

7-1-2001

Statements of Bystanders to Police Officers Containing an Accusation of Criminal Conduct Offered to Explain Subsequent Police Conduct

Joëlle Hervic

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Evidence Commons](#)

Recommended Citation

Joëlle Hervic, *Statements of Bystanders to Police Officers Containing an Accusation of Criminal Conduct Offered to Explain Subsequent Police Conduct*, 55 U. Miami L. Rev. 771 (2001)
Available at: <https://repository.law.miami.edu/umlr/vol55/iss4/17>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

Statements of Bystanders to Police Officers Containing an Accusation of Criminal Conduct Offered to Explain Subsequent Police Conduct

I. INTRODUCTION

The content of out-of-court statements of occurrence witnesses made to law enforcement officials are often offered by the government in criminal trials to explain police conduct in relation to a criminal investigation. These statements typically are admitted for a purpose other than for their truth, pursuant to Rule 801 of the Federal Rules of Evidence.¹ In many federal courts and in a number of state courts, these out-of-court statements are used regularly as a way to circumvent the rules against hearsay, with the ringing endorsement of judges. Thus, prosecutors are permitted to bring to the jury's attention the substance of out-of-court assertions either directly or inferentially. The willingness of the federal courts and some state courts to embrace even the most blatant forms of hearsay under the rubric of nonhearsay, while applying at best, minimal scrutiny, eviscerates not only the integrity of the Federal Rules of Evidence but also compromises defendants' Sixth Amendment right of confrontation under the United States Constitution.

This Comment examines the risks involved in admitting such testimony and advocating techniques and options for ameliorating such risks. It is the position of the author that prior to allowing the content of such statements as nonhearsay, courts should apply not only minimum threshold tests of relevance, but also determine that there is sufficient probative value to outweigh unfair prejudice to the defendant. An example of this standard is found in Illinois:

The trial judge first must determine whether the out-of-court words, offered for some purpose other than their truth, have any relevance to an issue in the case. If they do, the judge then must weigh the relevance of the words for the declared nonhearsay purpose against the risk of unfair prejudice and possible misuse by the jury. . . .²

The level of scrutiny utilized by the courts is inconsistent, as standards and approaches vary wildly between jurisdictions.³ While the methodology used by Illinois goes a long way towards achieving a desir-

1. FED. R. EVID. 801.

2. *People v. Warlick*, 707 N.E. 2d 214, 218 (Ill. App. Ct. 1998) (citing *People v. Cameron*, 546 N.E. 2d 259 (Ill. App. Ct. 1989)).

3. *Compare Keen v. State*, 775 So. 2d 263 (Fla. 2000) with *United States v. Linwood*, 142 F.3d 418, 425 (7th Cir. 1998).

able level of scrutiny to determine the appropriateness of admitting the content of out-of-court statements made by occurrence witnesses, it lacks the additional rigor of a requirement of enhanced relevance that is triggered when the defendant has "opened the door" concerning a police investigation. Such additional scrutiny may be easily defended: Heightened standards would assist in clarifying a growing morass of conflicting views and standards that result at times in confusion that is evident in the courts. The current approach of many jurisdictions permits the content of out of court statements that, although perhaps relevant, are often far outweighed in their probative value by unfair prejudice.

Statements offered for a reason other than for their truth are not hearsay as defined under Rule 801 and are therefore not caught by the rule against hearsay in Federal Rule of Evidence 802. Rule 802 provides that hearsay is not admissible unless it falls under a prescribed hearsay exception.⁴ Allowing testimony regarding the content of an informant's out-of-court statement often involves statements having hearsay components. Indeed, the content of such out of court statements may at times have no authentic nonhearsay component, depending on the context, the trial issues and the reasons advanced by counsel for permitting such statements.

II. THE RISK OF UNFAIR PREJUDICE

The hearsay risk in this area is at its most troublesome when the content of out-of-court statements is permitted that addresses a matter going to the heart of a trial, either directly or by way of inference. For example, where testimony is permitted as nonhearsay to the effect that the defendant was engaged in the criminal act for which he is charged, the prosecution's burden of proof is diluted.

Marginally relevant nonhearsay evidence should not be considered sufficient on its own to be permitted merely because it arises in the context of a police investigation. Testimony that relies on this type of nonhearsay evidence is all too frequently used as a means to permit the introduction of damaging hearsay evidence involving the substance of an out of court statement made by a third party. While the hearsay evidence may be relevant, without the nonhearsay component, the evidence would have been excluded. Such testimony is highly prejudicial and should not be heard by a jury.

The jury is likely to consider such testimony for its truth, with resulting prejudice to the defendant, where such testimony has a hearsay component but where the basis of its admissibility is for a purpose other

4. FED. R. EVID. 802.

than for its truth.⁵ Jurors, in spite of their best intentions, may have enormous difficulty in not being swayed by testimony that on its face implicates the defendant and goes to the heart of the issue of the defendant's guilt. This improper use of nonhearsay occurs by the jury, notwithstanding the jury being given a Federal Rule of Evidence 105 limiting instruction by the judge on the proper and improper use of such testimony.⁶

There are a multitude of concerns that arise from allowing testimony by a government witness that recounts an extrajudicial conversation between an occurrence witness and a government agent. One such concern relates to the probative value of the offered testimony. If indeed such testimony has any probative value, it is often far outweighed by the unfair prejudice to the defendant. By allowing such statements, a defendant has little opportunity to contain the damage resulting from such testimony.

This is not to say that out-of-court statements pertaining to a criminal investigation should never be permitted or that they are always of low probative value. Indeed, such statements should be permitted, when they are relevant and of sufficient probative value. In the absence of special circumstances and the existence of independent relevance, such as an issue of improper investigative methods, however, these statements ought not be admitted. All too often, the relevance of out of court statements is found by judges to exist in the police investigation itself, where no special circumstances or issues exist, and the relevance is therefore bootstrapped to the police investigation itself—hardly satisfactory.⁷

One judge has commented:

[N]o court has explained why investigative background is not hearsay or is necessary or even helpful to jurors in a criminal trial. Jurors need not revisit the government's preliminary investigative processes, especially when such low-value evidence comes at such a high price to the accused. For prosecutors determined to present such low-value evidence, they should at least have to produce the out-of-court declarant for cross examination or demonstrate his or her unavailability.⁸

5. See *United States v. Forrester*, 60 F.3d 52, 62 (2d Cir. 1995). "The government's identification of a relevant non-hearsay use for such evidence, however, is insufficient to justify the admission if the jury is likely to consider the statement for the truth of what was stated with significant resultant prejudice." *Id.* at 71 (citing *United States v. Reyes*, 18 F.3d 65, 69 (2d Cir. 1994)).

6. FED. R. EVID. 105.

7. See *United States v. Lazcano*, 881 F.2d 402 (7th Cir. 1989); *United States v. Freeman*, 816 F.2d 558 (10th Cir. 1987).

8. *United States v. Martin*, 897 F.2d 1368, 1373 (6th Cir. 1990) (Merritt, C.J., concurring in part, and dissenting in part).

The testimony should be elicited from the informant in court, who would therefore be subject to cross-examination. Alternatively, as espoused by Chief Judge Merritt in *Martin*, where a prosecution witness is unavailable, the prosecution should be required to demonstrate the unavailability of the witness because of all the risks and unreliability of the hearsay testimony.⁹ This is so notwithstanding that such testimony is offered for a purpose other than for the truth of the statement.

III. HYPOTHETICAL CASES

Hypothetical A: An assault and armed robbery takes place in a neighborhood of Sunny Town. There are no witnesses other than the victim, who is in a coma. The police subsequently receive a tip from a confidential informant that the person responsible for the offense committed a similar crime two months ago and a description and address is provided. The police have no other suspects and the person named by the informant is subsequently charged. In his trial the police wish to testify to the informant's statement regarding the previous crime.

Hypothetical B: Agent Orange has been acting under cover, investigating a drug operation for some weeks. He receives a tip from a confidential informant that he is in danger and that one of the dealers, X, had announced that he would be carrying a gun the next time he was scheduled to meet Agent Orange. In response to what he has been told, Agent Orange arms himself in preparation for the next meeting with X as a precautionary measure. At the next meeting, Agent Orange observes X reach inside his jacket. Agent Orange shoots and wounds the suspect and subsequently places him under arrest.

