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## THE HEARSAY EXCEPTION FOR PUBLIC RECORDS IN FEDERAL CRIMINAL TRIALS

Vincent C. Alexander\*

The rule against hearsay evidence generally excludes out-of-court statements offered to prove the truth of the matters asserted therein.<sup>1</sup> It seeks to ensure that cases are decided on the basis of reliable evidence by requiring that the declarant of a statement testify before the factfinder under oath and be subject to cross-examination.<sup>2</sup> There are numerous exceptions to the hearsay rule, however, which are justified, in part, by the inherent reliability of the statements involved.<sup>3</sup>

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<sup>1</sup> FED. R. EVID. 801(c); C. McCORMICK, EVIDENCE § 246 (E. Cleary 2d ed. 1972).

<sup>2</sup> C. McCORMICK, *supra* note 1, § 245. The principal reason for the exclusion of hearsay evidence is that, without cross-examination, the credibility of the declarant cannot be adequately tested. *Id.* Cross-examination is generally thought to be the most effective means in an adversary system of probing the factors upon which credibility depends: perception, memory, honesty, and accuracy in narration. G. LILLY, EVIDENCE § 49 (1978); 5 J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940); Morgan, *The Relation Between Hearsay and Preserved Memory*, 40 HARV. L. REV. 712, 712 (1927). The hearsay rule's general requirement of in-person testimony is also premised on the belief that the oath increases the probability that the witness will speak the truth and that observation of courtroom demeanor will be helpful in the factfinder's assessment of credibility. C. McCORMICK, *supra* note 1, § 245. Although it may be possible to impugn the credibility of an out-of-court declarant without cross-examination through reputation evidence, prior inconsistent statements, prior bad acts, or a showing of bias, observation of a witness' demeanor and reactions on the stand is thought to enhance the factfinder's ability to determine credibility. Weinstein, *The Probative Force of Hearsay*, 46 IOWA L. REV. 331, 334 (1961).

<sup>3</sup> Dean Wigmore's thesis was that each hearsay exception is justified by a "circumstantial probability of trustworthiness" and an element of necessity. 5 J. WIGMORE, *supra* note 2, § 1420. He observed that the two factors of reliability and necessity vary in relative strength among the exceptions. *Id.* Others have argued, however, that a coherent theory which would explain all of the exceptions does not exist and that some are premised solely on historical accident, necessity, the adversary nature of litigation, or mere absence of motive to falsify. Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937).

The hearsay exception for "public records" was recognized at common law and has been further developed in most jurisdictions by statute.<sup>4</sup> The reliability of public records is said to derive from the presumption of regularity and accuracy that attends the recording of events by public officials.<sup>5</sup> As with the hearsay exception for records made in the regular course of a private business, the reliability of many public records is enhanced by the routine and repetitive circumstances under which such records are made.<sup>6</sup> An additional justification for the admission of public records is public convenience: If government employees are continually required to testify in court with respect to matters they have witnessed or in which they have participated in the line of duty, the efficiency of public administration will suffer.<sup>7</sup> It has also been observed that a public official's written report of an event may be more reliable than his memory, as revealed through in-court testimony, because of the volume and repetitiousness of his work.<sup>8</sup> As a result, there may be no appreciable benefit to the factfinding process by requiring the courtroom appearance and cross-examination of the public official. Accordingly, public records have generally been held admissible regardless of the public employee's availability to testify.<sup>9</sup>

If a report were prepared by government agents in anticipation of a

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<sup>4</sup> C. McCORMICK, *supra* note 1, § 315. Although the requirements for satisfaction of the exception vary depending upon the jurisdiction or statute involved, generally the statement must have been made by a public employee in the regular course of his public duties and he must have been under a duty to record the statement in question. <sup>5</sup> J. WIGMORE, *supra* note 2, § 1633. Also, to be admissible the report must be based upon the first-hand knowledge of the public official. C. McCORMICK, *supra* note 1, § 317. *See* Yates v. Bair Transport, Inc., 249 F. Supp. 681, 682-83 (S.D.N.Y. 1965) (police report of accident inadmissible as business record to the extent that the relevant information was provided by a bystander). This requirement can be satisfied, however, if the public official relied upon information furnished to him by a subordinate with personal knowledge. <sup>4</sup> J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 803(8)[02], at 804-195 to -196 (1981). The contents of the record may also qualify for admission if the particular statement falls within an independent hearsay exception, such as an admission by a party. *See* United States v. Smith, 521 F.2d 957, 964-65 (D.C. Cir. 1975). The personal knowledge requirement has proved a stumbling block to the admissibility of conclusions contained in government investigative reports based on data provided by nongovernment employees. McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?*, 42 IOWA L. REV. 363, 363-64 (1957). In civil actions, Fed. R. Evid. 803(8)(C) has introduced a liberalizing trend in this regard. *See infra* note 55.

<sup>5</sup> J. WIGMORE, *supra* note 2, § 1631.

<sup>6</sup> G. LILLY, *supra* note 2, § 70.

<sup>7</sup> C. McCORMICK, *supra* note 1, § 315. Under Dean Wigmore's analysis, *see supra* note 3, public convenience was cited as the "necessity" factor justifying the public records hearsay exception. <sup>5</sup> J. WIGMORE, *supra* note 2, § 1631.

<sup>8</sup> C. McCORMICK, *supra* note 1, § 315.

<sup>9</sup> *Id.*

criminal prosecution, however, the foregoing assumptions concerning the inherent reliability of the report as evidence against the accused are subject to serious dispute because of the adversarial posture of the parties. Moreover, the use of such records in some cases may contravene the defendant's sixth amendment right to confront the witnesses against him. In enacting rule 803(8) of the Federal Rules of Evidence,<sup>10</sup> Congress intended to minimize such problems by excluding from the public records exception, in respect to a criminal prosecution, reports of "matters observed by police officers and other law enforcement personnel" and "factual findings resulting from an investigation made pursuant to authority granted by law."<sup>11</sup>

Courts have not, however, reached a consensus as to the proper scope of the exclusions. In this regard, several significant interrelated

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<sup>10</sup> FED. R. EVID. 803(8) provides that the following types of records constitute an exception to the hearsay rule:

(8) *Public records and reports.* Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Other provisions in the Federal Rules relating to government and quasi-government records as hearsay exceptions include: Fed. R. Evid. 803(9) (records of vital statistics, such as birth and death certificates); *id.* 803(10) (certification or testimony concerning the absence of a public record); *id.* 803(22) (judgment of previous conviction).

Prior to adoption of the Federal Rules in 1975, admissibility of public records in federal cases was governed by 28 U.S.C. § 1733(a) (1976). Courts also admitted public records into evidence under the Business Records Act, Act of June 20, 1936, ch. 640, § 1, 49 Stat. 1561 (repealed 1975), on the theory that government operations are a form of "business." *See, e.g.,* Salsberg v. Modern Transfer Co., 325 F.2d 737, 738 (2d Cir. 1963) (police report); La Porte v. United States, 300 F.2d 878, 880 (9th Cir. 1962) (selective service file); Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467, 473 (3d Cir. 1950) (Bureau of Mines report regarding cause of disaster).

<sup>11</sup> FED. R. EVID. 803(8)(B)-(C). The exclusions apply only when the evidence is used against the defendant. Subdivision (C) explicitly permits the defendant to use investigatory factfindings against the government. *See supra* note 10. Although subdivision (B) on its face excludes police reports "in criminal cases" without exception, *United States v. Smith*, 521 F.2d 957 (D.C. Cir. 1975), held that police reports are admissible "when offered by a criminal defendant to support his defense." *Id.* at 965 (emphasis in original). The *Smith* court observed that reading subdivision (B) in harmony with (C) would be consistent with congressional intent, *id.* at 968 n.24, and that the unqualified language of (B) simply may have been the result of legislative oversight since it was added on the floor of Congress, whereas (C) was the product of more careful drafting. *Id.* *See infra* notes 41-53 and accompanying text. A police report offered by the defendant against the government, however, must still satisfy the requirements for admissibility as a hearsay exception. *See United States v. Sims*, 617 F.2d 1371, 1377 (9th Cir. 1980) (FBI agent's report containing description of bank robbers inadmissible because information was provided by bystander); *supra* note 4.

issues have arisen. One problem is whether the exclusions should be given literal effect or whether some degree of flexibility may properly be read into the rule to permit admissibility in certain cases. A second problem is whether rule 803(8) exclusively governs the hearsay status of public records or whether admissibility may be premised on other hearsay exceptions. Additional issues include whether an objectionable report may be rendered admissible by the courtroom appearance of its author, and whether it may properly serve as the basis of an expert witness' trial testimony. This Article will analyze both the conceptual background and the legislative history of rule 803(8)'s exclusions in order to suggest the proper approach to these issues.

## I. THE CONCEPTUAL FRAMEWORK OF FEDERAL RULE OF EVIDENCE 803(8)

In civil trials, numerous public records are admissible under Federal Rule of Evidence 803(8).<sup>12</sup> In criminal trials, however, the rule generally permits only records describing the "activities" of an office or agency<sup>13</sup> and reports of matters observed in the line of duty by non-law enforcement officers.<sup>14</sup> The government is explicitly prohibited from using against criminal defendants hearsay reports concerning the observations of law enforcement officers and the factual findings of government investigations.<sup>15</sup> The reasons for the exclusions lie in the constitutional right of confrontation as well as Congress' intent to preclude the use of inherently unreliable evidence.

### A. *The Constitutional Background*

Legislative history reveals that Congress excluded police reports and government investigatory fact-findings on the ground that their admission might violate a criminal defendant's constitutional right to confront the witnesses against him.<sup>16</sup> At the time the Federal Rules

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<sup>12</sup> See *supra* note 10.

<sup>13</sup> FED. R. EVID. 803(8)(A).

<sup>14</sup> *Id.* 803(8)(B).

<sup>15</sup> *Id.* 803(8)(B)-(C).

<sup>16</sup> See *infra* notes 41-55 and accompanying text. The sixth amendment provides "that in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. Confrontation is a fundamental right in criminal cases and is obligatory upon the states through the fourteenth amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

were under consideration by Congress,<sup>17</sup> the Supreme Court had neither articulated a definitive standard for resolving conflicts between hearsay exceptions and the confrontation clause nor addressed the specific problem of the public records exception.<sup>18</sup> In decisions dealing with the constitutionality of particular applications of various other hearsay exceptions,<sup>19</sup> however, the Court had established a few guiding principles. The confrontation clause was said to have embodied a "preference for face-to-face accusation" by a witness at trial,<sup>20</sup>

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<sup>17</sup> The first Preliminary Draft of the Federal Rules, prepared by an advisory committee appointed by the Chief Justice of the Supreme Court, was published in 1969. 46 F.R.D. 161-426 (1969). Although the Supreme Court approved the Rules in 1972 to become effective in 1973, 56 F.R.D. 184 (1972), Congress refused to permit the Rules to take effect unless expressly authorized by Congress. Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9. Congressional consideration of the Rules spanned the period from February 1973 to January 2, 1975, when they were enacted into law with various revisions, to take effect July 1, 1975. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926. See H.R. REP. No. 650, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7076-78.

<sup>18</sup> Numerous commentators have criticized the Court's lack of a unified approach in dealing with confrontation issues and have suggested various interpretations of the clause. See, e.g., Baker, *The Right to Confrontation, the Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 CONN. L. REV. 529 (1974); Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 2378 (1972); Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972) [hereinafter cited as Graham, *The Right of Confrontation and the Hearsay Rule*]; Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151 (1978) [hereinafter cited as Graham, *The Forgetful Witness*]; Natali, Green, Dutton & Chambers, *Three Cases in Search of a Theory*, 7 RUT.-CAM. L. REV. 43 (1975); Read, *The New Confrontation-Hearsay Dilemma*, 45 S. CAL. L. REV. 1 (1972); Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76 (1971); Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185 (1979).

