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CRAWFORD AND FORFEITURE BY WRONGDOING: ISSUES FOR PROSECUTORS

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Hearsay is a part of virtually every criminal prosecution. Therefore the ability to recognize hearsay and analyze its admissibility is a critical skill for prosecutors. There are two basic hurdles in admitting hearsay in a criminal trial: 1) the rules of evidence; and 2) the Confrontation Clause.

Under the rules of evidence, a prosecutor must evaluate whether a particular out-of-court declaration is a statement, whether that statement is hearsay, whether that hearsay fits an exception, and whether the hearsay is more probative than prejudicial. The Confrontation Clause generally bars the admission of testimonial statements unless the declarant testifies or there has been a prior opportunity for confrontation and cross-examination. Under the Confrontation Clause, the prosecutor must evaluate whether the statement is testimonial, whether the declarant will testify, and whether there was a prior opportunity for cross-examination.

After Crawford, there are two basic questions for admitting hearsay in a criminal case:

- 1) Does it satisfy the Confrontation Clause?
- 2) Does it satisfy the rules of evidence?

I. THE SIXTH AMENDMENT AND HEARSAY

A. IS THE STATEMENT TESTIMONIAL?

1. The Basic Rule

Crawford v. Washington, 124 S.Ct. 1354 (2004). The Court held that an out-of-court statement by a witness that is testimonial is barred under the Confrontation Clause of the Sixth Amendment unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness regardless of whether such statement is deemed reliable by the court, abrogating Ohio v. Roberts, 448 U.S. 56 (1980).

See State v. Caulfield, 722 N.W.2d 304 (Minn. 2006) (discussing Crawford).

RULE: Where testimonial statements are at issue, the only indicia of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

If a hearsay statement is testimonial and sought to be introduced for the truth of the matter asserted, then it may only be admitted 1) if the declarant were to testify at trial, or 2) if the declarant is unavailable to testify, but the defendant was afforded a prior opportunity to cross-examine declarant about the particular statement.

2. The Primary Purpose Test

Davis v. Washington, 126 S. Ct. 2266 (2006) (Includes Hammon v. Indiana). See State v. Wright, 726 N.W.2d 464 (Minn. 2007) (adopting and analyzing primary purpose test for 911 calls and on-scene statements to police).

Primary Purpose Test-Non Testimonial: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.

911 Call was non-testimonial because the complainant was 1) speaking about events “as they were actually happening,” 2) facing an ongoing emergency (call was for help against bona fide physical threat), 3) giving statements necessary to resolve a present emergency, not to resolve a past incident, and 4) in an informal environment (frantic answers, over the phone, unsafe and not tranquil). However, the Court also recognized that statements elicited during an interrogation to determine the need for emergency assistance could develop into testimonial statements.

Primary Purpose Test – Testimonial: Statements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”

On-scene statements were found testimonial because 1) the interrogation was part of an investigation into possibly criminal past conduct, 2) no emergency was in progress (when officers initially asked the victim if anything was wrong, she said “nothing was the matter”), 3) officers were trying to elicit statements to find out about what had happened, 4) the interrogation was “formal enough” (the complainant and defendant were actively separated, complainant was asked to deliberately recount her statement in a battery affidavit and the interrogation took place after the incident was over).

Michigan v. Bryant, 131 S.Ct. 1143 (2011) **Primary Purpose Test Modified**

The existence of an emergency is “an important factor” in the primary purpose test, however the Court expanded on what constitutes an “ongoing threat” by noting that it is broader than simply the initial victim.

State v. Warsame, 735 N.W.2d 684 (2008)

A defendant’s flight together with the potential medical condition of a third party with him during the flight constituted an ongoing emergency.