In both hypotheticals, the government wishes to introduce testimony regarding the circumstances leading to the arrest of the defendant, including the content of the informants' out-of-court statements. To determine whether the testimony presented in either hypotheticals is admissible as nonhearsay, it is necessary at the outset to determine the logical and legal relevancy of the testimony.¹⁰ If the testimony is irrelevant, this ends the inquiry and the statement is inadmissible.¹¹ If a determination is made that the out-of-court statement contained in each hypothetical is relevant, the next step required in the analysis to determine admissibility is whether the statement is unfairly prejudicial and therefore inadmissible.¹² Norman M. Garland offers a useful step-by-step analysis in determining admissibility, relating to logical rele-

9. *Martin*, 897 F.2d at 1374.

10. See FED. R. EVID. 402.

11. See FED. R. EVID. 402.

12. See FED. R. EVID. 403.

vancy.¹³ These are:

(1) What is the evidence? (2) What is the evidence offered to prove? (3) Does the evidence help? This third question may, for ease of analysis, be broken into two subdivisions: (a) Does the evidence offered tend to make some assertion of fact at issue in the case more or less likely to be true, than if the evidence is not admitted?; (b) How does the evidence tend to prove that for which it is offered? (4) Even if the evidence helps, is its probative value (i.e., its ability to prove an assertion of fact at issue) substantially outweighed by the danger of unfair prejudice, confusion of the issues, possibility of misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence? This question, presented in Federal Rule of Evidence 403, requires a balancing of the costs and benefits of logically relevant evidence. . . . These first four questions constitute the analysis for logical relevance and the Rule 403 balancing test.¹⁴

The remaining questions applicable to whether these hypotheticals constitute nonhearsay concern legal relevancy ask, “(5) Is the evidence a statement? (6) If so, is the evidence of the statement offered for the truth of the matter asserted (or, alternatively, does the statement have to be true to be probative)?”¹⁵

If the answer to questions (5) and (6) is answered in the affirmative, the statements are hearsay and are irrelevant other than for their truth, and therefore are inadmissible as nonhearsay. Applying this analysis to Hypothetical A, the informant’s statement describing another crime that occurred weeks before, in order to link the offender involved in that crime with the defendant involved in the recent offense is irrelevant. It is pure hearsay as the statement’s only probative purpose is for its truth, viz., that it is the belief of an out-of-court declarant, not available for cross examination, that the most recent armed robbery was committed by the defendant. The statement is classic hearsay, and is therefore inadmissible, in addition to raising Federal Rule of Evidence 404¹⁶ inadmissibility issues, in so far as the statement is offered to show the propensity of the defendant to commit the present crime from proof of a past crime. There is no issue concerning the former crime to imbue the informant’s statement with any nonhearsay relevance. By contrast, in Hypothetical B, the informant’s out-of-court statement to Agent Orange, is admissible, because the events leading up to the arrest are now in issue and

13. Norman M. Garland, *An Overview of Relevance and Hearsay: A Nine Step Analytical Guide*, 22 S.W. U.L. REV. 1039 (1993).

14. *Id.* at 1039-40.

15. *Id.* at 1040.

16. FED. R. EVID. 404.

relevant. The statement is introduced for a purpose other than for its truth, viz., the effect on listener with regard to the subsequent conduct of Agent Orange in firing on the suspect.

Generally, where an out-of-court statement is offered to show the emotional or mental effect upon a listener, it would not be objectionable as hearsay, because it is not offered for the truth of the matter asserted, but rather offered by the proponent as circumstantial evidence of the state of mind of the listener.¹⁷ These statements may be admitted to show that a listener had knowledge of, or received notice of, a fact as a result of a particular statement having been made that was heard or read by the listener.¹⁸

Where, for instance, in an assault or homicide case, there is an issue of self-defense, an out-of-court statement made to the defendant that the victim threatened the defendant's life would be admissible to show that the defendant had a reasonable apprehension of danger. Whether such threat is communicated directly or indirectly to the defendant, it would still be admissible as nonhearsay for the purpose of showing the defendant's state of mind.

IV. ALTERNATIVE APPROACHES TO ADMITTING EXTRAJUDICIAL TESTIMONY CONCERNING POLICE INVESTIGATION AS NONHEARSAY

There are three main perspectives found presently in the courts for allowing out-of-court statements to be admitted as nonhearsay. They have varying appeal and may be appropriate in some contexts, but not in others. They can be summarized as:

A. Not permitting testimony to the substance of occurrence witness's statements where the sole relevance of such testimony is as background information relating to police investigation;¹⁹

B. The *Old Chief* school of thought that allows the substance of occurrence witness's statements as background information relating to police investigation;²⁰

17. *United States v. Linwood*, 142 F.3d 418, 425 (7th Cir. 1998). "Every statement that is made by someone other than the declarant while testifying at trial could, in theory, be used for the truth of the matter asserted. The fact of the matter, however, is that not every potentially hearsay statement is inadmissible, for there will often be a non-hearsay use for it" (emphasis in original).

18. *See Kelley v. Airborn Freight Corp.*, 140 F.3d 335, 345-46 (1st Cir. 1998) ("we agree that a customer complaint offered to show, for example, that a decision maker had notice of the complaint, rather than to prove the specific misconduct alleged in the complaint, is not barred by the hearsay rule."); *see also United States v. Chavis*, 772 F.2d 100 (5th Cir. 1985); *FED. R. EVID.* 801(c).

19. *State v. Baird*, 572 So. 2d 904 (Fla. 1990); *People v. Warlick*, 707 N.E.2d 214 (Ill. App. 3d 1998).

20. *Old Chief v. United States*, 519 U.S. 172 (1997).

C. Subjecting testimony concerning police investigation to an "upon information received" formulation (or similar limitation).²¹

A. *The Case Against Allowing Testimony of Content of an Occurrence Witness's Testimony as Background*

Admission of information received by a police officer in the investigation of a crime, on the basis that such information explains the officer's presence and conduct and therefore does not constitute hearsay evidence, is an area of widespread abuse. . . . Such information frequently has an impermissible hearsay aspect as well as a permissible nonhearsay aspect, and the court in determining admissibility should balance the need of the evidence for the proper purpose against the danger of improper use of the evidence by the jury. The fact that an officer acted on information received in an out-of-court assertion may be relevant to explain his conduct, but this fact should not become a passkey to bring before the jury the substance of the out-of-court information that would otherwise be barred by the hearsay rule.²²

In *State v. Broadway*,²³ the Supreme Court of Louisiana was very critical of the prosecutor's conduct in eliciting testimony that it considered to be hearsay. The case concerned the shooting and killing of a police officer and the shooting of a store manager while they were depositing the store's takings at the drive-in window of a bank.²⁴ During trial, the trial court permitted the prosecutor to present testimony from two police officers concerning the content of one of a codefendant's statements that identified the defendant as involved in the murder.²⁵ The court found the admission of the codefendant's statements constituted significant error.²⁶ The presence of other evidence, however, was found to render it harmless error.²⁷

When an out-of-court statement, such as information received by a police officer during an investigation of a crime, has both an impermissible hearsay aspect and a permissible nonhearsay aspect, the issue of relevancy becomes significantly interrelated with the hearsay issue. If the nonhearsay content of the statement has little or no relevance, then the statement should generally be excluded on both relevance and hearsay grounds. Marginally relevant nonhearsay evidence should not be used

21. *Jackson v. State*, 707 So. 2d 412 (Fla. 5th DCA 1998).

22. *State v. Broadway*, 753 So. 2d 801, 808 (La. 1999)(citations omitted) (emphasis added).

23. *Id.* at 809.

24. *Id.* at 805.

25. *Id.* at 806.

26. *Id.* at 810.

27. *Id.* at 818.

as a vehicle to permit the introduction of highly relevant and highly prejudicial hearsay evidence which consists of the substance of an out-of-court assertion that was not made under oath and is not subject to cross-examination at trial.²⁸

Absent some unique circumstances in which the explanation of purpose is probative evidence of a contested fact, such hearsay evidence should not be admitted under an "explanation" exception. The probative value of the mere fact that an out-of-court declaration was made is generally outweighed greatly by the likelihood that the jury will consider the statement for the truth of the matter asserted.²⁹

Of the existing approaches to the problem of allowing the content of out of court statements of occurrence witnesses, this approach is the most enlightened and that which arrives closest at upholding the intent of both the Federal Rules of Evidence and the United States Constitution.

