records does not violate the right to Confrontation. Ohio's Fourth District Court of Appeals concluded the same in *State v. Hardin* (2010), 193 Ohio App.3d 666, 953 N.E.2d 847, at ¶ 20 (“* * * the basis of *Craig*'s ruling remains good law under current United States Supreme Court precedent”.)

Furthermore, post *Melendez-Diaz* and *Bullcoming*, multiple other state courts have likewise concluded that the admission of autopsy reports at trial does not trigger the accused's constitutional right of Confrontation. See, *People v. Dungo*, 55 Cal. 4th 608, 286 P.3d 442 (2012), as modified on denial of rehearing (Dec. 12, 2012) and *People v. Westmoreland*, 213 Cal. App. 4th 602, 153 Cal. Rptr. 3d 267 (2013), as modified on denial of rehearing (Mar. 1, 2013), review filed (Mar. 13, 2013) [California: admission of autopsy report in criminal prosecutions did not trigger a right to confront the pathologist]; *Banmah v. State* (2012), 87 So.3d 101, 103-104 [Florida: substitute medical examiner may testify even if they did not complete the autopsy; autopsy report is non-testimonial]; *People v. Leach*, 2012 IL 111534, 980 N.E.2d 570 and *People v. Brewer*, 2013 IL App (1st Dist.) No. 072821, 2013 WL 1289732, [Illinois: autopsy report was non-testimonial and did not implicate the Confrontation Clause]; *State v. Francis*, Third Circuit No. 2012-1221 (La. App. 3 Cir. Apr. 11, 2013), 2013 WL 1459454 [Louisiana: autopsy report did not implicate the Confrontation Clause]; *State v. Barnes*, COA12-278, 2013 WL 1296764 (N.C. Ct. App. Apr. 2, 2013) [North Carolina: right of Confrontation was not violated when an expert medical examiner testified as to his opinion of cause of death.] Notably each of the foregoing decisions was rendered in 2012 or 2013—after

both *Melendez-Diaz* and *Bullcoming*.

Similarly, with respect to the non-testimonial nature of autopsy reports, the United States Second Circuit Court of Appeals very recently found that a routine autopsy report falls under the business record exception and that testimony by a pathologist who did not conduct autopsy herself did not violate the defendant's right of Confrontation. *United States v. James*, 09-2732-CR, 2013 WL 1235642 (2d Cir. Mar. 28, 2013), at *4-14. In *James* the Second Circuit reaffirmed the conclusion it previously had set forth in *United States v. Felix* (2006), 467 F.3d 227, that autopsy reports are business records and are non-testimonial in nature. *Id.* at *235-237. Based on the foregoing, this Court's decision in *Craig* continues to be constitutionally sound post *Melendez-Diaz* and *Bullcoming*. Autopsy reports, unlike laboratory drug testing results (*Melendez-Diaz*) and unlike blood-alcohol analysis (*Bullcoming*), are business records. Business records are not testimonial. Therefore autopsy reports do not implicate the accused's right of Confrontation. Applied here, the trial court's admission of the autopsy report and the testimony of Dr. Felo were not erroneous and cannot be grounds for reversal of Defendant's convictions.

Sound public policy supports the conclusion that autopsy reports do not offend the Confrontation Clause:

The admission of objective findings that are set forth in an autopsy report and the accompanying testimony of a qualified expert coroner who neither conducted the autopsy nor prepared the report do not offend the Constitution.

The practical implications that would follow from treating autopsy reports as inadmissible testimonial hearsay must be considered. In a criminal case it is not uncommon for years to pass between the completion of the autopsy and the discovery and apprehension of the perpetrator. This passage of time can easily lead to the inaccessibility or unavailability of the examiner who conducted

the autopsy and prepared the report. Allowing only the examiner who conducted the autopsy to testify at trial would, therefore, be the equivalent of placing a statute of limitations on murder prosecutions.

Moreover, coroners who regularly perform hundreds of autopsies are not likely to have any independent recollection of the autopsy at issue in a particular criminal case and, when called upon to testify at trial, will invariably rely on the autopsy report. Obviously, unlike other forensic tests, an autopsy cannot be replicated at a later date by another pathologist. Consequently it would be against sound public policy to permit the inaccessibility or the unavailability of the medical examiner who prepared the autopsy report to preclude the prosecution of a murder case.

Rather, a qualified expert coroner must be permitted to testify about the objective facts contained in an autopsy report that was prepared by a different examiner. Qualified expert coroners must also be permitted to express their own opinions about the manner and cause of death based on autopsy reports prepared by another. As the United States Supreme Court recently reiterated “It has long been accepted that an expert witness may voice an opinion based on facts concerning the events at issue in a particular case even if the expert lacks first-hand knowledge of those facts.” *Williams v. Illinois* (2012), 132 S.Ct. 2221, 2233, 183 L.Ed.2d 89.