3. Other Examples

a) Statements to Third Parties

Crawford v. Washington, 541 U.S. 36 (2004), “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.

i) **To family members:** State v. Moua-Her, 750 N.W.2d 258 (Minn. 2008) reversed on other grounds 555 U.S. 1092 (2009).

ii) **To Medical Personnel:** State v. Scacchetti, 711 N.W.2d 508 (Minn. 2006) (statement of child to nurse was not testimonial)

iii) **Testimonial Social Worker / Multi-disciplinary team member:** Bobadilla v. Carlson, 575 F.3d 785 (8th Cir. 2009) (child’s statements to social worker and police officer during forensic interview were testimonial, violated the Confrontation Clause, and warranted habeas relief) – **overruled** State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006)

iv) **Co-conspirator to informant:** State v. Larson, 788 N.W.2d 25 (Minn. 2010) (statements of co-conspirators to friends and acquaintances not testimonial); State v. Morales, 788 N.W.2d 737 (Minn. 2010) (same).

b) Lab Reports/Autopsies

Lab Reports:

Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011).

A DUI lab report admitted without the testimony of the lab analyst violated the Confrontation Clause. “A document created solely for an evidentiary purpose...made in aid of a police investigation ranks as testimonial.”

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009) held that the certified report of a lab analyst that the drugs seized were cocaine was testimonial and its admission violated the Confrontation Clause. Rejected the dissenters’ view that the lab analysts were “neutral” witnesses and found that there are no neutral witnesses against the accused. The Court left open the possibility of “Notice and Demand” states that put the defendant on notice that the state intends to offer a lab report and permits the defendant to demand that the state produce the witness. However, it is improper for the state to require the defendant to call the lab analyst.

State v. Jackson, 764 N.W.2d 612 (2009), held a firearm trace report (who owned it when) was not testimonial. This decision is doubtful in light of Bullcoming.

Autopsies:

State v. Johnson, 756 N.W.2d 583 (2008) held an autopsy report is testimonial. The Court has not addressed whether a forensic pathologist could reach independent conclusions based upon the reports, photos, etc. produced during the original autopsy.

B. IF IT’S TESTIMONIAL, IS THE DECLARANT TESTIFYING AND SUBJECT TO CROSS-EXAMINATION?

1. Is the Declarant Testifying?

Barriers & Screens: U.S. v. Bordeaux, 400 F.3d 548 (8th Cir. 2005) (Where a child victim testified via two-way closed-circuit television during a sexual abuse trial, admission of statements made to a government official at a “forensic interview” violated the defendant’s rights under the confrontation clause. The court concluded that closed circuit confrontation is not the constitutional equivalent of face-to-face confrontation because the encounter is virtual in nature and may have a diluted truth inducing effect. As a result, the closed-circuit testimony of the victim served the functional equivalent of absence from trial and improperly introduced testimonial statements without the opportunity to cross-examine.); US v. Yates, 438 F.3d 1307, 1313-8 (11th Cir. 2006) (en banc) (applying Craig and holding that the District court’s decision to permit live testimony, via 2-way video transmission, of a witness in a foreign country violated the Confrontation Clause). But see State v. Vogelsberg, Slip Copy, 2006 WL 3025684 (Wis.App. 2006) (A four year old child victim of sexual assault was permitted to testify from behind a screen to shield him

from contact with defendant. Defendant claimed that after Crawford, the use of the shield deprived him of his confrontation rights. In reviewing this claim, the appellate court provides an in-depth history of decisions addressing confrontation clause challenges to the use of barriers, both pre- and post-Crawford. In Coy v. Iowa, 487 US 1012 (1988), the Supreme Court struck down an Iowa statute that permitted the use of barriers between child witnesses and the accused without a prior particularized finding of necessity. The Court noted that any exception to a defendant's confrontation rights must be necessary to further an important public policy and supported by a particularized finding that a witness required special protection. In the subsequent case of Maryland v. Craig, 497 U.S. 836 (1990), the Supreme Court ruled that the state's interest in protecting the child witness from trauma may be sufficiently important to justify the use of a special procedure that denies a defendant of face-to-face confrontation. However, the state must first make an adequate showing of necessity, considering factors outlined by the Court. Here, the Wisc. Court of Appeals determined that Crawford did not overrule Craig; while Crawford concerned itself with the opportunity to cross examine witnesses, Craig addressed whether the demands of the Confrontation Clause are met following a specific determination that necessity requires the placement of a barrier between the witness and the accused. The use of the barrier in this case did not violate defendant's constitutional rights.].