B. *The Case in Favor of Allowing Unlimited Testimony Regarding Background to a Criminal Investigation:
The Old Chief Theory*

The defendant in *Old Chief*³⁰ was charged with violating a federal statute that prohibited possession of a firearm by any person who had been convicted of a felony.³¹ Johnny Lynn Old Chief, the defendant, offered to stipulate that he had been convicted of a felony and that the government had proven one of the essential elements of the offense with which he was charged.³² The government rejected the defendant's offer in favor of proving the offense by introducing a record of the defendant's prior conviction for assault resulting in serious bodily injury.³³ The district court agreed with the government, and over renewed objection, permitted the government to introduce the evidence of the prior conviction.³⁴

In a five-four split, Justice Souter announced the opinion of the Court in *Old Chief*, holding that the trial court had abused its discretion by allowing the defendant's conviction on the basis that "the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction."³⁵ This was particularly true because

28. *Id.* at 808 (emphasis omitted).

29. *Id.* at 809.

30. 519 U.S. 172, (1997).

31. *Old Chief*, 519 U.S. at 174.

32. *Id.* at 174.

33. *Id.* at 177.

34. *Id.*

35. *Id.* at 191.

the defendant had not testified, therefore Federal Rule of Evidence 609 was not applicable as there was no justification for introducing evidence relating to his conviction for impeachment.³⁶

Justice Souter distinguished between situations “when proof of convict status [was] at issue”³⁷ where:

“there is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the official record the prosecution would prefer to place in evidence. For purposes of the Rule 403 weighing of the probative against the prejudicial, the functions of the competing evidence are distinguishable only by the risk inherent in the one and wholly absent from the other.”³⁸

Old Chief contrasted the situation of proving felony status from the usual entitlement of the government “to prove its case free from any defendant’s option to stipulate the evidence away. . . .”³⁹ The Court concluded that in a criminal case, the jury is entitled to know the whole story behind the arrest of a defendant, and thus by implication sanctioned the introduction of out-of-court statements in recounting the story leading to an arrest.⁴⁰

The majority described the prosecutor as being entitled to some latitude in presenting a complete picture to the jury or risk the jury penalizing “the party who disappoints them by drawing a negative inference against that party.”⁴¹ “[A] defendant’s Rule 403 objection offering to concede a point generally cannot prevail over the Government’s choice to offer evidence showing guilt and all the circumstances surrounding the offense.”⁴²

Although the Court was careful to state that “[w]hile our discussion has been general because of the general wording of Rule 403, our holding is limited to cases involving proof of felon status,”⁴³ the decision has been used as a launching pad to justify virtually unlimited testimony by the government in the criminal context to explain the background of a police investigation.

In making an assumption about built-in relevance in the story itself, the decision in *Old Chief* has been taken out of its narrow context and

36. FED. R. EVID. 609.

37. *Old Chief*, 519 U.S. at 192.

38. *Id.* at 191.

39. *Id.* at 189.

40. *Id.* at 192.

41. *Id.* at 188 (quoting Stephen A. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CAL. L. REV. 1011, 1019 (1970)).

42. *Id.* at 183.

43. *Id.* at 183 n.7.

used by many courts, in particular, the federal courts, to justify dispensing with any real scrutiny of the content of an extrajudicial statement for its relevance prior to its admission. This movement represents the broadest approach seen in the courts and, in effect, offers a green light to virtually all extrajudicial statements made by an occurrence witness and offered by government witnesses as background information. Taking this approach, courts often fail to scrutinize a statement for its relevance and potential unfair prejudice, as required by Rules 401 and 403, aside from providing the background story of the police investigation. The risk inherent in that approach is that it results in statements constituting classic hearsay being admitted as nonhearsay with regularity because there is little or no screening for independent relevance.⁴⁴ Such hearsay is inadmissible.⁴⁵

In *United States v. Reyes*, the circuit court observed:

It is true, as the Government contends, that, in some instances, information possessed by investigating agents is received at trial not for the truth of the matter, but as "background" to explain the investigation, or to show an agent's state of mind so that the jury will understand the reasons for the agent's subsequent actions. Such evidence can be helpful in clarifying non-controversial matter without causing unfair prejudice on significant disputed matters. In other instances, it can constitute appropriate rebuttal to initiatives launched by the defendant . . . The proffer of such evidence generally raises two questions: first, whether the non-hearsay purpose by which the evidence is sought to be justified is relevant, *i.e.*, whether it supports or diminishes the likelihood of any fact "that is of consequence to the determination of the action," and second, whether the probative value of this evidence for its non-hearsay purpose is outweighed by the danger of unfair prejudice resulting from the impermissible hearsay use of the declarant's statement.⁴⁶

Contrary to the Supreme Court's position in *Old Chief*, there are many good reasons why testimony to the content of an extrajudicial statement made by a third party, not under oath, and not subject to cross-examination, would not be sufficient without more to admit it.⁴⁷ The

44. See *United States v. Trujillo*, 136 F.3d 1388 (10th Cir. 1988); *United States v. Gonzalez*, 967 F.2d 1032 (5th Cir. 1992).

45. See FED. R. EVID. 401.

46. *United States v. Reyes*, 18 F.3d 65, 70 (2d Cir. 1994) (citations omitted).

47. "People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best. . . [T]he prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story. . ." *Old Chief*, 519 U.S. at 189-190.

court may be criticized for having lost sight of which of the parties is in need of protection; the defendant's rights are protected by Rule 401 and 403, and by the United States Constitution, and it is the defendant who risks incarceration or the death penalty upon conviction.

In fact, the defendant is under a cloud of negative inference from the beginning of a trial, even before anybody has opened his or her mouth. This arises from the defendant's very presence in court as the person accused. The police, it is assumed, would not have wasted their time and resources on this person unless he or she is the "one." That in itself is a powerful negative inference and is a powerful counterbalance to the presumption of innocence. The United States Supreme Court should be more concerned with negative inferences drawn against the defendant than with a possible negative inference that may be drawn against the prosecution should it be deprived of being able to recount the whole story of their investigation.

In federal courts, the position taken by the Court in *Old Chief* is followed and, consequently, it is generally regarded in those courts that an out-of-court statement relating to police investigation is sufficient in itself to provide the necessary relevance, to background information, without further inquiry prior to allowing admission.⁴⁸ In those courts that incorporate this view of out-of-court statements, there are few that actually consider it necessary to perform any type of evaluation pursuant to the criteria in Rules 401 and 403 for relevance and prejudice.⁴⁹ Where such an evaluation is made in assessing admissibility, the balancing scale is already tipped in favor of admitting the testimony offered.

As a consequence, testimony is regularly admitted which is not relevant, or if relevant, is of insufficient probative value. This problem is compounded by the appeal courts frequently failing to reverse and remand a case where irrelevant out-of-court statements have been admitted as nonhearsay, or where perhaps relevant, unfairly prejudicial in effect.⁵⁰

In reaching a finding of relevance, the courts may, and do, stretch

48. See *United States v. Freeman*, 816 F.2d 558, 563 (10th Cir. 1987) ("out-of-court statements are not hearsay when offered for the limited purpose of explaining why a Government investigation was undertaken."); *United States v. Pedroza*, 750 F.2d 187, 200 (2d Cir. 1984) (cited with approval in *United States v. Harwood*, 998 F.2d 91, 99 (2d Cir. 1993)). "When statements by an out-of-court declarant are admitted as background, they are properly so admitted not as proof of the truth of the matters asserted but rather to show circumstances surrounding the events, providing explanation for such matters as the understanding or intent with which certain acts were performed." *Pedroza*, 750 F.2d at 200 (citing *United States v. Lubrano*, 529 F.2d 663, 637 (2d Cir. 1975)); see, e.g., *United States v. Scott*, 678 F.2d 606, 612 (5th Cir. 1982).

49. *United States v. Martin*, 897 F.2d 1368 (6th Cir. 1990) (Merritt, C.J., concurring in part and dissenting in part).

50. See *United States v. Lazcano*, 881 F.2d 402 (7th Cir. 1989).

the concept of relevance beyond all recognition thereby undermining its application. Where error is recognized by the appellate courts, the courts sometimes find the error to be harmless on the grounds that, notwithstanding that an out-of-court statement may have been irrelevant, it was cumulative in effect, and, therefore, was not determinative in the jury reaching its decision.⁵¹ A finding of harmless error, however, begs the question and fails to address the underlying problem of federal and some state courts admitting irrelevant out-of-court statements as nonhearsay without proper scrutiny.

The greater the likelihood of prejudice resulting from the jury's misuse of the statement, the greater the justification needed to introduce the "background" evidence for its nonhearsay uses.

The *Reyes* court concluded:

Questions involved in the determination of the relevance and importance of such evidence include: (i) Does the background or state of mind evidence contribute to the proof of the defendant's guilt? (ii) If so, how important is it to the jury's understanding of the issues? (iii) Can the needed explanation of background or state of mind be adequately communicated by other less prejudicial evidence or by instructions? (iv) Has the defendant engaged in a tactic that justifiably opens the door to such evidence to avoid prejudice to the Government?

