

7-1-2001

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Recommended Citation

Joëlle Harvic, *A Reply to Professor Capra*, 55 U. Miami L. Rev. 819 (2001)
Available at: <https://repository.law.miami.edu/umlr/vol55/iss4/19>

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A Reply to Professor Capra

I would like to thank Professor Capra for reviewing and commenting on my paper. However, I feel that it is important to rearticulate my concern, which is simply that there are inherent risks in permitting statements of occurrence witnesses made to law enforcement officers offered by the government in criminal trials to explain police conduct in relation to a criminal investigation or as background where no issue has been raised by the defendant with regard to the criminal investigation.

Of pivotal importance is that 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. The mere fact that such testimony explains subsequent police investigation should not be considered sufficient without more to supply the necessary relevance. This testimony is often admitted at a high price to the defendant. Nevertheless, these statements are regularly admitted as nonhearsay, viz. for a purpose other than for their truth pursuant to Rule 801.

Where the content of such out-of-court statements are offered by the government and admitted by the courts containing accusations of criminal conduct is unfortunately, a regular occurrence in many state and federal courts. Such statements ought to be permitted where relevant, and *if relevant*, only if sufficient probative value exists. A requirement of enhanced relevance, triggered, for instance, where the defendant has “opened the door” concerning a police investigation ought to be required. This requirement ought to be over and above the balancing required by Rules 401 and 403 for relevance and unfair prejudice. Such heightened standards would assist in clarifying a very confused area of the law and protect the rights of defendants. My point is that before permitting such hearsay statements, the police investigation should be in issue.

The problem occurs when statements of minimal or no nonhearsay relevance are admitted as a vehicle to bring before the jury the substance of out-of-court statements that would otherwise have been barred by the hearsay rule. These involve highly relevant and highly prejudicial hearsay statements that are often going to the heart of the only colorable issue of a criminal trial. To date, there has not yet been incorporated into the Federal Rules of Evidence a hearsay exception for statements relating to police investigations. Some courts, however, act as though there is such an exception and show a wide latitude in admitting questionably relevant statements vis a vis any nonhearsay purpose.

The risks involved in permitting accusatory statements made by occurrence witnesses through the mouth of government witnesses statements are numerous and include as follows:

- a. they are not subject to cross examination, nor are they made under oath;
- b. they defeat the constitutional right of confrontation;
- c. there exists a very real danger of the jury considering such testimony for its truth.

While a Rule 105 limiting instruction may be given, it is questionable how effective such instructions are in restricting jurors to consider a statement exclusively for its nonhearsay purpose, and not for its truth. Professor Capra characterizes my Comment as charging that courts are “engaged in a wholesale abrogation of the hearsay rule specifically and a wholesale trampling on the rights of criminal defendants generally.”¹ I disagree with this description. My intention was to discuss a universal problem, existing in state and federal courts alike, concerning the treatment of out-of-court statements as nonhearsay in a criminal context: “When 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.”²

There are three main themes in Professor Capra’s response. These are:

1. The role of Rule 403: Professor Capra asserts that “403 provides an important protection when an out-of-court accusation is offered as nonhearsay . . . In many cases statements accusing defendants of crime are subject to exclusion under Rule 403 when offered for background or to explain the officer’s conduct”³
2. The characterization of *Old Chief*⁴ as “defendant friendly” and an exposition of how a defendant may best reap its legacy.
3. Rule 105 limiting instructions, as distinguished from curative instructions.

I will respond to each of these concerns.

1. The Role of Rule 403. Professor Capra casts Rule 403 in the starring role in terms of screening inadmissible evidence while omitting to discuss the role of Rule 401 in screening inadmissible evidence. Those federal courts that are willing to admit out-of-court statements

1. Daniel J. Capra, *Out-of-Court Accusations Offered For “Background:” A Measured Response From the Federal Courts*, 55 U. MIAMI L. REV. 803, 818 (2001).

2. *Keen v. State*, 775 So. 2d 263, 274 (Fla. 2000).

3. Capra, *supra* note 2, at 807.

4. 519 U.S. 172 (1997).

containing accusations of criminal conduct,⁵ also overlook the Rule 401 aspect and *assume* relevance by virtue of the statements being offered to explain a criminal investigation. In other words, these statements are attributed built-in relevance and are often admitted *even though the criminal investigation is not in issue*. My principal thesis is that such statements should be subjected to a preliminary Rule 401 screening and it is only if the proffered statements are relevant that Rule 403 should be considered.

Professor Capra cites *United States v. Evans*⁶ as an illustration of the approach typically found in the federal courts. *Evans* is not, however, a decision that is typical of the treatment applied in federal courts to out-of-court statements offered by the government to explain police conduct. It was decided by a court which has not accepted the wholesale admission of such statements on the theory that they are explanative or provide background information. To that extent, the District of Columbia Circuit is not representative of the position taken by other federal courts.

The out-of-court statements containing accusations of criminal conduct elicited by the government during its direct examination in *Evans* were not concerned with any fact or matter in issue and, as such, had no relevance, as required by Rule 401.⁷ On that basis alone, the evidence was inadmissible, and a Rule 403 balancing was not required for the reason that there was no relevant evidence to balance with unfair prejudice. Rule 402 requires the exclusion of all evidence that is not relevant⁸ That, however, was not the approach taken, the court focused on Rule 403, finding, *inter alia*, that the challenged testimony was admitted in error “because the probative value of the only relevant nonhearsay purpose—general background—was substantially outweighed by the danger of unfair prejudice.”⁹ The court ultimately decided that the error was harmless notwithstanding the jury being exposed to hearsay of the most damning kind, containing references to the defendant as a drug trafficker.¹⁰

2. *Old Chief*. I disagree with Professor Capra’s characterization of *Old Chief* as “defendant friendly.” *Old Chief* is not defendant

5. Nowhere do I make a blanket statement that *all* federal courts treat such out-of-court statements as having built-in relevance by virtue of providing an explanation of a criminal investigation. However, a large number do, and that tends to be the norm.