In this case Dr. Felo personally reviewed the autopsy report, the photographs from the autopsy, the x-ray, and the microscopic slides. (Tr. 1458-1459.) As an expert in his field, Dr. Felo testified that he could review these materials and render an opinion with regard to the cause and manner of the victim’s death. (Tr. 1459.) Dr. Felo testified that it was his opinion that the cause of the victim’s death was gunshot wounds to the head and that the manner of her death was homicide. (Tr. 1478-1479.)

For these reasons, this Court must uphold its determination in *Craig* that autopsy reports are admissible as non-testimonial business records and that a qualified expert pathologist may testify about an autopsy that they did not personally perform.

Even if the admission of the autopsy report and testimony of Dr. Felo was erroneous, such error was harmless beyond a reasonable doubt:

Assuming for the sake of argument that this Court finds that the admission of the autopsy report and testimony of Dr. Felo triggered Defendant's right to Confrontation, Defendant is not entitled to relief as the admission of the evidence was harmless beyond a reasonable doubt.

Certain trial errors, even if they are of constitutional proportions, can be found harmless in light of the circumstances of a given case. *Chapman v. California* (1967), 386 U.S. 18, 22, 87 S.Ct. 824. However, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* 386 U.S. at 24.

In *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 106 S.Ct. 1431 the United States Supreme Court noted that violations of the Confrontation Clause do not fall "within the limited category of constitutional errors that are deemed prejudicial in every case." *Id.* 475 U.S. at 682. Instead where Confrontation Clause violations are found, reviewing courts should apply a harmless beyond a reasonable doubt analysis. *Melendez-Diaz v. Massachusetts*, *supra*, 129 S.Ct. at 2542, at FN14, *Coy v. Iowa* (1988), 487 U.S. 1012, 1020-1022, 108 S.Ct. 2798, *Schneble v. Florida* (1972), 405 U.S. 427, 430, 92 S.Ct. 1056. "Where constitutional error in the admission of evidence is extant, such error is harmless beyond a reasonable doubt if the remaining evidence, standing alone, constitutes overwhelming proof of [the] defendant's guilt." *State v. Hood* (2012), 135 Ohio St.3d 137, 984 N.E.2d 1057, 2012-Ohio-6208, ¶ 43, quoting *State v. Williams* (1983), 6 Ohio St.3d 281, 452 N.E.2d 1323, paragraph six of the syllabus.

For decades this Court has applied harmless beyond a reasonable doubt analysis to Confrontation Clause violations. *State v. Madrigal* (2000), 87 Ohio St.3d 378, 388, 721 N.E. 52, *State v. Moritz* (1980), 63 Ohio St.2d 150, 155-156, 407 N.E.2d 1268, *State v. Pierce* (1980), 64 Ohio St.2d 281, 290, 414 N.E.2d 1038. In fact, every appellate district in the State of Ohio has applied harmless beyond a reasonable doubt analysis to claimed Confrontation Clause violations. Some examples are: *State v. Hart*, Hamilton App. No. C-060686, 2007-Ohio-5740, ¶ 37-40 (1st District) *In re: J.S.*, Montgomery App. No. 22063, 2007-Ohio-4551, ¶ 46, (2nd District); *State v. McNeal*, Allen App. No. 1-01-158, 2002-Ohio-2981, ¶ 50 (3rd District); *State v. Reinhart*, Ross App. No. 07CA2983, 2008-Ohio-5570, ¶ 32 (4th District); *State v. McBride*, Stark App. No. 2008-CA-00076, 2008-Ohio-5888, ¶ 26 (5th District); *State v. Price* (March 29, 1996), Lucas App. No. L-95-071, unreported at *9 (6th District); *State v. Peeples*, Mahoning App. No. 07 MA 212, 2009-Ohio-1198, ¶ 56 (7th District); *State v. Carter*, Cuyahoga App. No. 84036, 2004-Ohio-6861, ¶ 38-40 (8th District); *State v. Hill*, 160 Ohio App.3d 324, 827 N.E.2d 351, ¶ 31-41 (8th District); *State v. Jenkins*, Cuyahoga App. No. 87606, 2006-Ohio-6421, ¶ 27-28, (8th District); *State v. Swaby*, Summit App. No. 24528, 2009-Ohio-3690, ¶ 7 (9th District); *State v. Jennings*, Franklin App. Nos. 09AP-70, 09AP-75, 2009-Ohio-6840, (10th District); *State v. Jenkins*, Lake App. No. 2003-L-173, 2005-Ohio-3092, ¶ 37-38, (11th District); and *State v. Wynn*, Butler App. No. CA2009-04-120, 2009-Ohio-6744, ¶ 17 (12th District).