Questions involved in the assessment of potential prejudice include: (v) Does the declaration address an important disputed issue in the trial? Is the same information shown by other uncontested evidence? (vi) Was the statement made by a knowledgeable declarant so that it is likely to be credited by the jury? (vii) Will the declarant testify at trial, thus rendering him available for cross examination? If so, will he testify to the same effect as the out-of-court statement? Is the out-of-court statement admissible in any event as a prior consistent, or inconsistent statement? (viii) Can curative or limiting instructions effectively protect against misuse or prejudice?⁵²

The potential for abuse by the prosecution in being permitted by the court to recount to the jury the background of the police investigation, or to impart sufficient information for the jury to be able to infer the desired content from the police testimony and context, is completely ignored by the Court in *Old Chief*. It is a danger, notwithstanding the subsequent holding of *Old Chief*, that has not gone totally unrecognized by certain judges in a few of the federal courts.

In *United States v. Martin*,⁵³ an investigation had been conducted

51. See *State v. Broadway*, 753 So. 2d 801 (La. 1999).

52. *Reyes*, 18 F.3d at 70-71.

53. 897 F.2d 1368 (6th Cir. 1990).

by the United States Secret Service and the Office of the Inspector General of the U.S. Department of Agriculture ("USDA") into suspected illicit food stamp trafficking.⁵⁴ The defendant was the general manager of a corporation that had been under government contract to distribute USDA food stamps in several Kentucky counties.⁵⁵ At trial, an undercover agent was permitted to testify to a government informant's statement naming the defendant as being involved in the food stamp trafficking.⁵⁶

The defendant appealed, contending that the statement constituted inadmissible hearsay, and violated his Sixth Amendment confrontation rights.⁵⁷ The Sixth Circuit found that the statement was not hearsay because it "was offered for the limited purpose of explaining how and why the investigation began."⁵⁸

In rejecting the majority's justification for allowing the statements as nonhearsay, Chief Judge Merritt stated:

Had Martin claimed some form of investigatory or prosecutorial misconduct, such as lack of probable cause, then the majority's argument would have greater force Otherwise, it is difficult to see what value the out-of-court statements would retain except to inform jurors that an out-of-court declarant not subject to cross-examination believed that Martin was a food-stamp trafficker.⁵⁹

Martin typifies the kind of testimony admitted on a regular basis in the federal courts. In his criticisms, Chief Judge Merritt identified one of the critical requirements to be satisfied prior to admitting testimony characterized as nonhearsay, relevance. The investigation or circumstances surrounding the arrest should be in issue prior to allowing such testimony.⁶⁰

However, the cases in which nonhearsay relating to police investigations are admitted, demonstrate few such instances of relevance. *Martin* is one of the many examples where testimony has been admitted as nonhearsay where it was not relevant, and therefore ought to have been excluded as inadmissible.

A determination by the court should be made in all cases as to whether, in regards to the issues being tried, the testimony is really being offered for its truth. If so, it is therefore inadmissible and unfairly preju-

54. *Id.* at 1369.

55. *Id.*

56. *Id.* at 1370.

57. *Id.* at 1371.

58. *Id.*

59. *Id.* at 1374 (citations omitted).

60. *See id.* at 1374 (Merritt, C.J., concurring in part dissenting in part) (commenting that before low-value evidence is admitted, it should be at issue before being introduced.)

dicial. To admit statements as nonhearsay where either not relevant, or where relevant but unfairly prejudicial, constitute harmful error beyond a reasonable doubt. It is therefore imperative that such statements be scrutinized by all courts, as a matter of course, for their probative value and relevance. It is a matter that is not dealt with by the Court in *Old Chief*.

C. *Restricting Admissibility of Background Information:
"Upon Information Received" Formulation*

Certain state courts, including Florida⁶¹ and Illinois,⁶² consider testimony as to the content of an occurrence witness's extrajudicial statement relating to police investigation, far from being inherently relevant, is *inherently* prejudicial because of the hearsay dangers in addition to the danger of misuse by the jury for its truth. Consequently, the response of these courts has been to tend to restrict testimony in this context to reference to "on information received, " without allowing reference to content:

"[W]hen the only relevance of such a statement is to show a logical sequence of events leading up to an arrest, the better practice is to allow the officer to state that he acted upon a 'tip' or 'information received,' without going into the details of the accusatory information."⁶³ Where there is no other relevance other than to show a logical sequence "the need for the evidence is slight and the likelihood of misuse is great."⁶⁴ While this approach is preferable to those courts that conform to the *Old Chief* sanction of providing the background to a police investigation, it does not go far enough and raises its own problems. The following cases illustrate a level of awareness of certain of these problems.

In *People v. Warlick*,⁶⁵ testimony had been allowed as nonhearsay of a radio call received by one of the police officers reporting "burglary in progress" and "intruder on premises."⁶⁶ One of the issues considered by the appellate court was whether this constituted inadmissible hearsay. The state argued that the testimony was not hearsay because it had been offered, not for its truth, but rather to provide an explanation of the

61. See *Keen v. State*, 775 So. 2d 263 (Fla. 2000).

62. "The trial judge first must determine whether the out-of-court words, offered for some purpose other than their truth, have any relevance to an issue in the case. If they do, the judge then must weigh the relevance of the words for the declared nonhearsay purpose against the risk of unfair prejudice and possible misuse by the jury . . . Police procedure or not, when the words go to 'the very essence of the dispute,' the scale tips against admissibility." *People v. Warlick*, 707 N.E. 2d 214, 218 (Ill. Ct. App. 1998).

63. *Jackson v. State*, 707 So. 2d 412, 414 (Fla. 5th DCA 1998)(citations omitted).

64. *Id.* at 413-14.

65. 707 N.E. 2d 214 (Ill. App. 3d, 1998).

66. *Id.* at 217.

police officer's investigative procedure.⁶⁷

In reaching its decision, the court was concerned with the issue of nonhearsay in Illinois courts, which, they observed, "keeps turning up in our cases."⁶⁸ The court commented:

Invocation of phrases such as "investigative steps" or "police procedure" or "course of the investigation" should not be used as a substitute for principled analysis when the contents of a message, call, or other out-of-court statement is offered. The claim that the words are not being offered for their truth does not foreclose further inquiry.⁶⁹

In *Keen v. State*,⁷⁰ the defendant had been convicted and sentenced for the first-degree murder of his wife. There had been two retrials following appeal and in the second retrial, the defendant was convicted again and sentenced to death. One of the defendant's claims of error was that hearsay had been improperly admitted, resulting in harmful error causing a mistrial.⁷¹ In reaching its decision, the Florida Supreme Court affirmed its prior rulings in *Wilding v. State*,⁷² *Conley v. State*,⁷³ and *State v. Baird*,⁷⁴ concerning their treatment of out-of-court statements containing accusatory information against the defendant.

In *Baird*, the defendant had been charged with multiple counts of bookmaking and racketeering.⁷⁵ In reply to the state's question as to why the defendant had been investigated at that time, a special agent was permitted to testify that he had "received information that [the defendant] was a major gambler and operating a major gambling operation in the Pensacola area."⁷⁶ The prosecution justified the testimony on the basis that it established the agent's motive in initiating the investigation.⁷⁷

The *Baird* court rejected this argument on the basis that the agent's motive was not in issue as "no evidence of selective prosecution or bad motives" had been made by the defense at the time the testimony was elicited.⁷⁸

[W]hen the only purpose for admitting testimony relating accusatory information received from an informant is to show a logical sequence

67. *Id.*

68. *Id.*

69. *Id.* at 218.

70. 775 So. 2d 263 (Fla. 2000).

71. *Id.* at 266-271.

72. 674 So. 2d 114 (Fla. 1996).

73. 620 So. 2d 180 (Fla. 1993).

74. 572 So. 2d 904 (Fla. 1990).

75. *Id.* at 905.

76. *Id.*

77. *Id.* at 907.