<sup>19</sup> See, e.g., Dutton v. Evans, 400 U.S. 74 (1970) (co-conspirator's out-of-court statement implicating defendant held not violative of sixth amendment); California v. Green, 399 U.S. 149 (1970) (prior inconsistent testimony given during preliminary hearing at which defendant's counsel conducted cross-examination held admissible at subsequent trial in which witness became forgetful); Barber v. Page, 390 U.S. 719 (1968) (prosecutor's failure to make diligent efforts to secure trial attendance of witness invalidated use of witness' preliminary hearing testimony); Douglas v. Alabama, 380 U.S. 415 (1965) (when defendant's accomplice invoked his privilege against self-incrimination on the stand, preventing cross-examination, it was a denial of defendant's right of confrontation to permit prosecutor to read aloud the accomplice's confession, implicating the defendant); Pointer v. Texas, 380 U.S. 400 (1965) (error to admit, at trial, prior testimony taken during preliminary hearing at which defendant was not represented by counsel and did not conduct cross-examination); Mattox v. United States, 156 U.S. 237, 243-44 (1895) (use of prior trial testimony of witness who was deceased at time of subsequent trial held permissible; in dictum, Court approved of dying declaration hearsay exception as unobjectionable under the confrontation clause).

<sup>20</sup> Ohio v. Roberts, 448 U.S. 58, 63 (1980). The importance of face-to-face accusation was stressed in the early case of Mattox v. United States, 156 U.S. 237 (1895), in which the Court stated that the primary purpose of the confrontation clause

was to prevent depositions or *ex parte* affidavits . . . [from] being used . . . in lieu of a personal examination and cross-examination of the witness in which the accused has an

accompanied by cross-examination.<sup>21</sup> Nevertheless, the clause was not to be read literally; the Court had expressly sanctioned the use of some hearsay evidence against an accused.<sup>22</sup> Conversely, the Court had rejected the argument that the confrontation clause incorporated by reference the hearsay rule with all of its exceptions, both historical and modern, and the notion that an accused's constitutional rights would be satisfied in all cases by cross-examination of any witness conveying an out-of-court statement.<sup>23</sup> Thus, the hearsay rule and the confrontation clause were not viewed as coextensive in their application.<sup>24</sup>

In 1980, the Court wrote in *Ohio v. Roberts*<sup>25</sup> that, although it had

opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor on the stand and the manner in which he gives his testimony whether he is worthy of belief.

*Id.* at 242-43. See *California v. Green*, 399 U.S. 149, 157 (1970) (the "literal right to 'confront' the witness at the time of trial . . . forms the core of the values furthered by the Confrontation Clause"); *Barber v. Page*, 390 U.S. 719, 725 (1968) ("The right to confrontation . . . includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness.").

<sup>21</sup> See *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) ("Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination."); *Pointer v. Texas*, 380 U.S. 400, 404 (1965) ("[t]he right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him.").

<sup>22</sup> *Mancusi v. Stubbs*, 408 U.S. 402 (1972) (prior trial testimony of witness who was residing in a foreign country at time of second trial); *Dutton v. Evans*, 400 U.S. 74 (1970) (declarations of a co-conspirator); *Mattox v. United States*, 156 U.S. 237 (1895) (prior trial testimony of witness who was deceased at time of second trial).

<sup>23</sup> In *California v. Green*, 399 U.S. 149 (1970), the Court observed that the hearsay rule and the confrontation clause were designed to protect similar values, but denied "that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law." *Id.* at 155. See *supra* note 2 and accompanying text. Accord *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (confrontation clause and hearsay rule "stem from the same roots" but are not equivalent). Justice Harlan, in contrast, endorsed the view advocated by Dean Wigmore, 5 J. WIGMORE, *supra* note 2, § 1397, that the confrontation clause places no limits on the type of evidence admissible pursuant to a hearsay exception, and that the right of confrontation is satisfied if the accused is able to cross-examine those witnesses who testify against him at trial. *Dutton v. Evans*, 400 U.S. 74, 94-97 (1970) (Harlan, J., concurring). Justice Harlan concluded that the due process clauses of the fifth and fourteenth amendments are better suited than the confrontation clause for the task of policing fairness in the use of hearsay evidence. *Id.* at 96-97.

<sup>24</sup> *Dutton v. Evans*, 400 U.S. 74, 81-82 (1970).

<sup>25</sup> 448 U.S. 56 (1980). *Roberts* involved the admissibility of testimony given at a preliminary hearing at which the witness, called and questioned by the defendant, made damaging statements about the defendant. At trial, the prosecution showed that several subpoenas had proved fruitless in producing this witness for trial and was thereupon permitted to introduce the prior testimony. *Id.* at 59-60. The Court held that defendant's confrontation rights were not violated. *Id.* at 67-77. The prior testimony bore sufficient "indicia of reliability" because defense counsel had had adequate opportunity for adverse questioning during the preliminary hearing, and the prosecution had satisfied its burden of showing the witness' unavailability. *Id.* See *infra* notes

not previously defined a theory for determining the constitutionality of hearsay exceptions, "a general approach to the problem [was] discernible."<sup>26</sup> The Court identified the confrontation-hearsay conflict as one pitting the accused's interests in face-to-face confrontation and cross-examination against the state's interests in effective law enforcement and the precise formulation of evidence rules in criminal cases.<sup>27</sup> The "general approach" to be followed in accommodating these competing interests is embodied in a two-part inquiry into the necessity and reliability of the hearsay evidence.<sup>28</sup> First, the prosecution generally must demonstrate the unavailability of the declarant whose statement will be offered against the accused.<sup>29</sup> Second, the government must show that the evidence bears adequate "indicia of reliability."<sup>30</sup> In an apparent attempt to provide direction to trial courts faced with deciding whether application of a particular hearsay exception passes the "indicia of reliability" test, the Court held that reliability may be "inferred . . . where the evidence falls within a firmly-rooted hearsay exception."<sup>31</sup> By way of example, the Court mentioned in a footnote that public records, business records, dying declarations, and cross-examined prior testimony<sup>32</sup> all "rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'"<sup>33</sup>

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29-33 and accompanying text.

<sup>26</sup> *Ohio v. Roberts*, 448 U.S. at 64-65.

<sup>27</sup> *Id.* at 64.

<sup>28</sup> *Id.* at 65. Although the Court in previous cases had disavowed a congruence between the hearsay rule and the confrontation clause, *see supra* note 23 and accompanying text, the two criteria by which compliance with the confrontation clause is to be judged—necessity and reliability—are the same two factors identified by Dean Wigmore as justifying the common-law hearsay exceptions. *See supra* note 3.

<sup>29</sup> *Ohio v. Roberts*, 448 U.S. at 65. The requirement that the prosecution generally must either produce or demonstrate the unavailability of the declarant was said to conform to the framers' "preference for face-to-face accusation." *Id.*

<sup>30</sup> *Id.* Thus, even upon a showing that the declarant is unavailable, to be admissible his statement must bear adequate indicia of reliability. *Id.* at 66. The second requirement is based on that aspect of the confrontation clause which seeks to ensure accuracy by giving the defendant "an effective means to test adverse evidence." *Id.* at 65. The reliability requirement is intended to provide a rough substitute for the truth-finding function of courtroom testimony and cross-examination. *Id.*

<sup>31</sup> *Id.* at 66.

<sup>32</sup> *Id.* at 66 n.8.

<sup>33</sup> *Id.* at 66 (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)). The Court's endorsement of traditional hearsay exceptions was said to reflect the "truism" that the hearsay rule and the confrontation clause were designed to protect similar values. *Id.* at 66. "It also responds to the need for certainty in the workaday world of conducting criminal trials." *Id.* *See supra* note 27 and accompanying text.



Although the *Roberts* Court apparently viewed public records as generally reliable, it did not state how the first prong of the test—the unavailability requirement—would apply to the public records exception. As noted above, the unavailability of the officer who prepared a public record is not generally required as a condition to its admissibility.<sup>34</sup> To satisfy the Constitution, must the government always produce the maker of the record or prove to the satisfaction of the court that the maker is unavailable? In a footnote, the Court answered this question in the negative, stating that unavailability is not always a constitutional prerequisite.<sup>35</sup> *Dutton v. Evans*<sup>36</sup> was cited as an example of a case in which “the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness.”<sup>37</sup> In *Dutton*, the “utility” of confrontation had been measured by the extent to which cross-examination “could conceivably have shown the jury that the statement . . . might have been unreliable.”<sup>38</sup> Based on *Roberts*’ reference to *Dutton*, it would seem that in the case of a public record the government would not be required to show the unavailability of its author where the inherent reliability of the evidence is so strong as to make the “utility” of his courtroom appearance “remote.”<sup>39</sup>

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<sup>34</sup> See *supra* note 9 and accompanying text.

<sup>35</sup> *Ohio v. Roberts*, 448 U.S. at 65 n.7.

<sup>36</sup> 400 U.S. 74 (1970).

<sup>37</sup> *Ohio v. Roberts*, 448 U.S. at 65 n.7.

<sup>38</sup> *Dutton v. Evans*, 400 U.S. at 89. The defendant Evans was prosecuted in a Georgia state court for the murder of three policemen. *Id.* at 76. A co-conspirator, Williams, was similarly charged but was tried separately. *Id.* Upon returning to his cell after arraignment, Williams allegedly said to a fellow prisoner, “If it hadn’t been for that dirty son-of-a-bitch Alex Evans, we wouldn’t be in this now.” *Id.* at 77. At Evans’ trial, the prosecution offered the testimony of the prisoner who heard Williams’ statement. *Id.* at 77-78. The state court admitted the evidence on the issue of Evans’ participation in the murder, *id.* at 78, and the Supreme Court found no violation of the confrontation clause. *Id.* at 87-90.

Justice Stewart, writing for a plurality of four justices, noted that the prisoner who testified to having heard Williams’ statement was fully cross-examined, thereby providing the defendant with a means of testing whether the statement was actually made and satisfying the right of confrontation on that issue. *Id.* at 88-89. The plurality then identified several factors bearing upon the reliability of Williams’ statement: Williams had no apparent motive to lie to a fellow prisoner; the statement was spontaneous and against Williams’ penal interest; it did not make an express assertion about a past fact, *i.e.*, it was ambiguous on its face, and therefore was unlikely to be given undue weight by the jury; Williams had personal knowledge of the identity and role of the other participants in the crime; and the possibility of faulty recollection by Williams was extremely unlikely. *Id.* The plurality found that “[t]hese are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.” *Id.* at 89. In addition, it was found that “the possibility that cross-examination of Williams could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal.” *Id.*

<sup>39</sup> Conversely, if the reliability of the statement were marginal, a showing of the actual un-

The inherent reliability of a hearsay statement has thus been identified as the most important factor in determining its admissibility under the constitutional test. In all cases, the statement must bear adequate "indicia of reliability"; if it is reliable enough to render cross-examination at trial of little value in casting doubt on its reliability, the prosecution need not show that the declarant is unavailable.

Since *Roberts* cited public records as one of the "firmly-rooted" hearsay exceptions entitled to an "inference" of reliability,<sup>40</sup> it might appear that Congress unnecessarily limited the scope of rule 803(8) by prohibiting the use of reports of observations by law enforcement officers and findings of fact by government agencies. The Court's broad language, however, should not be read as a blanket endorsement of the public records exception, for the inference of reliability would surely be subject to rebuttal in particular cases. In effect, Congress' exclusion of police reports and investigatory fact-findings reversed the presumption of reliability that these reports might otherwise possess. The congressional debates shed further light on the

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availability of the author would be required. It is not altogether clear, however, that reliability and a finding that cross-examination would be fruitless are the sole criteria for determining that the prosecution need not show the unavailability of the declarant. Much of Justice Stewart's opinion in *Dutton* was devoted to distinguishing prior cases such as *Douglas v. Alabama*, 380 U.S. 415 (1965), *Pointer v. Texas*, 380 U.S. 400 (1965), and *Barber v. Page*, 390 U.S. 719 (1968), on the grounds that in those cases the evidence was either "crucial" to the prosecution or "devastating" to the defense, whereas in *Dutton*, the co-conspirator's statement was "of peripheral significance at most." *Dutton v. Evans*, 400 U.S. at 87. Some commentators have suggested that Justice Stewart intended to introduce the relative importance of the hearsay as an additional factor in determining the constitutionality of its admission. 4 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 800[04], at 800-24 to -25; Note, *Right of Confrontation: Admissibility of Declaration by Co-conspirator*, 85 HARV. L. REV. 188, 197-98 (1971). *Roberts*, which dealt with an unavailable witness, *see supra* note 25, nowhere mentions the crucial or devastating nature of evidence as having any bearing on the constitutional issue. If the declarant were apparently available, however, as in *Dutton*, would the prosecution still have to show that the proffered evidence, although reliable, was not crucial? Under such an approach, the admissibility of crucial hearsay evidence would turn on necessity. The prosecution would have to either produce the declarant or satisfactorily explain his absence. Graham, *The Right of Confrontation and the Hearsay Rule*, *supra* note 18, at 129.