2. Is the declarant subject to cross-examination?

Opportunity for cross: U.S. v. Owens, 484 U.S. 554, 559 (1988) (“The confrontation clause guarantees only “an opportunity for cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish.”).

Lack of memory:

State v. Holliday, 745 N.W.2d 556 (2008), held that a witness' lack of memory did not result in a Confrontation Clause violation because the declarant was subject to cross examination. This echoes Owens which noted that a lack of memory was one of the things cross-examination is designed to bring out and is used to determine credibility.

Refusal to testify

State v. Morales, 788 N.W.2d 737 (Minn. 2010), a co-defendant who had been given use immunity refused to answer virtually all questions – save one. The State then questioned the witness about his prior incriminating grand jury testimony. The Court did not decide the Confrontation Clause issue because it determined that the witness was not “subject to cross-examination concerning the prior statement” as required by Minn. R. Evid. 801(d)(1)(A). However, it is unlikely that the complete refusal to answer questions would withstand Confrontation Clause scrutiny.

C. IF THE DECLARANT IS UNAVAILABLE, WAS THE PRIOR STATEMENT UNDER OATH AND SUBJECT TO CROSS-EXAMINATION?

1. Is the declarant unavailable?

a) See Minn. R. Evid. 804(a)

- Privilege
- Persists in refusing to testify
- Lack of memory
- Dead or absent because of physical/mental infirmity
- Absent and attendance cannot be reasonably procured
(Proponent cannot cause absence)

b) State Must Demonstrate Unavailability: State v. Cox, 779 N.W.2d 844 (Minn. 2010) (Confrontation Clause violated where state failed to demonstrate declarant was unavailable. Declarant told court in chambers that she was afraid but never actually refused to testify).

2. Was the prior statement under oath and subject to cross-examination.

a) Preliminary hearings: Cf. People v. Fry, 92 P.3d 970 (Colo. 2004)

(Preliminary hearings in Colorado do not provide enough opportunity for cross-examination to satisfy the Confrontation Clause requirements under Crawford.) and People v. Price, 15 Cal. Rptr. 3d 229 (Cal. App. 1 Dist. 2004) (Defendant had enough opportunity to cross-examine the victim at the preliminary hearing for the hearsay testimony to be properly admitted at trial.). Not really applicable in Minnesota.

b) Prior trial: State v. Byers, 570 N.W.2d 487 (Minn. 1997) (Decided under Ohio v. Roberts so continuing validity is questionable but admitted prior testimony of fellow gang member.

D. IS THERE FORFEITURE BY WRONGDOING?

A defendant may forfeit his right to confrontation if he has “engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.” Fed. Rule of Evid. 804(b)(6). Davis v. Washington, 547 U.S. 813, 833, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)(The rule “which codifies the forfeiture doctrine.”).

However, there must be a showing of an intent to prevent the witness from testifying. Giles v. California, 128 S.Ct. 2678, 2684 (2008) (unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying. In the domestic abuse context, the court recognized that prior “acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions...such evidence may support a finding that the conduct expressed the intent to isolate the victim and to stop her from reporting abuse or cooperating with a criminal prosecution – rendering her prior statements admissible under the forfeiture doctrine.)

State v. Cox, 779 N.W.2d at 851:

In Minnesota, the forfeiture by wrongdoing exception requires the State to prove

- 1) That the declarant is unavailable
- 2) That the defendant engaged in wrongful conduct;
- 3) That the wrongful conduct procured the unavailability of the witness; and
- 4) That the defendant intended to procure the unavailability of the witness.

PLUS: The statement must be admissible under the rules of evidence.