78. *Id.*

of events leading up to an arrest, the need for the evidence is slight and the likelihood of misuse is great.⁷⁹

The court stated that when the logical sequence of events is the only relevance of a statement, "the better practice is to allow the officer to state that he acted upon a 'tip' or 'information received,' without going into the details of the accusatory information."⁸⁰

The Florida Supreme Court in *Keen* was concerned with the risk of impermissible inferences from testimony, amounting to hearsay. This case shows a degree of scrutiny that is without precedent in the federal courts, which, as we have seen, regularly admits substantive accusatory statements against the defendant as nonhearsay, even where clearly irrelevant to the matters in issue and/or unfairly prejudicial and clearly including hearsay.⁸¹

[W]here "the inescapable inference from testimony [concerning a tip received by police] is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated."⁸²

The court in *Keen* reached the same conclusion that it had in *Wilding*,⁸³ concerning the dangers of inferences concerning the defendant's guilt. In both cases, the probative value was found to be outweighed by unfair prejudice. In *Wilding*, the court held that testimony that the police had received an anonymous tip naming the defendant "in connection with the murder" was reversible error. In so doing, the court rejected the state's argument that the testimony was admissible to show a logical sequence of events.

The *Keen* court ruled that the out-of-court statement inferring the defendant's guilt was "classic hearsay" for the reason that "[w]hen the only possible relevance of an out-of court statement is directed to the truth of the matters stated by a declarant, the subject matter is classic hearsay even though the proponent of such evidence seeks to clothe such hearsay under a nonhearsay label."⁸⁴ The admission of such testimony was also found by the Florida Supreme Court to compromise the defendant's Sixth Amendment constitutional rights:

[I]t is impermissible for the State to have the benefit of statements from mystery witnesses or sources without the defendant having the

79. *Id.* at 908.

80. *Id.*

81. See *Keen v. State*, 775 So. 2d 263 (Fla. 2000).

82. *Postell v. State*, 398 So. 2d 851, 854 (Fla. 3d DCA 1981).

83. 674 So. 2d 114 (Fla. 1996).

84. *Keen*, 775 So. 2d at 273.

right of confrontation and cross-examination. "In short, the insidious diminution of the precious rights of confrontation and cross-examination, through some literal application of the rule against hearsay, cannot be tolerated."⁸⁵

Even where offered in an abbreviated form, as in Florida, omitting any reference to the content of an out-of-court statement, such testimony may still implicate the rule against hearsay because of the possibility that the jury will infer content from such testimony. This would thereby raise relevance and unfair prejudice concerns. While this is not always the case, it is another element in the equation deserving of the courts' attention in determining whether to permit an out-of-court statement as nonhearsay.

V. CLOSING THE BARN DOOR AFTER THE HORSE HAS BOLTED: CAUTIONARY INSTRUCTIONS TO THE JURY

"The effectiveness of a limiting instruction has been characterized as trying to 'unring a bell' and as 'a mental gymnastic which is beyond not only [the jury's] powers, but anybody else's.'"⁸⁶

The role of the cautionary instruction is to restrict a jury to properly consider a statement's nonhearsay purpose where a statement has a potentially dual identity of both a hearsay and nonhearsay purpose. If a statement is hearsay, and the nonhearsay purpose is a mere pretext for having the statement admitted, free of cross examination, and without a proper inquiry into relevance and the danger of unfair prejudice, a court has no business admitting such a statement. No limiting instruction taking on the role of a so-called "curative instruction" can make it not hearsay.

"A chameleon-like factor reviewing courts look to in assessing potential prejudice is the existence of a curative instruction. Potentially determinative, it is the court's direction that distinguishes [non-hearsay] . . . from hearsay for the jury."⁸⁷ This ought not be the function of the cautionary statement. It should certainly not be viewed as determinative or curative and should not be used as a substitute for sound, principled scrutiny prior to admitting testimony as nonhearsay. By its mere utterance, a cautionary statement used as a curative instruction does not transform an essentially hearsay statement to a nonhearsay statement.

85. *Id.* at 273 (citing *Postell*, 398 So. 2d at 856).

86. MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 105.1, at 84 (4th ed. 1996) (quoting *United States v. Nace*, 561 F.2d 763, 768 (9th Cir. 1977) and *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932)).

87. *United States v. Linwood*, 142 F.3d 418, (7th Cir 1998) (citing *United States v. Lovelace*, 123 F.3d 650, 653 (7th Cir. 1997)) (citations omitted) (emphasis added).

As a result of the courts allowing irrelevant testimony for an improper purpose, the minds of juries are regularly poisoned, or, at the very least, tainted and improperly influenced. These jurors hear substantive statements going to the heart of an issue at trial from the mouths of the police witnesses that meet neither of Rules 401 or 403, and that often include hearsay.

Contrary to what some courts would like to believe is the almost incantative and magical cautionary instruction to the jury at trial which has the power to banish from their minds and memories what they have heard from prosecution witnesses, the instruction cannot undo what the jury has heard. This includes, for instance, hearing a police witness recite an out-of-court statement of a confidential informant that contains the name of the defendant that lead to the defendant's arrest and trial. There is a risk that such testimony will form the basis of a conviction.

There is debate in the courts as to how effective the cautionary statement is in achieving this end. In *United States v. Trujillo*,⁸⁸ the Tenth Circuit found that testimony by an FBI agent who had been assigned to investigate a bank robbery relating witness's descriptions of the suspect was nonhearsay and was not prepared to entertain the appellant's arguments that the evidence was unfairly prejudicial for the reason that identification was an issue.

The appellate court stated:

It is clear from the transcript Agent Fitzpatrick's testimony was offered as evidence of the focus of the FBI investigation, not to prove the truth of some unavailable witnesses' descriptions of the bank robber. As such, the testimony was not hearsay . . . Moreover, any possible error was cured by the court's clear instruction to the jury to limit its consideration of Agent Fitzpatrick's response to how the FBI was proceeding with its investigation. The district court did not abuse its discretion in admitting Agent Fitzpatrick's testimony.⁸⁹

United States v. Gonzalez,⁹⁰ concerned hearsay statements admitted as nonhearsay regarding a confidential informant's statements concerning the defendant "trafficking in large quantities of heroin and cocaine."⁹¹ Additionally, the arresting officer, Arabit, testified that he had learned from the informant that the defendant was about to relocate the heroin. Limiting instructions were made to the jury concerning the proper use of this testimony, but the defendant argued that such testimony was central to the defendant's conviction, as evidenced by a jury

88. 136 F.3d 1388 (10th Cir. 1998).

89. *Id.* at 1396 (emphasis added).

90. 967 F.2d 1032 (5th Cir. 1992).

91. *Id.* at 1034.

note. "During deliberations, the jury asked if they could have access to the testimony of Officer Arabit about the number of calls he received indicating there was drug activity by [the defendant.]"⁹²

Despite the note evidencing that the jury, in reaching its verdict, had improperly considered the arresting officer's testimony for its truth, the Fifth Circuit found that the jury had been properly instructed. The court refused to "assume that the jury considered this testimony for an improper purpose . . . The context makes clear that the testimony was elicited to establish the reason for the warrantless entry into the Gonzalez residence and the evidence was relevant for that purpose."⁹³

The limitations of the effectiveness of the cautionary instruction was recognized by the Supreme Court in *Bruton v. United States*.⁹⁴ In that case, the Court held that permitting a nontestifying codefendant's extrajudicial hearsay statements in the context of a joint trial was improper for the reason that there was too great a risk that the jury would improperly consider these as implicating the defendant, in spite of cautionary instructions to the jury.⁹⁵

VI. HEARSAY VS. NONHEARSAY

The rule against hearsay precludes the introduction of extrajudicial statements at a trial made other than by a declarant while testifying at a trial or hearing, when offered to prove the truth of the matter being asserted.⁹⁶ When extrajudicial statements are offered to show that a particular statement was made for a reason other than for the truth of the matter asserted, these statements are not hearsay ("nonhearsay"). These include statements tending to show the effect of a statement made by another on a person's subsequent conduct (such as effect on listener).

Whether a disputed statement is hearsay frequently turns on the purpose for which it is offered. If the hearsay rule is to have any force, courts cannot accept without scrutiny an offering party's representation that an out-of-court statement is being introduced for a material non-hearsay purpose. Rather, courts have a responsibility to assess independently whether the ostensible non-hearsay purpose is valid.⁹⁷

Out-of-court statements offered by police officers to explain their actions in a criminal investigation or the circumstances of an arrest, are regularly admitted by federal and state courts alike as nonhearsay,

92. *Id.* at 1035.

93. *Id.*

94. 391 U.S. 123 (1968).

95. *Id.* at 137.

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

97. *United States v. Sallins*, 993 F.2d 344, 346 (3d Cir. 1993).

offered for a purpose other than for the truth of the statement.⁹⁸ These statements are offered as background, and are often statements made by a person other than the witness testifying, to explain why he or she proceeded to the scene of a crime leading to an arrest. A radio call of a disturbance or reported crime requesting that an officer proceed to a described location, or upon a tip received, typify the kind of out-of-court statements offered under the label of nonhearsay.