It has been argued, however, that Justice Stewart's language concerning the "peripheral significance" of the hearsay evidence in *Dutton* can and should be read merely as an expression that the evidence was harmless error at most. Graham, *The Forgetful Witness*, *supra* note 18, at 186. The plurality opinion stressed that a total of twenty witnesses testified for the prosecution, one of whom was an eyewitness to the homicide. *Dutton v. Evans*, 400 U.S. at 87. Nevertheless, a few courts have held that with respect to an out-of-court statement made by an available declarant who has not been produced, the relative importance of the statement on the issue of the defendant's guilt must be taken into account. *See, e.g., State v. Henderson*, 554 S.W.2d 117, 122 (Tenn. 1977) (prosecutor not allowed to prove an essential element of a drug crime solely by a chemist's report).

<sup>40</sup> *Ohio v. Roberts*, 448 U.S. at 66 & n.8.

purpose and intended scope of the exclusions.

### B. Legislative History

Congress had no apparent difficulty in accepting the drafters' exclusion in rule 803(8)(C) of investigatory factual findings from use against defendants in criminal cases since the congressional reports and debates do not elaborate on this point. The Advisory Committee's Note to subdivision (C) states that "evaluative reports" were made inadmissible against the accused in criminal cases "in view of the almost certain collision with confrontation rights which would result" from such use.<sup>41</sup>

With respect to subdivision (B), the legislative history reveals a greater difference of opinion among the lawmakers. As originally drafted, this subdivision contained no exclusion for the use of reports by law enforcement personnel in criminal actions.<sup>42</sup> The exclusion was proposed on the floor of the House by Representative Dennis, who advocated that the prosecution should be required to call the "policeman on the beat" in order to give the defendant an opportunity for cross-examination.<sup>43</sup> Without specifically citing the sixth amendment confrontation clause, Mr. Dennis urged that "the defendant should be confronted with the accuser."<sup>44</sup> Representative Brasco, echoing this concern, argued that the exclusion was necessary in order to avoid the situation whereby "the prosecution could use [a policeman's report] to prove its case in chief with the possibility of no other evidence being presented."<sup>45</sup> It was suggested by Representative Smith that a police report should be admissible if the policeman became unavailable to testify at the trial.<sup>46</sup> In response, Representative Brasco expressed concern over a scenario in which a police officer's report "that he saw Mr. X with a gun" would be admissible if the officer thereafter became unavailable and the "statement could be used in a criminal trial against Mr. X without the defense attorney having the opportunity to cross-examine the officer."<sup>47</sup> Representative Dennis maintained that the proposed amendment to the rule

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<sup>41</sup> FED. R. EVID. 803(8)(C) advisory committee note.

<sup>42</sup> Proposed Federal Rules of Evidence, Rule 803(8)(B), 51 F.R.D. 315, 420 (Revised Draft 1971).

<sup>43</sup> 120 CONG. REC. 2387-88 (1974).

<sup>44</sup> *Id.* at 2388.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

would remove such a possibility.<sup>48</sup>

The report of the Senate Committee on the Judiciary articulated the rationale for the exclusion added by the House:

Ostensibly, the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.<sup>49</sup>

Although the Senate Committee accepted the House amendment, it proposed a separate hearsay exception for the recorded observations of police officers who are unavailable to testify in court because of death, incapacity, or similar reasons.<sup>50</sup> The Conference Report rejected the Senate proposal,<sup>51</sup> which resulted in congressional adoption of the current version of rule 803(8)(B). During the final debate on the floor of the House, Representative Holtzman expressed fear that police reports might still qualify under one of the "catchall" exceptions to the hearsay rule in the event that a policeman was unavailable.<sup>52</sup> Representative Dennis responded that such a possibility was precluded by the Conference Report's explicit rejection of the Senate-proposed addition to the rules.<sup>53</sup>

In sum, Congress sought to exclude on-the-scene crime reports by law enforcement officers and evaluative reports resulting from government investigations because of the danger that their admission would abridge the defendant's right of confrontation. The question of the extent to which the admissibility of such reports has the potential for violating this right is answered in the Senate Report's sugges-

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<sup>48</sup> *Id.*

<sup>49</sup> S. REP. No. 1277, 93d Cong., 2d Sess. 17 (1974), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7051, 7064 [hereinafter cited as SENATE REPORT].

<sup>50</sup> *Id.* The Senate Committee's proposed rule would have been numbered 804(b)(5). *Id.*

<sup>51</sup> CONFERENCE REP. No. 1597, 93d Cong., 2d Sess. 12 (1974), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7098, 7106.

<sup>52</sup> 120 CONG. REC. 40,893, 40,895 (1974). Representative Holtzman feared that Federal Rule of Evidence 804(b)(5) would open a "back door" to admit police reports, thereby undermining the Conference Committee's rejection of the Senate-proposed exception for the reports of unavailable policemen. 120 CONG. REC. 40,893 (1974). Federal Rule of Evidence 804(b)(5), commonly called a "residual" or "catchall" exception, permits hearsay not falling within a specific exception to be admitted if the declarant is shown to be unavailable, the statement possesses "circumstantial guarantees of trustworthiness" equivalent to those of the various specific exceptions, the evidence relates to a material fact, other evidence of more probative value cannot reasonably be procured, the interests of justice will be served, and prior notice of the intended use is given to the adversary. *Id.* Federal Rule of Evidence 803(24) contains identical language but eliminates the unavailability requirement.

<sup>53</sup> 120 CONG. REC. 40,895 (1974).

tion that the recorded observations of criminal activity by law enforcement officers are of doubtful reliability because of their adversarial bias.<sup>54</sup> The same defect inheres in fact-findings resulting from government investigations of potential criminal defendants. Additionally, fact-findings may be of questionable reliability if they contain subjective opinions or are based on multiple layers of hearsay.<sup>55</sup> Indeed, Congress seems to have recognized that such records are prima facie unreliable as evidence against the accused, at least in part because they are prepared with an eye toward litigation and are tainted by prosecutorial bias. Exclusion may be appropriate, therefore, for the same reason that documents are objectionable under the "litigation-records" doctrine of *Palmer v. Hoffman*.<sup>56</sup> An analysis of this doctrine may provide an additional conceptual frame of reference for determining the scope of rule 803(8)'s exclusions.

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<sup>54</sup> See *supra* note 49 and accompanying text.

<sup>55</sup> Traditional judicial views on investigatory reports are summarized in *Commonwealth v. Slavski*, 245 Mass. 405, 140 N.E. 465 (1923), where it was stated that public records consisting of investigations and inquiries conducted by public officers "concerning causes and effects and involving the exercise of judgment and discretion, expressions of opinion, and making conclusions" are generally inadmissible. *Id.* at 417, 140 N.E. at 469. Such reports may contain evaluative opinions by persons lacking proper qualifying credentials. 4 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 803(8)[03], at 803-201. Furthermore, the reliability of investigatory reports would be particularly questionable if they were not based upon the personal knowledge of the author or upon information provided by his subordinates or other persons under a public duty to provide the information. See, e.g., *Rusecki v. State*, 56 Wis. 2d 299, 316, 201 N.W.2d 832, 840-41 (1972) (social worker's report that child had illegally run away from home inadmissible in juvenile delinquency proceeding because it was based solely on information provided by child's parents). Admission of such reports in a criminal case would come very close to creating the spectre of a prosecution based on ex parte affidavits, which the confrontation clause was clearly intended to prevent. See *Mattox v. United States*, 156 U.S. 237, 242 (1895); *Kay v. United States*, 255 F.2d 476, 480 (4th Cir.), *cert. denied*, 358 U.S. 825 (1958); *supra* note 20.

In civil cases, on the other hand, the foregoing objections to the admissibility of investigatory reports have been met by arguments that such reports are sufficiently reliable to overcome the absence of first-hand knowledge. This is because of the presumed care with which the public official will evaluate the accuracy of the data he receives and because these reports are prepared in a timely fashion in respect to the events in question. McCormick, *supra* note 4, at 364-65. Additionally, it is argued that problems of bias and the qualifications of the investigator can be met on a case-by-case basis. *Id.* at 365. In accordance with the latter view, rule 803(8)(C) permits admission of investigative reports in civil actions unless the judge concludes in a particular case that the sources of information or the circumstances under which the report was made render it untrustworthy. "[T]he rule . . . assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present." FED. R. EVID. 803(8)(C) advisory committee note. See generally Young, *The Use of Public Records and Reports as Trial Evidence under the Federal Rules of Evidence*, 3 AM. J. TRIAL ADV. 381 (1980); Note, *The Trustworthiness of Government Evaluative Reports Under Federal Rule of Evidence 803(8)(C)*, 96 HARV. L. REV. 492 (1982); Note, *The Admissibility of Evaluative Reports Under Federal Rule of Evidence 803(8)*, 68 KY. L.J. 197 (1979); Note, *The Scope of Federal Rule of Evidence 803(8)(C)*, 59 TEX. L. REV. 155 (1980).

<sup>56</sup> 318 U.S. 109 (1943).

### C. *The Palmer Doctrine*

The Supreme Court's decision in *Palmer v. Hoffman*<sup>57</sup> introduced to the jurisprudence of the private business records hearsay exception the notion that reports prepared by a party or his agents in contemplation of litigation are inherently unreliable because of the maker's natural bias and motive to misrepresent. *Palmer* was a personal injury and wrongful death action in which the defendant railroad sought to introduce an accident report made by its employee prior to his death.<sup>58</sup> The Court held the report inadmissible because it was "calculated for use essentially in the court"<sup>59</sup> and therefore was not made in the "regular course" of the railroad's business;<sup>60</sup> its "primary use [was] in litigating, not in railroading."<sup>61</sup> Most authorities seem to agree that the underlying reason for the Court's exclusion of the accident report was that it lacked the same quality of trustworthiness that characterizes a routine business report made in the absence of contemplated use in litigation.<sup>62</sup> Under this rationale, it is often appropriate to exclude both private and public records made in anticipation of litigation when offered in support of the party responsible for making the record.<sup>63</sup> This is not to suggest that records

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 111.

<sup>59</sup> *Id.* at 114.

<sup>60</sup> *Id.* at 111.

<sup>61</sup> *Id.* at 114.

<sup>62</sup> *United States v. Smith*, 521 F.2d 957, 965-66 (D.C. Cir. 1975); *Leon v. Penn Central Co.*, 428 F.2d 528, 530 (7th Cir. 1970); *C. McCORMICK*, *supra* note 1, §§ 723-24; 4 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 803(6)[07], at 803-173 to -174. The report in question in *Palmer* had been excluded by the court of appeals because it was "dripping with motivations to misrepresent." *Hoffman v. Palmer*, 129 F.2d 976, 991 (2d Cir. 1942), *aff'd*, 318 U.S. 109 (1943). The *Palmer* principle was incorporated in the last phrase of Federal Rule of Evidence 803(6), which provides that business records should be excluded if "the source of information or other circumstances indicate lack of trustworthiness." *Id.* See J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 803(6)[07], at 803-175. Similar language is contained in rule 803(8)(C).