II. THE RULES OF EVIDENCE

A. IS IT HEARSAY?

Minn. R. Evid. 801(c) defines hearsay as an out-of-court, “statement... offered in evidence to prove the truth of the matter asserted.” If you can demonstrate that the remark is not a “statement” or that it is “not being offered” for the truth, then you have shown it is not hearsay and is admissible if otherwise relevant.

1. It’s Not A Statement.

Minn. R. Evid. 801(a) defines a statement as “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended as an assertion.

a) **Questions:** Not hearsay.

A true question is not hearsay.

Example: Bustamonte v. State, 557 N.E.2d 1313 (Ind. 1990). An arsonist sent a letter asking for money before the fire. The request was not hearsay.

b) **Commands or Instructions:** Not hearsay.

A command is a “verbal act”, not an assertion of fact.

Example: U.S. v. Reilly, 33 F.3d 1396 (3rd Cir. 1994). An instruction to dump ash at sea was not hearsay.

2. It’s Not Being Offered For The Truth Of The Matter.

801(c) says that a statement is only hearsay if it is offered for the truth of the statement. “Out of court statements offered for purposes other than proving the truth of the matter asserted are not hearsay. State v. Champion, 353 N.W.2d 573, 580 (Minn. App. 1984). However, a limiting instruction should be given.

a) **Statements Rendering Conversation Intelligible:** Not Hearsay.

In a taped conversation, between the defendant and a non-testifying informant, the statements of the informant are not hearsay if they render the defendant’s statements intelligible.

Example: U.S. v. Sorrentino, 72 F.3d 294, 298 (2nd Cir. 1995).

b) **Motive:** Not Hearsay.

A statement or materials offered to show a relevant motive or state of mind is not hearsay.

Example: U.S. v. Salameh, 152 F.3d 88, 112 (2nd Cir. 1998)(World Trade Center bombing case. Seized bomb making books not hearsay because used to show motive and state of mind of defendants).

c) **Exemplars:** Not Hearsay

A handwriting or voice exemplar is an identifying characteristic not testimonial speech.

Example: Gilbert v. California, 388 U.S. 263 (1969).

d) **Statements Showing Reasonableness Of Investigation:** “A police officer testifying in a criminal case generally may not, under the guise of explaining how an investigation focused on the defendant, relate hearsay statements of others. State v. Cermak, 365 N.W.2d 243, 247 (Minn. 1985).

3. It Meets An Exception in 801(d)(1) – The Declarant Testifies At Trial

a) **Prior Inconsistent Statement**

801(d)(1)(A) allows prior inconsistent statements to be admitted as substantive non-hearsay if:

- 1) The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement;
- 2) The statement is inconsistent with the declarant’s testimony; and
- 3) The prior statement was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition.

See State v. Morales, 788 N.W.2d at 759.

b) **Prior Consistent Statement**

801(d)(1)(B) allows prior consistent statements to be admitted as substantive evidence if:

- 1) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement; and
- 2) The statement is consistent with the declarant’s testimony and helpful to the trier of fact in evaluating the declarant’s credibility as a witness.

In State v. Nunn, 561 N.W.2d 902, 909 (Minn. 1997) this rule was interpreted in a slightly different manner. Under Nunn, and State v. Manley, 754 N.W.2d 686, 702 (Minn. 2008), Minn. R. 801(d)(1)(B) the court must determine whether:

- 1) There has been a challenge to the witness’s credibility;
- 2) The prior consistent statement would be helpful to the trier of fact in evaluating the witness’s testimony;
- 3) The prior statement and the trial testimony are consistent with each other; and
- 4) The prior statement must bolster the witness’ credibility with respect to the challenged aspect.

c) Prior Identification

801(d)(1)(C) treats prior statements of identification as non-hearsay if:

- 1) The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement; and
- 2) The statement is one of identification made after perceiving the person, if the court is satisfied that the circumstances of the prior identification demonstrate the reliability of the prior identification.

In State v. Robinson, 718 N.W.2d 400 (Minn. 2008), the Minnesota Supreme Court held that this exception “does not extend to the out-of-court accusation against an offender whose identity was well-known to the victim.