In many respects, the treatment by the courts of statements by police witnesses containing information about the course of a police investigation has alternatively developed into two theories. Some courts use a new *de facto* hearsay exception of "investigative explanation." Other courts classify such statement automatically as nonhearsay when offered for the "limited" purpose of explaining the background of a police investigation. The rationale followed depends on the court's methodology.

The contradictory categorizations of investigative out-of-court statements as both a hearsay exception and nonhearsay, depending on the court, epitomizes the state of confusion in this area. The mere fact, however, that an out-of-court statement was made in these circumstances is, by itself, of little probative value. Any probative value is outweighed greatly by the likelihood of the jury considering the information for an improper purpose, *i.e.*, for its truth.

Often, such statements involve double hearsay, where testimony is offered of an out-of-court statement made by a third party declarant (whose identity is often not disclosed to the defense, is usually not present in court, and therefore not subject to cross examination), in addition to the witness testifying to an out-of court statement. Additionally, an out-of-court statement may have a dual hearsay and nonhearsay aspect, and in these circumstances, the issue of relevance is intertwined with an issue of hearsay. When the nonhearsay aspect of such a statement has either marginal or no relevance, it should be excluded on grounds of both hearsay and relevance.⁹⁹

In some state courts, and as a routine practice in most federal circuit courts, a determination that a statement is not hearsay is sufficient in the view of many judges to allow the offered statement into evidence without more scrutiny in relation to police investigations in criminal cases. This is clearly erroneous and reflects a lack of understanding of the demands of the Federal Rule of Evidence prior to admitting such statements. "Indeed, courts often admit evidence of the most damning

98. See *United States v. Martin*, 897 F.2d 1368 (6th Cir. 1990); *United States v. Lazcano*, 881 F.2d 402 (7th Cir. 1989).

99. See *State v. Broadway*, 753 So.2d 801, 808 (La. 1999).

kind without any Rule 403 analysis merely because it has been received for some nonhearsay purpose.”¹⁰⁰ The real issues, glossed over in federal courts and many state courts, concern whether the evidence is relevant and whether its probative significance is substantially outweighed by the danger of unfair prejudice.¹⁰¹

One observer has recently remarked that in the context of the Federal Rules of Evidence, the routine practice involved in determining whether a statement is or is not hearsay, “is often a misguided scholastic inquiry.”¹⁰² Cole quite correctly points out that it is a simple matter for the proponent of a particular statement to advance “[a] nonhearsay, pretextual purpose. . . even though the real purpose is to bring highly prejudicial evidence to the jury’s attention. Indeed, that is often the point of the whole exercise, which works all too often.”¹⁰³

VII. MINIMAL SCRUTINY OF NONHEARSAY ILLUSTRATED

On occasion the failure by the court to consider an out-of-court statement for relevance prior to allowing it as nonhearsay is due to counsel’s failure in making the objection to raise Rules 401 and/or 403 as grounds for why a particular statement should not be permitted.¹⁰⁴ At other times, the error lies with the judge, who fails to perceive Rules 401 or 403 as having any applicability to a statement offered other than for its truth, and allows this type of statement without any further analysis.

Such misapplication, and in some cases, complete omission in the application of Rules 401 and 403, results in the dual consequence of permitting statements that should never be allowed on the basis of their lack of relevance or where of insufficient probative value. This is compounded by the frequent misunderstandings on the part of some attorneys about the nature of hearsay.¹⁰⁵

In *Harris v. State*,¹⁰⁶ the state was permitted to offer statements made by a confidential informant that identified the defendant as a supplier of illegal narcotics. The trial court had allowed the statements on the grounds that they were not “exactly hearsay.”¹⁰⁷ The appellate court reversed and remanded on the basis of reversible error. However, in

100. Jeffrey Cole, *The Continuing Riddle of the Federal Hearsay Rule*, LITIGATION, Spring 1999, at 15, 16.

101. See FED. R. EVID. 401, 403.

102. Cole, *supra* note 100, at 16.

103. *Id.*

104. *United States v. Bowser*, 941 F.2d 1019 (10th Cir. 1991).

105. *People v. Carpenter*, 190 N.E.2d 738, 741 (Ill. 1963) (rejecting the objection “frequently appearing in the trial records before this court” that anything said out of the defendant’s presence is hearsay).

106. 544 So.2d 322, 323 (Fla. 4th DCA 1989).

107. *Id.*

making its analysis of the evidence, the court displayed some novel interpretations of the hearsay rule. The appellate court referred to two "seeming exceptions" to the hearsay rule, which it described as being inapplicable to the case at bar.¹⁰⁸ These were: "(1) the verbal act doctrine; and (2) . . . where it is necessary to show a logical sequence of events."¹⁰⁹

As to its first "exception," the court stated that a witness would be permitted to testify to a confidential informant's statement where ". . . the statement is itself a part of the transaction."¹¹⁰ The court distinguished that situation on the basis that, ". . . the occurrence was complete without the statements of the confidential informant. The statements were not part of the transaction."¹¹¹ This improperly extends the application of the verbal act doctrine and the court, on that basis, would allow an array of inadmissible hearsay testimony.

While the court is correct in identifying a verbal act doctrine, it is not correct in identifying the doctrine as an exception to the hearsay rule. Statements constituting a verbal act are nonhearsay because the statement is regarded as having independent legal significance. An agent testifying to his principal's grant of authority to act as his agent would be an example of a verbal act. No hearsay is involved in that situation.¹¹² On the other hand, statements made in the course of conversation between drug dealers during a drug sale have no independent legal significance and thus are classic hearsay, because they are offered for their truth.

The court described what it termed to be ". . .[t]he second exception to the hearsay rule" as involving:

. . . testimony which may be admissible where it is necessary to show a logical sequence of events . . . It would have been permissible to introduce a statement to the effect that the police officers knocked on the door of the apartment because of something they were told by an informant. It was *not* permissible to relate the accusatory remarks of the informant. Such information is inadmissible hearsay.¹¹³

In this instance, the *Harris* court has gone one step further than confusing hearsay with nonhearsay. Here, it has minted a brand new hearsay exception. There is no such "logical sequence" hearsay exception and, once again, the court impermissibly extends the type of state-

108. *Id.*

109. *Id.* 323-324.

110. *Id.* 323. The "transaction" was a drug sale to a confidential informant by the defendant.

Id.

111. *Id.* 323-324.

112. GRAHAM, *supra* note 86, § 801.5, at 208.

113. *Harris* 544 So. 2d at 324.

ments allowable.¹¹⁴ The verbal act exception is similarly misinterpreted. Further, the court makes no mention of relevance or unfair prejudice in its review of the challenged testimony permitted by the trial court. The appellate court was concerned only with direct hearsay, not with the inferences arising from reference to an informant's statement to explain the police investigation.¹¹⁵

When an out-of-court statement of a third party is offered through a police witness, instead of eliciting the testimony directly from the declarant, there should be very solid grounds for allowing such testimony, viz., relevance. Arguably, the prosecution should be required to demonstrate unavailability of the declarant. In *United States v. Linwood*,¹¹⁶ the Seventh Circuit affirmed a conviction where four police officers had testified, over objection, that the defendant's daughter had told them that her mother was a drug dealer. The prosecution claimed to offer the statement "not to prove the truth of the matter being asserted, but to establish why the defendant reacted as she did upon hearing the statement."¹¹⁷ Judge Coffey stated, "[t]he case law of this Circuit leaves no doubt that this is a non-hearsay purpose."¹¹⁸ One of the police officers further testified as to a statement by the daughter indicating the location of drug money in her mother's apartment, where it was subsequently found by the officer.¹¹⁹

The Seventh Circuit was satisfied that the cautionary instruction to the jury that the statement was offered for the limited purposes of establishing background facts or showing why one reacted as one did upon hearing the statement was sufficient to dispel any prejudice.¹²⁰ Notwithstanding the appellate court's agreement with the appellant that the evidence was irrelevant, it refused, however, to consider the appellant's claim that the evidence was thereby inadmissible.¹²¹ The appellate court rejected the claim for the reason that the appellant had failed to raise an objection on that specific ground at trial and relevancy was not pressed by the defendant as a ground for reversal.¹²² Additionally, the court said that the daughter was available to be cross-examined by the defendant's attorney concerning her statements to the police.¹²³

The latter basis for the court's decision is somewhat questionable,

114. *See id.*

115. *Harris*, 544 So.2d. at 324.

116. 142 F.3d 418, (7th Cir. 1998).

117. *Id.* at 425.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 426.