<sup>63</sup> Admissibility generally turns upon whether the report is being offered by or against the party responsible for its preparation. Although reliability is doubtful when a self-serving litigation report is offered in support of the author's position, it is enhanced when the report contains statements damaging to the author's position. Since such statements are akin to declarations against interest and party admissions, it is reasonable to permit the adversary to introduce litigation records against the party who made them. See, e.g., *Yates v. Bair Transport, Inc.*, 249 F. Supp. 681, 690-91 (S.D.N.Y. 1965) (plaintiff in personal injury action was not allowed to introduce medical reports prepared by his treating physicians because they were self-serving and made in anticipation of litigation "to shore up his own case"; whereas reports of plaintiff's condition made by defendants' doctors were deemed sufficiently trustworthy because they were offered by the plaintiff); *Levy-Zentner Co. v. Southern Pac. Transp. Co.*, 74 Cal. App. 3d 762, 783-86, 142 Cal. Rptr. 1, 15-17 (1977) (fire accident report made by defendant corporation held admissible against defendant). It was this reasoning which led the court in

should be excluded merely because at the time of their making there was a potential for their use in litigation. *Palmer* dictates exclusion for lack of reliability only when the report is made under circumstances in which the potential for litigation is known to the maker and he has both an opportunity and a motive, conscious or unconscious, to falsify or color the facts.<sup>64</sup>

Police reports and government investigatory fact-findings describing criminal conduct, which might otherwise qualify for the business or public records hearsay exceptions, may thus be excluded in criminal proceedings under the *Palmer* doctrine.<sup>65</sup> Many such records are intrinsically linked to litigation by the government. In addition, they are prepared by persons who can be presumed to favor the government's adversarial posture. Therefore, if at the time of its making there could have been a motive and opportunity to falsify or color the facts in order to favor the government's position in criminal litigation, the accuracy of a police or investigatory record is suspect.<sup>66</sup>

It can be argued that the admissibility of party-prepared reports should not be defeated on the ground of bias, because the factfinder will naturally be skeptical of the truth of such an obviously self-serv-

United States v. Smith, 521 F.2d 957 (D.C. Cir. 1975), to conclude that police reports excluded by rule 803(8)(B) may be offered by the defendant even though they may not be used on behalf of the government. *Id.* at 967-68. See *supra* note 11.

<sup>64</sup> See, e.g., *Bracey v. Herring*, 466 F.2d 702, 704 (7th Cir. 1972) (in civil action by prisoners against prison guards alleging mistreatment, guards' records and logs describing plaintiffs' behavior were inadmissible on guards' behalf because of likelihood that such records would have been prepared in contemplation of future lawsuits).

<sup>65</sup> Adversarial bias would not ordinarily be present with respect to a government record offered in civil litigation involving two private parties since the report was not prepared by either party. See Note, *The Admissibility of Police Reports Under the Federal Rules of Evidence*, 71 Nw. U.L. Rev. 691, 693-94 (1976). For example, in accident cases, either party may be able to introduce a policeman's report describing the accident, assuming all other requirements for admission of such a report are satisfied. See, e.g., *Baker v. Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978) (upholding, under Federal Rule of Evidence 803(8)(C), defendant's introduction of report containing policeman's conclusion that plaintiff ran a red light based on policeman's subsequent observation of the accident scene and interview of defendant), *cert. denied*, 441 U.S. 933 (1979).

<sup>66</sup> Courts which have applied the underlying reasoning of *Palmer* to reports prepared by or on behalf of the government and offered by the prosecution against criminal defendants include *United States v. Smith*, 521 F.2d 957, 965-67 (D.C. Cir. 1975) (police records); *United States v. Ware*, 247 F.2d 698, 700 (7th Cir. 1957) (narcotics agent's description of drug purchase); *Hartzog v. United States*, 217 F.2d 706, 709-10 (4th Cir. 1954) (IRS worksheets); *Stewart v. State*, 246 Ga. 70, 76, 268 S.E.2d 906, 911 (1980) (summary of private employer's payroll records prepared for welfare agency for use in investigation and litigation); *State v. Henderson*, 554 S.W.2d 117, 120 (Tenn. 1977) (toxicologist's report prepared by police crime laboratory). *But see In re Nelson R.*, 83 Misc. 2d 1081, 1083-84, 374 N.Y.S.2d 982, 984-86 (N.Y. Fam. Ct. 1975) (*Palmer* has no applicability to a police ballistics report concerning the operability of a firearm).

ing document and would therefore give it little weight.<sup>67</sup> In litigation involving monetary or other non-penal interests, a jury might very well be inclined to discount the accuracy of a party's own report of the matter. In criminal litigation, however, the danger exists that records prepared by government agents which bear the official imprimatur of the government itself will be unduly persuasive.<sup>68</sup> Furthermore, because of the interests at stake in a criminal trial, society has demanded a high degree of accuracy in the fact-finding process,<sup>69</sup> making it particularly appropriate to exclude evidence of dubious reliability.<sup>70</sup>

Thus, Congress acted in accordance with both the confrontation clause and the *Palmer* doctrine in excluding against criminal defendants, as a general rule, the use of written reports prepared by the government specifically with an eye toward prosecution. Rule 803(8) thereby advances the goals of reliability and fairness in the use of public records in criminal trials. As noted at the outset, however, problems remain concerning the proper scope of rule 803(8)'s exclusions. Among these are whether the exclusions should be given literal effect, whether other hearsay exceptions may be utilized when rule 803(8) forecloses admissibility, whether live testimony by the author of an objectionable record should affect its admissibility, and whether an expert witness may properly render an opinion on the basis of such a record. In addressing these problems, courts should be guided by the legislative history of rule 803(8), the *Palmer* doctrine, and the confrontation clause. The remainder of this Article will show that under such analysis the result need not be the exclusion of all reports prepared by law enforcement officers and government factfinders.

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<sup>67</sup> See G. LILLY, *supra* note 2, at 240-41.

<sup>68</sup> Cf. *United States v. Quinto*, 582 F.2d 224, 235 (2d Cir. 1978) ("The more official and authoritative a writing appears to be, the less likely it is that even cautious or cynical individuals will be able to resist the temptation to regard the accuracy of the contents of the document as being beyond reproach.").

<sup>69</sup> See *In re Winship*, 397 U.S. 358, 363-64 (1970).

<sup>70</sup> See *State v. Taylor*, 46 N.J. 316, 332, 217 A.2d 1, 10 ("In a criminal case . . . , a court should be reluctant to broaden the scope of an exception to the hearsay rule unless the type of statement sought to be admitted carries with it strong and convincing indicia of trustworthiness."), *cert. denied*, 385 U.S. 855 (1966).



## II. THE SCOPE OF RULE 803(8)'S EXCLUSIONS

### A. "Matters Observed" by Law Enforcement Officers

Courts are divided concerning the question whether the exclusionary language of rule 803(8)(B) should be given a literal interpretation so as to encompass all records of matters observed by law enforcement officers.<sup>71</sup> The court in *United States v. Ruffin*<sup>72</sup> appears to

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<sup>71</sup> The exclusion in rule 803(8)(B) may be avoided in some cases, of course, if the officials who made the record in question do not fall within the definition of police or "other law enforcement personnel." For example, *United States v. Hansen*, 583 F.2d 325 (7th Cir.), *cert. denied*, 439 U.S. 912 (1978), upheld the government's introduction of reports by city building inspectors of violations and deficiencies in buildings which had been burned in an arson-insurance fraud scheme, in part, because the court found that the inspectors had not been acting in a law enforcement capacity. *Id.* at 333. Aside from its questionable characterization of the function of the building inspectors, the court appears to have overlooked rule 803(8)(C), which excludes investigatory fact-findings regardless of whether they were prepared by law enforcement personnel.

Prior to adoption of the Federal Rules, a "'solid wall of authority,'" *United States v. Lloyd*, 431 F.2d 160, 163-64 (9th Cir. 1970) (quoting *United States v. Scott*, 425 F.2d 55, 57 (9th Cir. 1970)), *cert. denied*, 403 U.S. 911 (1971), approved the admissibility of reports by military officers, draft boards, and government employers to prove that particular persons did not report for military or alternative civilian duty. *See, e.g., United States v. Holmes*, 387 F.2d 781 (7th Cir. 1967), *cert. denied*, 391 U.S. 936 (1968); *La Porte v. United States*, 300 F.2d 878 (9th Cir. 1962); *United States v. Ward*, 173 F.2d 628 (2d Cir. 1949). One such case, *United States v. Van Hook*, 284 F.2d 489 (7th Cir. 1960), *remanded for resentencing*, 365 U.S. 609 (1961), was cited by the Advisory Committee as an example of the intended scope of rule 803(8)(B). FED. R. EVID. 803(8)(B) advisory committee note. Would such reports, however, fall within the exclusionary language added by Congress on the ground that military officers or selective service personnel constitute law enforcement officials? The answer is probably no, since congressional history reveals no intent to change the result of such cases. *See supra* notes 41-53 and accompanying text.

Challenges to the introduction of selective service files on confrontation grounds have been uniformly rejected by the courts. *See, e.g., United States v. Downing*, 454 F.2d 373, 375-76 (10th Cir. 1972); *Kemp v. United States*, 415 F.2d 1185, 1186-87 (5th Cir. 1969), *cert. denied*, 397 U.S. 969 (1970); *United States v. Holmes*, 387 F.2d 781, 784 (7th Cir. 1967), *cert. denied*, 391 U.S. 936 (1968). *But see United States v. Richardson*, 484 F.2d 1046, 1048-49 (9th Cir. 1973) (Hufstедler, J., dissenting), *vacated*, 415 U.S. 971 (1974). Scholars have expressed divergent points of view. Compare Graham, *The Right of Confrontation and the Hearsay Rule*, *supra* note 18, at 131 n.158 (case where the government's only evidence consisted of the defendant's selective service file described as "the All-Time Confrontation Hall of Horrors") with Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711, 726 (1971) (presentation of selective service file properly shifts burden of producing contradictory evidence to the defendant). The results of the selective service cases are acceptable for the most part since a person's appearance or non-appearance at a particular time and place is essentially an objective fact presenting little opportunity for fabrication. *See infra* notes 88-96 and accompanying text. *But see United States v. Webb*, 467 F.2d 1041, 1042-43 (7th Cir. 1972) (military officer's letter that defendant had refused induction was insufficient to sustain conviction where defendant disputed the officer's version of the events that transpired at the induction center). *United States v. Hudson*, 479 F.2d 251 (9th Cir. 1972), *cert. denied*, 414 U.S. 1012 (1973), however, is troubling because the defendant's failure to report for induction was established by

have adopted the literal approach. The defendant was charged with income tax evasion and filing false returns both personally and on behalf of a corporation he controlled.<sup>73</sup> One of the issues was whether the defendant had filed a return for the corporation in 1972.<sup>74</sup> The government offered an IRS computer printout with a coded notation that at some unspecified time in the past the defendant had contacted the IRS and stated to an unidentified IRS official that the corporation was not required to file for 1972.<sup>75</sup> The court held that the printouts were inadmissible under rule 803(8)(B) because "IRS personnel who gather data and information and commit that information to records which are routinely used in criminal prosecutions are performing what can legitimately be characterized as a law enforcement function."<sup>76</sup>

In contrast to *Ruffin's* all-encompassing approach, other courts have taken the position that the exclusionary language of rule 803(8)(B) may be given a flexible reading without contravening the specific congressional intent underlying the section. For example, in *United States v. Orozco*,<sup>77</sup> a prosecution for possession of drugs, an issue at trial was the credibility of one of the defendants who contended that she had been using her automobile on the night in question for social purposes in Los Angeles.<sup>78</sup> In rebuttal the government offered computer data cards from the Treasury Enforcement Communications System (TECS), showing that on that night a customs inspector had recorded the license plate of the defendant's car as the car crossed the Mexican border.<sup>79</sup> The Ninth Circuit Court of Appeals found that the computer cards qualified for admission under subdivision (B).<sup>80</sup> Emphasizing that the purpose for the exclusion of evidence under subdivision (B) was the unreliability of observations

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an anonymous entry in the government's file. *Id.* at 253. At minimum, the government should show that such a report was based on information provided by identifiable officials in order to provide a proper basis for evaluating its reliability. *See id.* at 255-57 (Lumbard, J., dissenting); *infra* note 131.