6. 216 F.3d 80 (D.C. Cir. 2000).

7. *See id.* at 85-7.

8. “Evidence which is not relevant is not admissible.” FED. R. EVID. 402.

9. *Evans*, 216 F.3d at 89.

10. *Id.* at 90.

friendly because the opinion gives prosecutors greater latitude in presenting evidence. *Old Chief* reinforces the assumption that had long been evident in many of the federal courts that the government has a right to present the story behind a police investigation and that a priori, this carries its own stamp of relevance, without further inquiry. In doing so, even with a Rule 403 balancing, the scales are already tipped in favor of admitting the government's evidence. The decision may be seen as standing for the proposition that evidence offered to prove the intent and acts comprising a crime are themselves afforded enhanced relevance in the balancing required by Rule 403. The Court announced that evidence might possess "fair and legitimate weight" if it enables the prosecutor to "tell . . . a colorful story with descriptive richness."¹¹ *Old Chief* can be seen as an affirmation of this approach and reinforcing the status quo.

Justice Souter delivered the opinion of the Court, in which Justice Stevens, Justice Kennedy, Justice Ginsburg, and Justice Breyer joined. Justice O'Connor filed a dissenting opinion, in which Chief Justice Rehnquist, and Justice Scalia, and Justice Thomas joined. In *Old Chief*, Justice Souter provided a rationale for the principle described by the court as being of unquestionable truth, "that the prosecution is entitled to prove its case by evidence of its own choice, or, more directly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it."¹²

The decision represented a narrow departure from that rationale in so far as it provided that the government in that case ought to have accepted the defense offer to stipulate to the defendant's felony status where he had been charged with a federal statute that prohibited possession of a firearm by any person who had been convicted of a felony. The Court reiterated the principle that to require the acceptance of a defendant's bare stipulation for the government's evidence in any other context

might have the effect to rob the evidence of much of its fair and legitimate weight . . . This recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has, however, virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him.¹³

Justice O'Connor was of the view that the Court went too far in

11. *Old Chief*, 519 U.S. at 187.

12. *Id.* at 186-87.

13. *Id.* at 190.

permitting this narrow divergence in the government's right to tell a story by requiring the acceptance of the stipulation offered and was troubled by the Court's departure from "the fundamental principle that in a criminal prosecution the government may prove its case as it sees fit . . . On its own terms, the argument does not hold together. A jury is as likely to be puzzled by the missing chapter resulting from a defendant's stipulation to his prior felony conviction as it would be by the defendant's conceding any other element of the crime."¹⁴

3. Rule 105 limiting instructions. Professor Capra asserts that I have confused the function of Rule 105 limiting instructions with curative instructions. Rather, it is the case law that gives rise to the confusion of these two types of instructions. In allowing inadmissible testimony as nonhearsay where its only probative value is in the truth of the statement, there is a strong likelihood that the jury's verdict will be improperly shaped by such testimony.

Some courts, including the Tenth Circuit in *United States v. Trujillo*,¹⁵ and the Fifth Circuit in *United States v. Gonzalez*,¹⁶ treat Rule 105 as having a curative function. The *Trujillo* court found that testimony, though containing accusations of criminal conduct, was nonhearsay and that any error "was cured by the court's clear instruction to the jury to limit its consideration of [the testimony]" and that the district court did not abuse its discretion in permitting such testimony.¹⁷ The court in *Gonzalez* was presented with clear evidence that the jury had improperly considered testimony for its truth, but yet were unshaken in their belief that the jury had been properly instructed.¹⁸

These cases evidence a reliance on Rule 105 for a purpose for which it was not intended. It was not intended to cure inadmissible testimony of any defect. A limiting instruction, no matter how expertly crafted, cannot turn water into wine, just as it cannot transform hearsay to nonhearsay. Yet, it is evident that some courts rely on Rule 105 limiting instructions to perform such miracles.

Finally, I did not call for a per se rule of harmful error where an out-of-court statement is admitted where Rule 403 would mandate its exclusion. My Comment does not deal with the issue of redress where there is an occurrence of harmful error. The principle concern of my Comment concerns nonhearsay relevance. It is in that context that I make the observation that permitting statements containing accusations

14. *Id.* at 198.

15. 136 F.3d 1388 (10th Cir. 1998).

16. 967 F.2d 1032 (5th Cir. 1992).

17. *Trujillo*, 136 F.3d at 1396.

18. *See Gonzalez*, 967 F.2d at 1035 n.3.

of criminal conduct is likely to be enormously influential in shaping a jury's verdict, in particular, they contain highly prejudicial hearsay statements. The principal concerns that my Comment raises are addressed succinctly in *Stribbling v. State*: "As a general rule, the investigation leading to the defendant's arrest is not at issue in a criminal trial. Placing information before the jury that a non-testifying witness gave police reliable information implicating the defendant in the very crime charged clearly could affect the verdict."¹⁹

In conclusion, where the nonhearsay content of this type of out-of-court statement has minimal or no relevance, then the statement should be excluded on both relevance and hearsay grounds. Where a statement has some nonhearsay relevance, there should be a requirement of enhanced relevance prior to allowing statements containing accusations of criminal conduct. Otherwise, highly relevant hearsay evidence will be admitted, despite its high prejudice to the defendant and lack of cross-examination. These are the dangers presented.

JOËLLE HERVIC

19. *Stribbling v. State*, 778 So. 2d 452, 454 (Fla. 4th DCA 2001).