122. *Id.*

123. *Id.*

given that such availability does not address the issue of for what purpose the testimony was offered. The police investigation was not in any way challenged for its propriety and its only purpose was therefore for its truth, rendering the testimony in this form inadmissible hearsay. The testimony was premature and ought to have been elicited from the daughter by the prosecution in their evidence in chief. It was irrelevant as nonhearsay and clearly constituted impermissible hearsay.

VIII. RELEVANCE

As discussed, the lack of relevance of an out-of-court statement offered regarding a police investigation is one of the fundamental concerns in this area. Information about the course taken in a police investigation is, more often than not, irrelevant to the essential elements of the crime being tried. Examples of occasions when such testimony would be relevant include instances where the police are alleged to have coerced a confession,¹²⁴ made an arrest without probable cause,¹²⁵ or where some type of police misconduct in the course of an investigation is alleged to have occurred.¹²⁶

There is support for allowing out-of-court statements about a police investigation to recount the story of an investigation, and *Old Chief* carries the banner for this approach.¹²⁷ This carries with it the danger of lack of scrutiny for relevance as shown in *United States v. Lazcano*,¹²⁸ in which the court looked at the nature of nonhearsay and found that certain out-of-court statements "... [were] not hearsay if ... offered for the limited purpose of explaining why a government investigation was undertaken."¹²⁹

The purpose of explaining why a government investigation occurred is inadequate without more, however, to supply the necessary relevance in order to admit an out-of-court statement as nonhearsay. To be relevant, the testimony should be relevant to a trial issue. The testimony admitted as nonhearsay in *Lazcano* was classic hearsay, admitted for its truth; yet, the court managed to find that the statement was not hearsay:

[t]he statement that the defendant "was from the Herreras from Durango," ... was not offered to prove that Mr. Lazcano was indeed a member of the Herrera family, but rather, to set the context in which the DEA investigation originated ... Moreover, the district

124. See *Tennessee v. Street*, 471 U.S. 409 (1985).

125. *United States v. Mancillas*, 183 F.3d 682 (7th Cir. 1999).

126. *Carter v. State*, 795 F.2d 116 (D.C. Cir. 1986).

127. *Old Chief v. United States*, 519 U.S. 172 (1997).

128. 881 F.2d 402 (7th Cir. 1989).

129. *Id.* at 407 (quoting *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985)).

court carefully admonished the jury that it was to consider the information . . . only for the purpose for which it was offered.¹³⁰

This completed the court's inquiry, without a single utterance concerning relevance or unfair prejudice. It is extraordinary that such a statement, not only identifying the defendant, but also linking him with the Herrera crime family, was considered by the court to be nonhearsay, apparently ending the need for any further inquiry. The court was of the view that the cautionary instruction made to the jury by the district court was sufficient to somehow negate any prejudicial effect of the statement, if any.¹³¹

Other federal courts have allowed similar out-of-court statements as "not hearsay when offered for the limited purpose of explaining why a Government investigation was undertaken."¹³² In *United States v. Freeman*, the defendant had been charged with possession and distribution of counterfeit \$100 notes. A special agent was permitted to testify that he had been told by a Kansas police officer that a "reliable source had information regarding [the passing of] counterfeit money."¹³³

The court cautioned, however, that "out-of-court statements by informants offered to explain the background of an investigation, like all evidence, must be evaluated under the criteria in Fed. R. Evid. Rules 401 and 403 for relevance and to prevent confusion or prejudice on the part of the jury."¹³⁴ Unfortunately, the court did not listen to its own counsel, and concluded, nevertheless, "the informant's statements were neither confusing nor prejudicial."¹³⁵

The *Freeman* court found there was no likelihood of prejudice nor would the jury be confused by such statements explaining why a police investigation was instigated.¹³⁶ The informant's statements explained why it was that agents had two suspects, Grady and Martin, under surveillance on the day that they passed counterfeit money to the defendant.¹³⁷ There was no claim of improper grounds for the investigation and the statement, admitted as nonhearsay, was irrelevant and an additional example of classic hearsay.

There is a limit even in federal courts, however, to the admission of such out-of-court statements. In *United States v. Cass*,¹³⁸ the defen-

130. *Id.* at 407 (citations omitted).

131. *Id.*

132. *United States v. Freeman*, 816 F.2d 558, 563 (10th Cir. 1987).

133. *Id.* at 560.

134. *Id.* at 563.

135. *Id.*

136. *Id.*

137. *Id.*

138. 127 F.3d 1218 (10th Cir. 1997).

dant's husband had filed a missing person report the day that she disappeared.¹³⁹ The defendant was ultimately convicted of making a false statement to a federal agent that she had been kidnapped and sexually assaulted.¹⁴⁰ Information was uncovered in the course of investigation that suggested the defendant was with a boyfriend during the time that she alleged she had been kidnapped.¹⁴¹

The court in *Cass* cited *Freeman* with approval, finding that multiple out-of-court statements admitted by the trial court as nonhearsay were inadmissible hearsay:

Here, the hearsay problem is exacerbated because the evidence the government presented to "explain the course of its investigation" - - [the defendant's husband's] statements, statements of Dallas F.B.I. agents, statements of Sonya's employer, etc. - - go to precisely the issue the government was required to prove - - that Sonya lied about being kidnapped. Hearsay evidence that directly goes to guilt is particularly difficult to limit to background purposes.¹⁴²

In a decision that departs from the norm in federal courts regarding the admission of nonhearsay in the context of a police investigation, the court in *United States v. Williams*¹⁴³ determined that certain statements admitted by the trial court were inadmissible hearsay, resulting in harmful error. The case concerned a robbery in which two armed men robbed a bank branch and the pivotal issue was identification.¹⁴⁴ Judge Bauer, in giving the court's opinion, said:

The government's argument that [Special Agent Johnson's] testimony provides the context for the police investigation and composition of the photo spread for the identification is misplaced. There is absolutely no reason for Special Agent Johnson to testify about the substance of his conversation with the confidential informant and to explicitly identify Williams in court for the government to explain the actions taken by the police in their investigation. Context and background can be established, and are properly established, without the admission of the confidential informant's hearsay declaration.¹⁴⁵

The court stated that to allow such statements would have the effect of creating a risk of misleading the jury by virtue of the prejudicial

139. *Id.* at 1219.

140. *Id.* at 1218.

141. *Id.*

142. *Id.* at 1223 (citing *United States v. Brown*, 767 F.2d 1078, 1084 (4th Cir. 1985) for the proposition that it is "error to admit out-of-court statements as 'background' where statements implicated defendant in charged crime and 'effect of the evidence could only have been a substantial bolstering of the government's case by inadmissible hearsay').

143. 133 F.3d 1048 (7th Cir. 1998).

144. *Id.* at 1048-50.

145. *Id.* at 1051.

impact of such out-of-court statements. “[I]ts probative value is far outweighed by the prejudice to Williams arising from its admission.”¹⁴⁶

We are concerned with the strong possibility that the jury made improper use of the evidence introduced through Special Agent Johnson’s testimony, i.e., as concrete proof that Williams did indeed participate in the bank robbery. This testimony could give rise to an inference in the jurors’ minds that because a confidential FBI informant identified Williams as one of the bank robbers, then it must be true.¹⁴⁷

That such an improper inference and use was made of the statement by the jury is made all the more likely by virtue of the case against Williams being described by the court as “paper thin,”¹⁴⁸ and the jury still managed to return a conviction against Williams. The court continued, “[t]here is a clear distinction between an agent testifying about the fact that he spoke to an informant without disclosing the contents of the conversation and the agent testifying about the specific contents of the conversation – which is inadmissible hearsay.”¹⁴⁹

A relatively unusual instance of where an out-of-court statement allowed by the court as nonhearsay was relevant, and was therefore admitted properly for a nonhearsay purpose, is *United States v. Bowser*,¹⁵⁰ In that case, an undercover agent was permitted to testify to a confidential informant’s statement to him warning the agent about a threat made by the defendant against the agent. The defendant was under surveillance by the agent involving the sale of crack cocaine.¹⁵¹

This testimony by the agent consisted of a warning given to the agent by an informant that the defendant was armed with a gun during a drug transaction and that the defendant wanted to kill the agent. The per curiam opinion of the Tenth Circuit found “that the evidence was not hearsay because it was not introduced for the purpose of proving defendant carried a gun or intended to kill the agent. The statements were introduced merely to explain the officer’s aggressive conduct towards the defendant. In that context, the statements were relevant.”¹⁵²

IX. PROBATIVE VALUE AND UNFAIR PREJUDICE

The test for determining whether a statement is unfairly prejudicial is that, “[a]lthough relevant, evidence may be excluded if its probative

146. *Id.* at 1052.