<sup>72</sup> 575 F.2d 346 (2d Cir. 1978).

<sup>73</sup> *Id.* at 349.

<sup>74</sup> *Id.* at 356.

<sup>75</sup> *Id.* at 355.

<sup>76</sup> *Id.* at 356. The court concluded, however, that admission of the printouts was harmless error because the defendant was not ultimately convicted of the charge involving the corporation's failure to file in 1972. *Id.*

<sup>77</sup> 590 F.2d 789 (9th Cir.), *cert. denied*, 442 U.S. 920 (1979).

<sup>78</sup> *Id.* at 791-92.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 793. The district court had admitted the data pursuant to Federal Rule of Evidence 803(6), the general business records provision. The court of appeals, in contrast, held that rule 803(8) was the applicable rule. *Id.*

made by law enforcement officials at the scene of a crime, the court found that "Congress did not intend to exclude records of routine, nonadversarial matters such as those in question here."<sup>81</sup> The customs officer's "simple recordation of license numbers of all vehicles which pass the station" was viewed as a neutral, nonconfrontational observation in which the official's perception would not be clouded.<sup>82</sup>

The *Orozco* court relied, in part, on *United States v. Grady*,<sup>83</sup> which had utilized a similar analysis in holding that "routine records" of an inventory of serial numbers on rifles found in Northern Ireland and prepared by the local police authorities could be offered against a defendant in the United States accused of illegal firearms shipments to that troubled area.<sup>84</sup> The *Grady* court held that admission of such reports would not contravene congressional intent because they were distinguishable from "police officers' reports of their contemporaneous observations of the crime" through which prosecutors might attempt to prove their cases in chief.<sup>85</sup>

Regardless of the courts' resolutions, the reports at issue in *Ruffin*, *Orozco*, and *Grady* all involved matters that were objective in nature, requiring no evaluative conclusions or interpretations. In addition, the matters observed and recorded involved no accusations of criminal activity against particular individuals. Further, they were prepared by persons with first-hand knowledge close in time to the occurrence of the events being recorded. Such reports bear the same earmarks of reliability that justify public records in general as a hearsay exception.<sup>86</sup>

The *Orozco-Grady* interpretation of rule 803(8)(B) is preferable to the blanket exclusionary approach of *Ruffin* because it allows for the admission of reliable government records while at the same time it

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> 544 F.2d 598 (2d Cir. 1976).

<sup>84</sup> *Id.* at 604.

<sup>85</sup> *Id.*

<sup>86</sup> See *supra* notes 4-9 and accompanying text. There is no requirement in the text of rule 803(8), unlike that of rule 803(6), that a public record, to be admissible, must have been made at or near the time of the event recorded. There can be little doubt, however, that such a showing would enhance the accuracy of the report since the officer's memory would have been fresh at the time of its preparation. See C. McCORMICK, *supra* note 4, at 364-65; cf. C. McCORMICK, *supra* note 1, § 49, at 105 n.88, § 303, at 715 (hearsay exception for past recollection recorded and use of prior consistent statements reliable because statements were made at a time when recollection was fresh and clear). It is appropriate to impose a contemporaneity requirement on the admissibility of public records in criminal cases in order to enhance the reliability of such evidence. See, e.g., *State v. Kreck*, 86 Wash. 2d 112, 119, 542 P.2d 782, 787 (1975) (requirement that crime laboratory report be made near in time to test insures against inaccuracy due to lapse of memory).

preserves the underlying congressional intent to preclude the prosecution's use of out-of-court statements of an official accuser, such as the "policeman on the beat" who "made a report that he saw Mr. X with a gun."<sup>87</sup> The systematic notation of all license plates of cars crossing the border,<sup>88</sup> the recording of a taxpayer's telephone call in the ordinary course of government business,<sup>89</sup> the making of an inventory of rifle serial numbers,<sup>90</sup> and similar ministerial reports concerning objective facts<sup>91</sup> fall outside the concerns of the Congressmen

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<sup>87</sup> See *supra* notes 43-53 and accompanying text. Reports by undercover narcotics agents describing the details of drug purchases from particular suspects would seem to exemplify what Congress intended to exclude as matters observed by law enforcement officers. For example, *United States v. Ware*, 247 F.2d 698 (7th Cir. 1957), held that agents' notations on lock-seal envelopes containing suspected narcotics "lack the necessary earmarks of reliability and trustworthiness." *Id.* at 700. Applying *Palmer's* "litigation-motivation" test, see *supra* notes 57-70 and accompanying text, *Ware* found that "such utility as they possess relates primarily to prosecution of suspected law breakers and only incidentally to the systematic conduct of the police business." *United States v. Ware*, 247 F.2d at 700. *Accord* *United States v. Frattini*, 501 F.2d 1234, 1235-36 (2d Cir. 1974); *United States v. Brown*, 451 F.2d 1231, 1234 (5th Cir. 1971); *Sanchez v. United States*, 293 F.2d 260, 267-70 (8th Cir. 1961); *State v. Garvey*, 283 N.W.2d 153, 155-57 (N.D. 1979).

*United States v. Cain*, 615 F.2d 380 (5th Cir. 1980), also reached a result which comports with the proper scope of rule 803(8)(B). In a prosecution for interstate transportation of a stolen vehicle, the district court allowed the government to introduce an escape report made at a federal prison recording the defendant's escape on the date the vehicle was reported stolen. The court of appeals reversed, reasoning that rule 803(8) establishes a rule of absolute exclusion. *Id.* at 382. The decision is justified on its facts, because the escape report recorded the prison officials' observations concerning the defendant's crime of escape, the date, time, and circumstances of which would be significant with respect to the feasibility of his having committed the subsequent crimes. Cross-examination of the prison guards responsible for the report would be necessary to test its reliability. See also *State v. Miller*, 42 Ohio St. 2d 102, 326 N.E.2d 259 (1975) (probation officer's report offered against defendant during revocation hearing was error in absence of appearance by the officer).

<sup>88</sup> See *United States v. Orozco*, 590 F.2d 589 (9th Cir.), *cert. denied*, 442 U.S. 920 (1979).

<sup>89</sup> See *United States v. Ruffin*, 575 F.2d 346 (2d Cir. 1978). To be distinguished from the IRS records at issue in *Ruffin* are those which were properly excluded in *Hartzog v. United States*, 217 F.2d 706 (4th Cir. 1954). *Hartzog* held that, in a prosecution for income tax evasion, it was error for the trial court to have admitted IRS worksheets in which defendant's documents, which had been observed by IRS agents during an investigatory interview with him, were classified under various categories of income and deductions. *Id.* at 708-10. The worksheets had been prepared specifically for the purpose of prosecuting the defendant. *Id.* at 708.

<sup>90</sup> See *United States v. Grady*, 544 F.2d 598 (2d Cir. 1976). A different result might have been appropriate in *Grady* if, prior to taking an inventory of the rifles received in Northern Ireland, the foreign police authorities had received a list from United States authorities of the serial numbers of defendant's rifles. In such case, there would have been motive and opportunity for the Northern Irish police to fabricate the inventory so as to correspond with the list provided by the United States. Upon such a showing, the trustworthiness of the inventory would be doubtful.

<sup>91</sup> *E.g.*, *United States v. Hernandez-Rojas*, 617 F.2d 533, 535 (9th Cir.) (in prosecution of alien for illegal re-entry, government was permitted to establish prior deportation by warrant containing dated notation by immigration officer of defendant's deportation to Mexico; report was nonadversarial, objective, and reliable because of government's need to keep accurate

who added the exclusion in rule 803(8)(B).<sup>92</sup> A law enforcement officials' routine recording of objective data in a nonadversarial setting should not be automatically excluded. In particular cases, of course, the reliability of such records may be called into question despite the absence of accusatory or evaluative content.<sup>93</sup> For example, the court may not be satisfied as to the accuracy of the methods by which the observations were made, or the report on its face might show signs of

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records of the movement of aliens), *cert. denied*, 449 U.S. 864 (1980); *United States v. Friedman*, 593 F.2d 109, 118 (9th Cir. 1979) (in prosecution for conspiracy to import cocaine, court stated in dictum that Chilean immigration records of dates of defendants' entry into and exit from Chile would be admissible under rule 803(8)); *United States v. Union Nacional de Trabajadores*, 576 F.2d 388, 391 (1st Cir. 1978) (in criminal contempt proceeding for violation of injunction, marshal's return stating that he had served the injunction held admissible; marshal was acting in nonadversarial capacity); *cf. Heike v. United States*, 192 F.2d 83, 94-95 (2d Cir. 1911) (entries in dock books by Assistant United States Weighers of weights of defendants' cargoes admissible in prosecution for falsification of weights), *aff'd*, 227 U.S. 131 (1913).

<sup>92</sup> One commentator has suggested that routine reports like those in *Orozco* and *Grady* could be classified as reports of "activities of the office or agency" under rule 803(8)(A), thereby obviating the need to carve out exceptions to the exclusion in rule 803(8)(B). M. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* 840-41 n.50 (1981). Under this analysis, it would appear that pre-rules cases, such as *United States v. Burruss*, 418 F.2d 677 (4th Cir. 1969), would be decided the same under rule 803(8). *Burruss* held that in a prosecution for interstate transportation of a stolen vehicle, police records containing the vehicle owner's report of the theft were inadmissible to prove the fact of theft but were admissible to show that the vehicle had been reported stolen. *Id.* at 678. The court's reasoning was that, as to the commission of the crime itself, the police report contained only hearsay information provided by an informant under no employment-related duty to make such a report. *Id. Accord United States v. Jacobson*, 518 F.2d 1171, 1172 (8th Cir. 1975) (inadmissible if sole issue is fact of theft); *United States v. Wolosyn*, 411 F.2d 550, 551 (9th Cir. 1969) (admissible for confirming date on which car was reported stolen). *Cf. State v. Dahms*, 310 N.W.2d 479, 481 (Minn. 1981) (police reports of stolen cars unreliable because persons reporting theft may have agreed to have their cars stolen or torched to collect insurance). *See supra* note 4. The police department's recording of the theft report, however, would seem to qualify as one of the routine activities of the office, falling under rule 803(8)(A). *See United States v. King*, 590 F.2d 253, 255 (8th Cir. 1978) (documents on file with a state's department of revenue admissible to show defendant's ownership of a car), *cert. denied*, 440 U.S. 973 (1979).

<sup>93</sup> The court in *United States v. Orozco*, 590 F.2d 789 (9th Cir.), *cert. denied*, 442 U.S. 920 (1979), took the position that routine, nonadversarial police records may be admitted unless other circumstances suggest a lack of trustworthiness. *Id.* at 794. Although the concluding trustworthiness provision in rule 803(8) appears on its face to modify only subdivision (C), *cf. Brown v. ASD Computing Center*, 519 F. Supp. 1096, 1103 n.23 (S.D. Ohio 1981) (trustworthiness proviso does not encompass subdivision (A)), it is appropriate to superimpose an overriding trustworthiness requirement on all of the subdivisions of rule 803(8) as the draftsmen expressly did in the case of private business records under rule 803(6). *See S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL* 579 (3d ed. 1982).

The *Orozco* court found no lack of trustworthiness in the computer records at issue in that case. Their admission into evidence was preceded by testimony explaining the procedures by which customs inspectors record license plate numbers and feed such data into computers. *United States v. Orozco*, 590 F.2d at 794. The court of appeals observed that the system used had sufficient internal controls and that, under the circumstances, there had been no motive for the officers to make false entries. *Id.*

irregularity, such as additions or erasures, or that it was prepared at a point in time remote to the events in question. In such a case, the defendant would have a legitimate objection to the use of the evidence.