4. It’s A Statement By A Party-Opponent

Although there are several sections on admissions by party-opponents, there are three that are especially important for prosecutors: the defendant’s own statements, adoptive admissions, and statements during and in furtherance of a conspiracy.

a) A Party’s Own Statements

801(d)(2)(A) excludes a party’s own statements from hearsay where they are offered against the party.

A defendant’s own statements are not hearsay where they are offered against him. State v. Reed, 737 N.W.2d 572 (Minn. 2007).

b) Co-conspirator Statements During And In Furtherance Of A Conspiracy

801(d)(2)(E) permits introduction of a co-conspirator’s statements made during and in furtherance of a conspiracy.

In Minnesota, generally “statements designed to promote the common good of the conspirators are admissible but simple narrative statements of what happened are not.” State v. Flores, 595 N.W.2d 860 (Minn. 1999).

B. IF IT IS HEARSAY, DOES IT MEET AN EXCEPTION?

1. 803 Exceptions – Does not matter if declarant is unavailable.

a) Excited Utterance

803(2) is the excited utterance exception. In State v. Moua-Her, 750 N.W.2d 258, 276 (Minn. 2008) rev. on other grounds 555 U.S. 1092 (2009), the Court held the basic elements of an excited utterance are:

- 1) A startling event or condition;
- 2) The statement relates to the events or condition; and
- 3) The statement is made under the stress caused by the event or condition.

b) Medical Diagnosis Or Treatment

803(4) is the medical diagnosis or treatment exception. It requires:

- 1) A statement made for diagnosis or treatment; and
- 2) The statement describes medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source therefore insofar as reasonably pertinent to diagnosis or treatment.

Statements that identify the perpetrator, however, require additional foundation.

For children, the proponent must show that the “child knew she was speaking to medical personnel and that it was important she tell the truth. State v. Salazar, 504 N.W.2d 774 (Minn. 1993)

For adults alleging domestic abuse, the State must put in “expert testimony on the scope of the customary treatment of a victim of domestic violence and whether the identity of the domestic abuser is reasonably pertinent to that treatment.” State v. Robinson, 718 N.W.2d 400, 405-06 (Minn. 2008).

c) Recorded Recollection

803(5) is the past recollection recorded exception. The contents of a record or memorandum may be admitted if:

- 1) The document, record (or even a recording) constitutes a “memorandum or record”;

- 2) the witness now has insufficient recollection to testify fully and accurately;
and
- 3) the statement was made or adopted by the witness when the matter was fresh in the witness' memory.

State v. Stone, 784 N.W.2d 367 (Minn. 2010). In Stone, the Court permitted admission of a recording even where it was recorded by the police and the witness was never asked to formally adopt the recording. Instead, the Court held that the witness “made” the recorded statement.

d) Business Record

803(6) is the business record exception. In Minnesota, to qualify as a business record:

- 1) The record must be kept in the course of a regularly conducted business activity;
- 2) The document must have been made as a regular practice of that business activity; and
- 3) The custodian of the record or another qualified witness must provide a foundation for the evidence by explaining the recordkeeping of the organization.

Nat'l Tea Co. v. Tyler Refrigeration Co., 339 N.W.2d 59, 61 (Minn. 1983).

A memorandum, record, report or data compilation prepared for litigation is not admissible under the rule. 803(6). In determining whether a document offered under rule 803(6) was prepared for litigation, “a district court must consider when and by whom the report was made and the purpose of the report.” In re Child of Simon, 662 N.W.2d 155, 160 (Minn. App. 2003).

2. 804 Exceptions – Declarant must be unavailable.

a) Unavailability

804(a) defines unavailability as situations where the declarant:

- (1) Is exempted by virtue of a privilege.
- (2) Persists in refusing to testify concerning the subject of the statement despite an order of the court to do so.
- (3) Testifies to a lack of memory of the subject matter.