147. *Id.*

148. *Id.* at 1053.

149. *Id.* at 1052.

150. 941 F.2d 1019 (10th Cir. 1991).

151. *Id.* at 1021.

152. *Id.* (citations omitted).

value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ”¹⁵³ Even where relevant, a statement may not be offered if unfairly prejudicial and not of sufficient probative value, a matter recognized by the Court in *Old Chief*. “If, then, relevant evidence is inadmissible in the presence of other evidence related to it, its exclusion must rest not on the ground that the other evidence has rendered it irrelevant, but on its character as unfairly prejudicial, cumulative or the like, its relevance notwithstanding.”¹⁵⁴

“Evidence which meets the standard of relevancy, Rule 401, may nevertheless possess attendant disadvantages of sufficient importance to call for its exclusion. These disadvantages according to Rule 403 consist of unfair prejudice, confusion of the issues, misleading the jury, and considerations of undue delay, waste of time and the needless presentation of cumulative evidence.”¹⁵⁵

An additional disadvantage is the jury’s “potential misuse of the information for substantive purposes.”¹⁵⁶ Thus, this is also a factor that must be balanced as a potential prejudicial effect.

In *United States v. Johnston*,¹⁵⁷ the defendants were convicted of various drug charges. The appellate court found numerous instances of prosecutorial misconduct and catalogued these instances, remarking about one of these:

[T]he “personal knowledge” of “information” regarding a defendant’s narcotics activity is never admissible. No prosecutor should ever ask such a question . . . This was not an isolated instance of such questioning . . . Based upon the large number of instances of similar improper questioning we conclude that the prosecutors intentionally used such questioning as part of their trial strategy. . . The questions were clearly improper and highly prejudicial to the defendants. Prosecutors have an obligation “to refrain from improper methods calculated to produce a wrongful conviction . . . ”¹⁵⁸

The court in *Linwood* stated the test:

So long as the judge is convinced that the potential prejudicial effect of the jury considering testimony for a hearsay purpose does not substantially outweigh the probativity of the testimony’s intended non-hearsay use it is within his broad discretion to admit the evidence into the record, provided that a limiting instruction is given upon request.¹⁵⁹

153. FED. R. EVID. 403.

154. *Old Chief v. United States*, 519 U.S. 172, 179 (1997).

155. MICHAEL H. GRAHAM, *supra* note 86, §403.1 at 247.

156. FED. R. EVID. 703 advisory committee’s note.

157. 127 F.3d 380 (5th Cir. 1997).

158. *Id.* at 395-396 (citations omitted).

159. *United States v. Linwood*, 142 F.3d 418, 425 (7th Cir. 1998).

While the test propounded by the court correctly sets out the elements that must be balanced, the court incorrectly applied it. In *Linwood*, the statement had no relevance, and that being the case, the question of unfair prejudice should not have been reached, because the out-of-court statement should have been inadmissible on the grounds of relevance.

X. USE OF TESTIMONY NONHEARSAY IN CLOSING STATEMENTS

Federal courts and some state courts have gone further and allowed the prosecution to refer to out-of-court statements in their closing arguments. Those courts apparently fail to see any inconsistency in allowing testimony as nonhearsay and then permitting the prosecution to refer to it for its truth. This creates prejudicial and reversible error.

The practice of the federal courts in this area creates a convenient loophole for the prosecution in federal court. Courts in allowing statements under the guise of nonhearsay, which pertain to the defendant's guilt in order to prove the crime charged, thereby afford the prosecution an opportunity to circumvent its burden of proof.

That burden of proof, of course, requires that the prosecution prove every element of a crime beyond a reasonable doubt. Apparently, the federal courts consider themselves exempt from such concerns. Some defendants, however, may end up literally paying with their lives as a consequence of the cavalier approach of the federal courts to the issues surrounding nonhearsay.

In *Illinois v. Godina*,¹⁶⁰ the defendant had been convicted of second-degree murder. On appeal by the defendant, the court reversed and remanded.¹⁶¹ One of the grounds of appeal was that the defendant had been denied a fair trial because the state had been allowed to introduce highly prejudicial hearsay testimony.¹⁶² This included testimony by a police officer that he had learned from an informant that the defendant had been in the area after the shooting had occurred and had subsequently left to board a Greyhound bus.¹⁶³

The officer testified that the defendant was subsequently arrested in Saint Louis.¹⁶⁴ The prosecutor further referred to this testimony in her closing statement in order to infer guilt from the defendant's flight from the area. The court agreed with the defendant that he had been prejudiced by this testimony, which was classic hearsay, all the more so

160. 584 N.E. 2d 523 (Ill. App. Ct. 1991).

161. *Id.* at 524.

162. *Id.* at 527.

163. *Id.* at 527-29.

164. *Id.* at 527.

because the defendant had alleged self defense, which the impermissible inference of guilt negated.¹⁶⁵

It is evident from this discussion that numerous dangers are presented in treating nonhearsay as admissible, either on the basis of the newly minted rules of evidence developed by the courts that we have observed, or on *Old Chief*—type theory, that the whole story ought to be recounted to the jury or risk a negative inference. This area is alarmingly bereft of any consistency in application of the rules concerning evidence, unfair prejudice and hearsay.

In bending the rules of evidence beyond all recognition, the courts are exhibiting either contempt or disregard for the rights of defendants. Further, by doing so, the prosecution escapes its burden of proof that requires that the government prove every element beyond a reasonable doubt. Some defendants may end up literally paying with their lives as a consequence of the approach of many courts to the issues surrounding nonhearsay in the area of police investigation. "In short, the insidious diminution of the precious rights of confrontation and cross-examination, through some literal application of the rule against hearsay, cannot be tolerated."¹⁶⁶

XI. CONCLUSION

It is evident that the Federal Rules of Evidence demand more in regards to testing for relevance than the position taken by the Court in *Old Chief*. It is insufficient that the background be deemed to contain sufficient information in and of itself to supply the requisite relevance to permit out-of-court statements relating to a defendant's arrest.

As has been shown, this invites prosecutorial abuse and compromises the defendant's rights. An out-of-court statement should only be permitted where it is independently relevant, viz, where there is an issue concerning the circumstances leading to an arrest. Anything less

165. *Id.* at 529 ("Hearsay statements are generally inadmissible because the party against whom they are offered has no opportunity to test the credibility of the declarant by cross-examining the declarant . . . It was prejudicial error for the prosecutor to argue the substantive value of the hearsay evidence to the jury . . . It was additional prejudicial error for the prosecutor to infer Godina's guilt by flight . . . If a prosecutor takes improper advantage of the admissibility of evidence by offering it for a limited purpose, and once it is admitted, makes impermissible use of it during closing argument, that impermissible use will be deemed flagrant and grounds for reversal . . . Ultimately, the issue of whether Godina's belief that he acted in self-defense was reasonable or unreasonable should have been decided by the jury based solely on competent evidence. Furthermore, the hearsay testimony concerning Godina's flight, coupled with the prosecutor's improper inference of guilt based upon the hearsay testimony, was the glue that bonded together all the circumstantial evidence of the case") (citation omitted).

166. *Keen v. State* 775 So. 2d 263 (Fla. 2000) (citing *Postell v. State*, 398 So. 2d 851, 856 (Fla. 3d DCA 1981)).

than a complete assessment for relevance is improper and leads to the admission of inadmissible hearsay statements, dressed up as nonhearsay on a regular basis in the federal courts and many state courts.

To permit testimony of the content of extrajudicial statements relating to a police investigation where no special circumstance exists is unsatisfactory. At the very least, minimal standards should be applied by the courts to ensure that testimony regarding a police investigation is of sufficient probative value, and that such testimony is relevant. A requirement of the defendant opening the door should be incorporated in these standards. Cautionary instructions ought not be viewed as a quick-fix because this simply begs the question of whether testimony should have been admitted in the first place.

The *Old Chief* viewpoint is far too sweeping and inclusive. Background to a police investigation is not relevant merely because it is background. That is patently insufficient. This is an area that demands attention because the defendant is far too often unfairly prejudiced by the content of out of court statements of occurrence witnesses which comprise inadmissible hearsay statements. If minimal scrutiny were applied, this would not and should not be admitted. Much more than minimal scrutiny is advocated, however, which would entail a much stricter scrutiny and the requirement of the defendant having opened the door prior to the court giving consideration to permitting the content of out of court statements to be heard by a jury.

JOËLLE HERVIC