The records permissible under the more flexible reading of rule 803(8)(B) would survive a *Palmer* analysis in most cases because of their objective content and the absence of an adversarial posture. Although it is arguable that all reports of observations made by law enforcement officials are made in anticipation of litigation, their reliability normally would be called into question only when the nature of the data reported and the relationship of such data to particular criminal suspects provides an opportunity for falsification. For the same reasons, reports such as those in *Orozco* and *Grady* normally should not be inadmissible under the confrontation clause. Because of their objective, nonaccusatory content, the records would satisfy the constitutional requirement of reliability,<sup>94</sup> and the utility of cross-examining the maker of the record would be minimal.<sup>95</sup> Assuming a proper foundation as to the regular and routine nature of the circumstances under which the record was made, and no facial indicia of irregularities, it is difficult to see how cross-examination would be of any appreciable value in testing the record's reliability.<sup>96</sup>

### *B. Investigatory Fact-findings: The Special Problem of Forensic Reports*

Under subdivision (C), there is little doubt that a written report of an administrative agency's investigation, such as findings by the Securities and Exchange Commission in connection with an alleged violation of the securities laws, would be inadmissible in a subsequent criminal action against the persons involved. The subjective and adversarial nature of such reports, together with the likelihood, in many cases, that their contents will be based on multiple hearsay,<sup>97</sup> would

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<sup>94</sup> See *supra* notes 28-39 and accompanying text.

<sup>95</sup> See *supra* notes 34-39 and accompanying text.

<sup>96</sup> Since it is unlikely that the public official would have an independent recollection of routine matters, inquiry into his perceptions and memory would be of little value. See *supra* note 8. The most that might be expected from the witness on the stand is a concession as to his fallibility.

<sup>97</sup> See, e.g., *United States v. Davis*, 571 F.2d 1354, 1356-60 (5th Cir. 1978) (in prosecution for illegal receipt of a firearm shipped in interstate commerce, a federal agent's report containing information as to origin of gun provided by out-of-state manufacturer held properly excludable under rule 803(8)(C); report also inadmissible under rule 803(6)). See *supra* note 55.

render them insufficiently reliable to satisfy the sixth amendment.<sup>98</sup> More controversial is the question whether government forensic reports may be admitted under the rule. If such a report emanated from a police laboratory, literal application of subdivision (B) would appear to require its exclusion as a "matter observed" and, whether it was produced in a law enforcement or any other government-operated laboratory, subdivision (C), on its face, would require its exclusion as a finding based on an investigation authorized by law.

The problem with such an interpretation of rule 803(C), however, is that prior to adoption of the Federal Rule, federal courts approved the admissibility of certain types of laboratory reports under the business records exception.<sup>99</sup> For example, in *Kay v. United States*,<sup>100</sup> the Fourth Circuit sanctioned the introduction of a government chemist's report showing the alcoholic content of the defendant's blood in a prosecution for drunken driving on a federal parkway.<sup>101</sup> In rejecting the contention that use of the report violated the defendant's constitutional right of confrontation, the court observed that alcoholic content of the blood "may be accurately determined by well recognized chemical procedures. It is an objective fact, not a mere expression of opinion . . . ."<sup>102</sup> It had also been held by some federal courts that chemists' analyses of suspected narcotic substances were admissible as business records.<sup>103</sup> In *United States v. Parker*,<sup>104</sup> the Eighth Circuit stressed the reliability of such reports and the regularity with which the testing and recording of the results thereof are usually made: "The making of the chemical analysis of the substance in question is a part of the daily routine of the Bureau laboratory . . . ."<sup>105</sup>

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<sup>98</sup> See *supra* note 41 and accompanying text. To the extent that a government agent's fact-findings are not based on his own knowledge or that of his subordinates, the report would not qualify as one of the "firmly-rooted" hearsay exceptions to which the Supreme Court would attribute a presumption of reliability for confrontation purposes. See *supra* notes 31-33 and accompanying text. The admissibility of fact-findings based on information provided by nongovernment employees is of relatively recent vintage. See *supra* note 55.

<sup>99</sup> See *supra* note 10.

<sup>100</sup> 255 F.2d 476 (4th Cir.), *cert. denied*, 358 U.S. 825 (1958).

<sup>101</sup> *Id.* at 480-81.

<sup>102</sup> *Id.* at 481. See also *Commonwealth v. Slavski*, 245 Mass. 405, 417, 140 N.E. 465, 469 (1923) (admission of state chemist's report concerning the percentage of alcohol in alleged liquor not violative of confrontation right because the analysis involved "ascertainment of fact by well recognized scientific processes").

<sup>103</sup> See, e.g., *United States v. Frattini*, 501 F.2d 1234, 1236 (2d Cir. 1974); *United States v. Ware*, 247 F.2d 698, 699-700 (7th Cir. 1957).

<sup>104</sup> 491 F.2d 517 (8th Cir. 1973), *cert. denied*, 416 U.S. 989 (1974).

<sup>105</sup> *Id.* at 520-21.

In 1977, in *United States v. Oates*,<sup>106</sup> the Second Circuit reversed the trend started by the previous cases by holding that, as a result of the exclusionary language of rule 803(8), government laboratory reports are inadmissible against criminal defendants, even if they otherwise fall within the separate hearsay exception for business records in rule 803(6).<sup>107</sup> In *Oates*, two persons were jointly charged with conspiracy and possession of heroin with intent to distribute.<sup>108</sup> At trial, the Government was permitted to introduce the official report and the handwritten worksheet of a chemist who analyzed the white powder seized from one of the defendants by officers of the United States Customs Service.<sup>109</sup> The chemist, an employee in a laboratory operated by the Customs Service, was not called to testify at the trial,<sup>110</sup> but reports setting forth his conclusion that the substance was heroin were introduced through another chemist who testified concerning the chemical analyses, practices and procedures regularly utilized by the Customs Service.<sup>111</sup> The court of appeals held that admission of the chemist's report violated rule 803(8)(B) and (C)<sup>112</sup> and that the

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<sup>106</sup> 560 F.2d 45 (2d Cir. 1977).

<sup>107</sup> *Id.* at 66-78.

<sup>108</sup> *Id.* at 48 n.1.

<sup>109</sup> *Id.* at 63-64.

<sup>110</sup> The trial record indicated that on the day of the trial the chemist telephoned the United States Attorney's Office to advise of his unavailability. The Assistant United States Attorney in charge of the case later called the chemist's home and spoke with his wife, who said that he was ill. No further inquiries were made by the government. *Id.* at 64.

<sup>111</sup> *Id.* The testifying chemist herself had performed hundreds of tests for the Customs Service for the purpose of identifying heroin. *Id.* at 64-65. Although she had never worked with the chemist who performed the test in question, she testified that she could ascertain from his worksheet the steps he had taken to determine whether the substance was heroin. *Id.* at 64. Upon defendant's objection to the introduction of the documents through this witness, the government cited rules 803(6), 803(8) and 803(24) (residual exception) in support of admissibility. *Id.* at 64.

It might be argued that pursuant to Federal Rule of Evidence 703 (bases of opinion testimony by experts need not be admissible in evidence "if of a type reasonably relied upon by experts in the particular field in forming opinions"), the chemist at trial could have rendered an opinion that the substance was heroin based upon the data contained in the other chemist's report regardless of its hearsay status. See 4 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 803(6)[07], at 803-176 n.20. Rule 703, however, has been limited to cases in which the expert has at least some personal knowledge of the matter in question. See *infra* notes 178-94 and accompanying text. The chemist in *Oates* had no such knowledge. *United States v. Oates*, 560 F.2d at 65.

<sup>112</sup> *United States v. Oates*, 560 F.2d at 66-68. The court had no difficulty in concluding that the chemist's analysis was a "factual finding" and the product of an "investigation" which the Customs Service was authorized by law to perform. *Id.* at 67. "Though with less confidence," *id.* at 67, the court also concluded that the reports were "matters observed" by "law enforcement personnel" because the Customs Service had "clearly defined law enforcement authority in the field of illegal narcotics trafficking" and Customs Service chemists were "important participants in the prosecutorial effort." *Id.* at 68 (footnote omitted). It is interesting to note that on appeal



report could not qualify, in the alternative, as a business record.<sup>113</sup>

Addressing the government's contention that the chemist's report qualified under rule 803(6), the text of which contains no automatic exclusion in criminal cases, the court held that the rules must be read in harmony with the specific legislative intent to make police reports and government factual findings "absolutely inadmissible" against criminal defendants.<sup>114</sup> The court relied principally upon remarks made by Representative Hungate in presenting the report of the Committee of Conference to the House: "As the rules of evidence now stand, police and law enforcement reports are not admissible against defendants in criminal cases. This is made quite clear by the provisions of rule 803(8)(B) and (C)."<sup>115</sup> These remarks were viewed by the court as establishing a legislative intent to make rule 803(8) "comprehensively all-encompassing"<sup>116</sup> with respect to police reports and government factual findings so that they would be "similarly disqualified under *any* exception to the hearsay rule."<sup>117</sup> Despite the absence of any exclusionary language concerning such reports in rule 803(6),<sup>118</sup> the court held that the business records provision should

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the government did not attempt to justify admissibility of the evidence pursuant to rule 803(8) or rule 803(24), but chose instead to rely solely upon rule 803(6), the business records exception. *Id.* at 66, 72-74. Its decision to forego reliance upon rule 803(24) is understandable in view of its failure to meet the pretrial notification requirements of that provision. *Id.* at 72 n.30.

<sup>113</sup> *Id.* at 68-78.

<sup>114</sup> *Id.* at 72.

<sup>115</sup> *Id.* at 70 (quoting 120 CONG. REC. 40,891 (1974), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7111). Representative Hungate's remarks were made in explanation of the Conference Committee's rejection of the Senate-proposed amendment to the Rules that would have allowed for the admissibility of police reports upon a showing of the policeman's unavailability. See *supra* notes 50-53 and accompanying text.

<sup>116</sup> *United States v. Oates*, 560 F.2d at 71.

<sup>117</sup> *Id.* at 72 (emphasis in original). The court also quoted extensively from the colloquy between Representatives Dennis and Holtzman regarding the latter's fear that police reports might be admissible under one of the residual exceptions. *Id.* at 71-72. See *supra* notes 52-53 and accompanying text. The court acknowledged that Representative Dennis' response was addressed to the question of police reports, but the court found "no reason to doubt that, if specifically asked, he would have answered that government-generated 'evaluative reports' were similarly disqualified under *any* exception." *United States v. Oates*, 560 F.2d at 72.

<sup>118</sup> The only textual qualification to admissibility of a business record is the general trustworthiness proviso at the conclusion of rule 803(6). See *supra* note 62. The *Oates* court questioned whether the chemist's reports at issue would have surmounted the trustworthiness hurdle even if they had been eligible for admission under rule 803(6). *United States v. Oates*, 560 F.2d at 75. On their face, they bore signs of irregularity. The chemist's worksheet contained a handwritten notation indicating the chain of custody; a similar notation appeared on the official typewritten report, but it was crossed out. *Id.* at 65. In addition, the copy of the official report given to defense counsel prior to trial was unsigned, whereas the copy offered at trial contained the chemist's signature. *Id.*

not be interpreted literally;<sup>119</sup> rather, it should be interpreted so as to effectuate the congressional intent underlying rule 803(8) to avoid all possible conflicts between the hearsay exception for government records and the defendant's confrontation rights.<sup>120</sup>

*Oates* was undoubtedly correct in holding that reports specifically excluded in criminal cases by rule 803(8) should also be excluded under rule 803(6).<sup>121</sup> Although it may be a general rule that hearsay which does not satisfy one exception may be admitted pursuant to another,<sup>122</sup> it would be logically inconsistent for Congress to have explicitly excluded particular types of records under rule 803(8)(B) and (C) and yet to have sanctioned their entry as business records. To the extent that *Oates* requires literal application of rule 803(B) and (C) to all forensic laboratory reports, however, the decision divorces the rule from its legislative history and conceptual underpinnings.