- (4) Is unable to be present or to testify at the hearing because of death or then physical or mental illness or infirmity.
- (5) Is absent from the hearing and the proponent ..has been unable to procure the declarant's attendance...by process or other reasonable means. A declarant is not unavailable if the absence...is due to the procurement or wrongdoing of the proponent...for the purpose of preventing the witness from testifying.

A witness will not be deemed "unavailable" unless good faith efforts have been made to locate and present that witness. United States v. Quinn, 901 F.2d 522, 527-28 (6th Cir.1990)(Government issued subpoena only days before trial).But, Cf. U.S. v. Pena-Gutierrez, 222 F.3d 1080 (9th Cir. 2000)(Deported witness not unavailable where government had address in Mexico and made no effort to contact witness) and U.S. v. Olafson, 213 F.3d 435 (9th Cir. 2000)(Deported witness unavailable where deportation was inadvertent and witness told agent he would refuse to return to the U.S. to testify).

b) Former Testimony

804(b)(1) provides that former testimony is admissible if:

- 1) The testimony was given as a witness; and
- 2) The party against whom the statement is offered had an opportunity; and
- 3) Similar motive to develop the testimony by, direct, cross or redirect examination.

See, State v. Byers, 570 N.W.2d 487 (Minn. 1997)(Defendant's membership in gang and gang's "code of silence" resulted in witness' unavailability and witness' prior testimony was therefore admissible).

c) Statement Against Interest

804(b)(3) permits the introduction of a statement against interest. For prosecutors, this arises most often when one of the criminal conspirators confesses to involvement in the crime. In Minnesota, there are 3 requirements for admissibility:

- 1) The declarant must be unavailable;
- 2) The statement must at the time of its making...so far tend to subject the declarant to civil or criminal liability...that a reasonable person in the

declarant's position would not have made the statement unless believing it to be true; and

3) The court must scrutinize the statements to avoid violating the confrontation clause.

State v. Morales, 788 N.W.2d at 762 (citing State v. Tovar, 605 N.W.2d 717 (Minn. 2000)).

3. 807 – Residual Clause

The residual clause, formerly 803(24) and 804(b)(7), permits the introduction of hearsay that does not fit the other exceptions provided:

- (A) the statement is offered as evidence of a material fact;
- (B) the statement is more probative on the point than other available evidence;
- (C) the general purposes of the rule and the interests of justice will be served by admission of the evidence; and
- (D) the proponent makes the statement known to the adverse party sufficiently in advance...to provide the adverse party with a fair opportunity to meet it, the intention to offer the statement, and the particulars of it including the name and address of the declarant.

State v. Morales, 788 N.W.2d at 760.

C. Probative Outweigh Prejudice – Rule 403

403: Although relevant, evidence 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 considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The trial court should engage in this balancing each time a hearsay ruling is made. It is particularly important where the hearsay is likely to elicit a strong reaction from the jurors. A ruling at the trial court gives the proponent a much stronger argument on appeal since the appellate courts largely defer to trial court rulings on this issue.

HEARSAY ADMISSIBILITY CHECKLIST

I. DOES IT SATISFY THE CONFRONTATION CLAUSE?

- A. Is the statement **testimonial**?
- B. If testimonial, is the **declarant testifying** at this trial and available for cross-examination?
- C. If the declarant is unavailable, was the prior statement **under oath and subject to cross-examination**?
- D. Is there **forfeiture by wrongdoing**?

II. DOES IT SATISFY THE HEARSAY RULES?

A. Is it hearsay?

Is it an out of court statement **offered for the truth** of the matter?

Is the declarant testifying and the statement meets one of the definitions of **non-hearsay in 801(d)**?

D. If it's hearsay, does it meet an **exception** to the hearsay rules?

Does it meet an exception in **803**?

Does it meet an exception in **804**?

Did you give notice and does it meet the exceptions in **807**?

E. If it's admissible, does the **probative value outweigh prejudice** under 403?

F. If it's admissible, should a **limiting instruction** be given?