Applied here, any error in the admission of the autopsy report or testimony of Dr. Felo was harmless beyond a reasonable doubt considering the overwhelming evidence of Defendant's guilt. Eyewitness testimony from the Defendant's child established that Defendant shot the victim. Additional witnesses corroborated this testimony by placing Defendant at the victim's home with a

gun immediately before the victim was killed. Identity was not an issue in this case nor was the fact that the victim met her untimely death due to gunshot wounds to her head. Thus, the autopsy report and testimony of Dr. Felo at Defendant's trial simply did not contribute in any measurable degree to his convictions. Even if this Court finds that the admission of the autopsy report and testimony of Dr. Felo implicated Defendant's right to confrontation, Defendant's convictions cannot be overturned.

In sum, "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. 'A defendant is entitled to a fair trial but not a perfect one.'" *Bruton v. U.S.* (1968), 391 U.S. 123, 135, 88 S.Ct. 1620, quoting *Lutwak v. United States* (1953), 344 U.S. 604, 619, 73 S.Ct. 481. In this case, Defendant received a fair trial. The autopsy report and testimony of Dr. Felo never implicated Defendant's rights under the Confrontation Clause. If any constitutional error occurred it was harmless beyond a reasonable doubt.

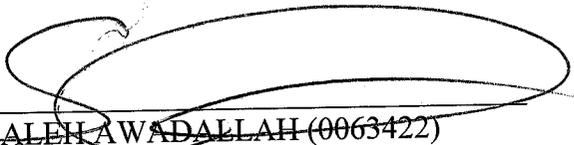
CONCLUSION

The State of Ohio respectfully requests this Honorable Court reject Defendant-Appellant Charles Maxwell's fifteenth proposition of law and affirm his convictions and sentence

Respectfully submitted,

TIMOTHY J. MCGINTY
CUYAHOGA COUNTY PROSECUTOR

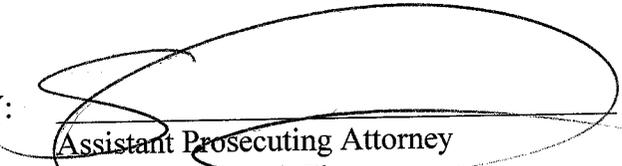
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SERVICE

A true and accurate copy of the foregoing Supplemental Merit Brief of Appellee has been sent by regular United States mail on this 29th day of April, 2013, to David L. Doughten, Esq., and John P. Parker, Esq., Counsel for Defendant-Appellant Charles Maxwell, at 4403 St. Clair Avenue, Cleveland, Ohio, 44103-1125.

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313.09 Records.

The coroner shall keep a complete record of and shall fill in the cause of death on the death certificate, in all cases coming under his jurisdiction. All records shall be kept in the office of the coroner, but, if no such office is maintained, then such records shall be kept in the office of the clerk of the court of common pleas. Such records shall be properly indexed, and shall state the name, if known, of every deceased person as described in section 313.12 of the Revised Code, the place where the body was found, date of death, cause of death, and all other available information. The report of the coroner and the detailed findings of the autopsy shall be attached to the report of each case. The coroner shall promptly deliver, to the prosecuting attorney of the county in which such death occurred, copies of all necessary records relating to every death in which, in the judgment of the coroner or prosecuting attorney, further investigation is advisable. The sheriff of the county, the police of the city, the constable of the township, or marshal of the village in which the death occurred may be requested to furnish more information or make further investigation when requested by the coroner or his deputy. The prosecuting attorney may obtain copies of records and such other information as is necessary from the office of the coroner. All records of the coroner are the property of the county.

Effective Date: 08-26-1975

RULE 801. Definitions

The following definitions apply under this article:

(A) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(B) **Declarant.** A "declarant" is a person who makes a statement.

(C) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(D) **Statements which are not hearsay.** A statement is not hearsay if:

(1) **Prior statement by witness.** The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with declarant's testimony, and was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive, or (c) one of identification of a person soon after perceiving the person, if the circumstances demonstrate the reliability of the prior identification.

(2) **Admission by party-opponent.** The statement is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

[Effective: July 1, 1980; amended effectively July 1, 2007.]

RULE 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then existing, mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown by the testimony of the witness to have been made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of entry in record kept in accordance with the provisions of paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a

memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of vital statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirement of law

(10) **Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 901(B)(10) or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of religious organizations.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Marriage, baptismal, and similar certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) **Family records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the

document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of the declarant's family by blood, adoption, or marriage or among the declarant's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of the declarant's personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among the person's associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of no contest or the equivalent plea from another jurisdiction), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

[Effective: July 1, 1980; amended effective July 1, 2006; July 1, 2007.]