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<sup>119</sup> *Id.* at 75-77.

<sup>120</sup> *Id.* at 78. The court reasoned that since Congress chose to exclude the admission of police and evaluative reports because of their potential interference with an accused's right of confrontation, it follows that exclusionary treatment of such reports should apply with equal force under "any of the other exceptions to the hearsay rule." *Id.* Since Congress intended rule 803(8)(B) and (C) to "serve as a filter to screen out evidence which might be suspect in the event of a constitutional challenge on confrontation grounds," *id.* at 79, the court concluded that it should do likewise and avoid deciding difficult constitutional questions by excluding evidence which creates a tension with the right of confrontation. *Id.* at 79-80. Without specifically holding that the introduction of the chemist's reports violated *Oates*' right of confrontation, *id.* at 80, the court nevertheless noted the existence of several problems in this regard. *Id.* at 81-83. The court found that cross-examination might be necessary to determine the reliability of such reports because it would provide an opportunity to probe the chemist's qualifications and experience, the general acceptance of the procedures and analyses which were used, whether the tests were properly and accurately performed and whether the instruments were in good working order. *Id.* at 81-82. Cross-examination would have been particularly important in this case to resolve questions concerning the facial irregularities of the reports. *Id.* at 81; *see supra* note 118. The court also observed that the reports were "crucial" to the government's case. *United States v. Oates*, 560 F.2d at 83. Assuming that the crucial nature of hearsay evidence triggers a requirement that the witness either be produced or be shown to be unavailable, *id.* at 82-83; *see supra* note 39, the government's showing of unavailability in this case was weak. *United States v. Oates*, 560 F.2d at 83. *See supra* note 110.

<sup>121</sup> Several courts have indicated their agreement with this aspect of the *Oates* opinion. *See, e.g.*, *United States v. Sims*, 617 F.2d 1371, 1377 (9th Cir. 1980); *United States v. Cain*, 615 F.2d 380, 382 (5th Cir. 1980); *United States v. Hansen*, 583 F.2d 325, 333 (7th Cir.), *cert. denied*, 439 U.S. 912 (1978). *But see* *United States v. King*, 613 F.2d 670, 672-73 (7th Cir. 1980) (Social Security Administration forms held admissible against criminal defendant under rule 803(6) when accompanied by the in-court testimony of their author); *see infra* notes 161-64 and accompanying text. In civil actions, there is greater disagreement whether rule 803(8) pre-empts rule 803(6). *Compare* *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125, 1143 n.7 (E.D. Pa. 1980) (rule 803(8)(B) alone is applicable to business records prepared by public officials) *with* *Brown v. ASD Computing Center*, 519 F. Supp. 1096, 1103 n.2 (S.D. Ohio 1981) (standards for admissibility under rule 803(6) may be utilized to admit government agency records which do not fall within scope of rule 803(8)).

<sup>122</sup> *United States v. Oates*, 560 F.2d at 74.

The type of report covered by subdivision (B), for which Congress determined there was an absolute need for cross-examination, was that of the "policeman on the beat" concerning his contemporaneous observations of a crime and the arrest of the accused.<sup>123</sup> Routine laboratory analyses of the objective quality and characteristics of a substance or an object do not seem to fall within this category. Nor is there any indication that Congress intended such reports to fall within the exclusionary language of subdivision (C). As noted above, Congress had little to say about the use in criminal cases of evaluative reports under subdivision (C), apparently agreeing tacitly with the Advisory Committee's statement that such reports would probably collide with the defendant's right of confrontation.<sup>124</sup> Evaluative reports threaten confrontation rights when their reliability is inherently doubtful either because of their subjective content and the adversarial circumstances of their preparation or because of their authors' reliance upon hearsay data obtained from persons under no duty to provide accurate information.<sup>125</sup> A forensic technician's report of his own routine laboratory test involving objective standards and mechanical procedures, however, would seem to fall outside the zone of presumptive unreliability. In any event, there is no indication in the legislative history that Congress intended to circumscribe what appears to have been the existing law that routine reports of objective scientific tests are admissible.<sup>126</sup>

Although the congressional intent underlying rule 803(8) may not have been to render laboratory reports absolutely inadmissible, it certainly does not follow that all such reports should be admissible. Each report should be examined on a case-by-case basis to determine whether its admission would contradict the teachings of the *Palmer* doctrine or contravene the defendant's right of confrontation. Such an approach may lack the simplicity of the all-inclusive *Oates* rule of exclusion but, in appropriate cases, it would permit the fact-finder to

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<sup>123</sup> See *supra* notes 42-53 and accompanying text.

<sup>124</sup> See *supra* note 41 and accompanying text.

<sup>125</sup> See *supra* notes 54-55 and accompanying text.

<sup>126</sup> See *supra* notes 99-105 and accompanying text. In criticizing the absolutist approach to laboratory reports in *Oates*, the authors of one treatise have observed that "[n]o legislative history indicates a Congressional intent to change in a revolutionary fashion the routine everyday practice in both state and federal courts, particularly when no reason for such a change has been shown." 4 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 803(6)[07], at 803-177. The same authors urge that regardless of whether the admissibility of government reports is tested under rule 803(6) or rule 803(8), courts should be guided by Congress' intent to prevent "the dangers of inaccurate observation and misrepresentation." *Id.* ¶ 803(8)[04], at 803-212. *Accord* S. SALTZBURG & K. REDDEN, *supra* note 93, at 612-13.

consider reliable hearsay evidence and relieve the prosecution of the burden of producing an unnecessary witness without unfairly depriving the defendant of the benefits of cross-examination.

In view of the ever-expanding forms of scientific evidence produced in modern crime laboratories,<sup>127</sup> it would be difficult, if not impossible, to suggest any rigid categories of permissible laboratory reports.<sup>128</sup> Since rule 803(8)(C) makes evaluative reports presumptively inadmissible, it would be appropriate, initially, to cast upon the prosecution the burden of satisfying the court that a particular report qualified for admission.<sup>129</sup> The prosecution should be required to show that the report was made at or near the time of the test<sup>130</sup> and that it was based on first-hand information provided by identifiable government employees.<sup>131</sup> In addition, the government should show that the laboratory technician who made the report possessed the proper qualifications.<sup>132</sup> If the report bears facial signs of irregularity, it should be excluded on this basis alone.<sup>133</sup> Beyond these particularized foundation requirements, the court should evaluate the inherent

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<sup>127</sup> See generally A. MOENSSENS & F. INBAU, *SCIENTIFIC EVIDENCE IN CRIMINAL CASES* (2d ed. 1978).

<sup>128</sup> Some scientific evidence, of course, would not be admissible under any circumstances. See, e.g., *United States v. Clark*, 598 F.2d 994, 995 (5th Cir. 1979) (results of polygraph examination inadmissible), *cert. denied*, 449 U.S. 1128 (1981); *United States v. Brown*, 557 F.2d 541, 557 (6th Cir. 1977) (ion microprobiotic analysis of hair not a generally accepted comparison procedure). A review of the current status of judicial standards for admitting scientific evidence is set forth in Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half-Century Later*, 80 COLUM. L. REV. 1197, 1198-1245 (1980).

<sup>129</sup> Such an approach would shift the burden that usually rests upon the opponent of evidence under rule 803(8)(C) to show that the sources of information or other circumstances indicate lack of trustworthiness. See S. SALTZBURG & K. REDDEN, *supra* note 93, at 579.

<sup>130</sup> See *supra* note 86.

<sup>131</sup> If the report is based upon the first-hand knowledge of the government employee or upon data provided by his subordinates, the traditional presumption of reliability attending the work of public officials will be met. See *supra* notes 4-5. A requirement that the officials be identified will also ensure a means of verifying the qualifications of the officials, facilitate the defendant's decision whether to subpoena the officials, see *infra* notes 152-53, and provide the defendant with possible bases for impeachment of their credibility through such techniques as reputation evidence, prior inconsistent statements, prior bad acts, or bias. See FED. R. EVID. 806 (credibility of hearsay declarant may be attacked as though he testified in person).

<sup>132</sup> Cf. *State v. Rhone*, 555 S.W.2d 839, 841-42 (Mo. 1977) (evidence adduced at trial showed that expert whose test results were introduced in a laboratory report was sufficiently qualified). Part of the foundation for live testimony concerning the results of a scientific test is a showing that the witness qualifies as an expert. See Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 ILL. L.F. 1, 20-21. The same rule should apply with equal force in the case of an expert whose test results are conveyed through a written report.

<sup>133</sup> Such facial irregularities in themselves would constitute "circumstances indicat[ing] lack of trustworthiness." FED. R. EVID. 803(8)(C). Exclusion of the laboratory report in *Oates* would have been justifiable on this basis because of discrepancies which appeared in the documents offered at trial. See *supra* note 118.

reliability of the report. If it is a routine record of essentially mechanical, objective laboratory operations, it should be admissible. If, on the other hand, it contains a subjective interpretation of facts or is accusatory in the sense that it consciously identifies the defendant as a participant in criminal conduct, it should be excluded.<sup>134</sup>

The pre-Federal Rules case of *United States v. Beasley*<sup>135</sup> illustrates how the objective-subjective criteria might be applied under rule 803(8) in drawing the line between admissible and inadmissible scientific analyses. *Beasley* held that the palm print taken from the hold-up note used in an attempted robbery was admissible despite the absence of testimony by the laboratory technician, because there was nothing "accusatorial" in the mechanical test by which the print, invisible to the naked eye, was "brought out."<sup>136</sup> The fingerprinting expert who matched the developed prints on the note with those of the defendant, however, was "properly . . . presented at trial and cross-examined."<sup>137</sup> A fingerprint analyst's opinion that palm prints belong to a particular defendant is the type of report that should continue to be excluded under rule 803(8). Such a conclusion is inherently accusatorial and is based on the personal judgment and interpretation of the expert.<sup>138</sup> Since the expert would know the identity of the suspect, he would have both the motivation and the opportunity to conform his opinion to the prosecution's theory. In such case, the defendant should have an opportunity to challenge the reliability of the expert's opinion by confronting him in court. The same result should follow in regard to other forensic reports which consist of highly subjective interpretations or tend to identify particular suspects as participants in a crime.<sup>139</sup>

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<sup>134</sup> A somewhat similar approach is advocated in Imwinkelried, *The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants*, 30 HASTINGS L.J. 621, 636-49 (1979). Professor Imwinkelried argues that admission of laboratory reports violates confrontation rights when such reports are "highly evaluative." *Id.* at 643. His thesis that admission of evaluative reports is unconstitutional is based on findings of a nationwide survey that crime laboratories have a less-than-perfect accuracy record in chemical analyses, thereby calling into doubt their inherent reliability, *id.* at 636-37; that such evidence is usually crucial to the prosecution's case, *id.* at 637-38; but see *supra* note 39; and that, in the absence of cross-examination, a lay jury will give improper weight to an evaluative opinion. Imwinkelried, *supra*, at 638-42. He concludes that laboratory reports should be presumptively admissible, but should be excluded upon a showing by the defendant that "the report is so evaluative that it could be the subject of varying expert opinion." *Id.* at 647.

<sup>135</sup> 438 F.2d 1279 (6th Cir.), cert. denied, 404 U.S. 866 (1971).

<sup>136</sup> *Id.* at 1281.

<sup>137</sup> *Id.*

<sup>138</sup> But see Imwinkelried, *supra* note 134, at 641 (*Beasley* characterized as "strict" because "there are fairly objective standards for fingerprint comparison").

<sup>139</sup> Likely candidates for inclusion in this category are ballistics comparisons, see, e.g., Stew-

By contrast, routine laboratory reports of simple mechanical operations in which subjective and adversarial components are minimal, such as the chemical process by which fingerprint impressions are made visible should continue to be admissible under rule 803(8).<sup>140</sup> Similarly, a routine report which merely identifies a substance or describes its objective characteristics, such as a report which states that a specimen is cocaine,<sup>141</sup> or that a vaginal swab contains seminal fluid,<sup>142</sup> or that a blood sample contains .15% alcohol,<sup>143</sup> should qual-

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art v. Cowan, 528 F.2d 79, 82-85 (6th Cir. 1976); psychiatric evaluations, *see, e.g.*, Phillips v. Neil, 452 F.2d 337, 347 (6th Cir. 1971), *cert. denied*, 409 U.S. 884 (1972); voiceprint analyses, *see, e.g.*, Reed v. State, 283 Md. 374, 378, 391 A.2d 364, 366 (1978) (voiceprint technique is dependent on the individual judgment of the examiner); and polygraph evidence, *see, e.g.*, Imwinkelried, *A New Era in the Evolution of Scientific Evidence—A Primer on Evaluating the Weight of Scientific Evidence*, 23 WM. & MARY L. REV. 261, 282-83 (1981) (polygraphists' interpretive standards are highly subjective). Forensic pathologists' opinions on causation of death in autopsy reports have also been recognized as highly subjective. *See generally* Devlin, *The Autopsy in Criminal Cases*, in SCIENTIFIC AND EXPERT EVIDENCE 1205-17 (E. Imwinkelried 2d ed. 1981). Thus, several courts have admitted a medical examiner's objective findings of fact, such as a description of a wound, but have excluded his opinions or conclusions as to causation. *See, e.g.*, State v. Reddick, 53 N.J. 66, 68, 248 A.2d 425, 426 (1968); People v. Nisonoff, 293 N.Y. 597, 600-04, 59 N.E.2d 420, 421-23 (1944); *cf.* Commonwealth v. McCloud, 457 Pa. 310, 315, 322 A.2d 653, 655-57 (1974) (autopsy report may not be used to prove cause of death). *But see* Montgomery v. Fogg, 479 F. Supp. 363, 369-72 (S.D.N.Y. 1979) (autopsy report that death was caused by gunshot wounds of the head did not violate right of confrontation); Bursleson v. State, 585 S.W.2d 711, 712-13 (Tex. Crim. 1979) (autopsy report that death was caused by multiple gunshot wounds of the chest admissible over confrontation challenge).

<sup>140</sup> Records of maintenance tests on scientific equipment in crime laboratories, which may be helpful in establishing that the results of experiments were accurate, should be admissible by analogy to fingerprint processing. People v. Black, 84 Ill. App. 3d 1050, 1053, 406 N.E.2d 23, 25 (1980) (test decal on breathalyzer equipment). Such tests are not performed for any specific prosecution but are part of the daily routine and upkeep of the laboratory. They are more akin to the internal activities of the office, permissible under rule 803(8)(A), than to police reports or investigatory factfindings.

<sup>141</sup> *See, e.g.*, United States v. Parker, 491 F.2d 517, 520-21 (8th Cir. 1973), *cert. denied*, 416 U.S. 989 (1974); *cf.* United States v. Scholle, 553 F.2d 1109, 1123-24 (8th Cir.) (approving admissibility of computer printouts of data collected by DEA laboratories throughout the country revealing the number of instances in which specific adulterants were found in cocaine samples), *cert. denied*, 434 U.S. 940 (1977). *But see* United States v. Sarmiento-Perez, 633 F.2d 1092, 1105 n.9 (5th Cir. 1981) (court expressed "serious reservations" on question whether laboratory analysis identifying white substance as cocaine could be admissible over confrontation objections). Several state courts have upheld the admissibility of chemical analyses of suspected drugs as either business or public records. *See, e.g.*, State v. Cosgrove, 181 Conn. 562, 566-72, 436 A.2d 33, 36-44 (1980) (marijuana); *In re Kevin G.*, 80 Misc. 2d 517, 521-24, 363 N.Y.S.2d 999, 1004-07 (Fam. Ct. 1975) (heroin). *Contra* Commonwealth v. McNaughton, 252 Pa. Super. 302, 309, 381 A.2d 929, 932 (1977) (hospital report; morphine); State v. Henderson, 554 S.W.2d 117, 122 (Tenn. 1977) (LSD).

<sup>142</sup> *See, e.g.*, Virgin Islands v. St. Ange, 458 F.2d 981 (3d Cir. 1972) (laboratory report finding presence of semen in smear sample admissible as business record); Robertson v. Cox, 320 F. Supp. 900 (W.D. Va. 1970) (report of chief medical examiner's office indicating presence of seminal fluid in vaginal swabs did not violate right of confrontation because report did not express an opinion but only a positive chemical finding); Clark v. Indiana, — Ind. —, —, 436

ify for admission under the rule if the tests upon which such a report is based are ministerial in nature, requiring the analyst to do little more than record the results of a mathematical computation or the reading of a dial.<sup>144</sup> A showing that the test was performed as part of the daily routine of a busy crime laboratory would answer a *Palmer*-based argument that it was made with an eye toward prosecution. As to repetitious tests performed on substances of unknown origins, there would usually be insufficient motivation or opportunity for the chemist to color the facts in such a way as to favor the prosecution's case.<sup>145</sup>

A counterargument to the admission of even relatively objective laboratory reports without testimony by the preparer is that cross-examination could play a significant role in undermining the reliability of the test results. As is the case generally with expert scientific evidence, the adversary may have a great deal to gain by probing such matters as the expert's qualifications and experience, the conditions under which the test was made, and whether the instruments used were in good working order.<sup>146</sup> A partial answer to this argument, however, is that cross-examination would be of limited use in shedding light on the performance of a routine test in a busy laboratory because of the unlikelihood that the analyst would have any independent recollection of the test.<sup>147</sup> It was for this reason that Jus-

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N.E.2d 779, 781-82 (1982) (report of state police technician on type of blood found on knife held admissible); cf. *United States v. McKinney*, 631 F.2d 569, 571 (8th Cir. 1980) (improper for FBI agent to testify about results of laboratory report which was not offered into evidence). *But see* *State v. Monroe*, 345 So. 2d 1185, 1188-91 (La. 1977) (coroner's report showing presence of seminal fluid inadmissible unless author is unavailable).

<sup>144</sup> See, e.g., *Kay v. United States*, 255 F.2d 476, 480-81 (4th Cir.), cert. denied, 358 U.S. 825 (1958); *People v. Porter*, 46 A.D.2d 307, 311-13, 362 N.Y.S.2d 249, 255-56 (1974) (blood test for alcohol); *State v. Kreck*, 86 Wash. 2d 112, 119-21, 542 P.2d 782, 785-88 (1975) (blood test for chloroform).

<sup>145</sup> It is true, of course, that a subjective element can enter into even the reading of a dial. See Lewis, *The Element of Subjectivity in Interpreting Instrumental Test Results*, in SCIENTIFIC AND EXPERT EVIDENCE 409, 414 (E. Imwinkelried 2d ed. 1981) (expert pressed for time may conclude: "That's close enough"). Subjectivity is a question of degree, and each type of scientific test should be evaluated separately.

<sup>146</sup> If the chemist were inherently biased, it is more likely than not that he would always find that a suspected substance was legally tainted. Such findings would undermine his credibility in the long run since errors would be discovered sooner or later, thereby harming the government's prosecutorial efforts. Thus, a chemist would arguably be motivated to make only accurate findings. One court has characterized the work of crime laboratory chemists as a "check on the prosecutorial effort" to assure the propriety of convictions and to avoid the prosecution's expenditure of time on meritless cases if the substances examined are not contraband. *State v. Cosgrove*, 181 Conn. 562, 577, 436 A.2d 33, 41 (1980).

<sup>147</sup> See *United States v. Oates*, 560 F.2d 45, 81-82 (2d Cir. 1977); *supra* note 120.

<sup>148</sup> See *supra* notes 8-9 and accompanying text. *State v. Kreck*, 86 Wash. 2d 112, 120, 542

tice Harlan concluded in his concurring opinion in *Dutton v. Evans*<sup>148</sup> that routine laboratory analyses would not violate a defendant's right of confrontation.<sup>149</sup> In addition, the analyst's qualifications will be adequately established if the prosecution has laid a proper foundation for admissibility of the report. Further, it is significant in evaluating the fairness of introducing routine laboratory reports that the defendant has the right, prior to trial, to review such reports<sup>150</sup> and to inspect any documents or tangible objects "which are material to [the] defense or are intended for use by the government as evidence in chief at the trial, or were obtained from, or belong to, the defendant."<sup>151</sup> Such discovery should facilitate the acquisition of evidence by which to challenge the foundation for admissibility of the report or to attack its merits if it is admitted. Finally, if the defendant believes that his case will benefit from the actual courtroom appearance of the government analyst, he can subpoena the witness as his own<sup>152</sup> and seek to impeach his credibility on the stand.<sup>153</sup>

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P.2d 782, 787 (1975) (laboratory technician unlikely to recall test performed two years ago after having conducted approximately one thousand tests in the meantime).

<sup>148</sup> 400 U.S. 74, 93-100 (1970).

<sup>149</sup> Justice Harlan cited *Kay v. United States*, 255 F.2d 476 (4th Cir.), *cert. denied*, 358 U.S. 825 (1958), as an example of a case demonstrating why the confrontation clause should be interpreted to permit hearsay exceptions which "eliminate the necessity for production of declarants where production would be unduly inconvenient and of small utility to a defendant." *Dutton v. Evans*, 400 U.S. at 96. See *supra* notes 100-02 and accompanying text.

<sup>150</sup> FED. R. CRIM. P. 16(a)(1)(D) (defendant entitled to discovery and inspection of reports of physical or mental examinations and of scientific tests or experiments). See, e.g., *United States v. Penix*, 516 F. Supp. 248, 258 (W.D. Okla. 1981) (report of government's test on alleged cocaine).

<sup>151</sup> FED. R. CRIM. P. 16(a)(1)(C). See, e.g., *United States v. Acarino*, 270 F. Supp. 526, 528 (E.D.N.Y. 1967) (defendant's expert permitted to test alleged heroin seized from defendant). A growing body of authority holds that the prosecution is duty-bound to preserve discoverable evidence for re-testing by the defendant. See *United States v. Bryant*, 439 F.2d 642, 652 (D.C. Cir. 1971); *People v. Hitch*, 12 Cal. 3d 641, 650, 527 P.2d 361, 367, 117 Cal. Rptr. 9, 15 (1974); *State v. Wright*, 87 Wash. 2d 783, 789, 557 P.2d 1, 5 (1976). See generally Note, *The Right to Independent Testing: A New Hitch in the Preservation of Evidence Doctrine*, 75 COLUM. L. REV. 1355 (1975). Such duty is particularly appropriate with respect to novel scientific evidence. See Giannelli, *supra* note 128, at 1242-43.

<sup>152</sup> FED. R. CRIM. P. 17. The defendant's subpoena rights flow, in part, from the sixth amendment's guarantee that he "have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI. See 8 R. CIPES, MOORE'S FEDERAL PRACTICE: RULES OF CRIMINAL PROCEDURE ¶ 17.02 (2d ed. 1982). The defendant's sixth-amendment right to compulsory process is not a cure for the prosecution's noncompliance with defendant's complementary sixth-amendment right to confront the witnesses against him, but it helps preserve a balance of fairness in criminal trials when reliable hearsay evidence is admitted against the defendant. See generally Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 613-28 (1978).

<sup>153</sup> FED. R. EVID. 607 (credibility of a witness may be attacked by party who called him). See *State v. Cosgrove*, 181 Conn. 562, 579-80, 436 A.2d 33, 41-42 (1980) (defendant's rights of pre-



In sum, the particular investigatory report, such as a government laboratory analysis, should be admissible if it was made at or near the time of the matter recorded, it is based on information from identifiable government officials, its author is shown to be qualified in his field, its contents describe primarily objective, routine matters which are not directly accusatory of the defendant, and it is devoid of facial irregularities.

### C. *The Effect of Live Testimony*

Congress made it fairly clear that it intended government records which are excluded under rule 803(8) to be inadmissible as evidence in chief against criminal defendants under any exception to the hearsay rule if the maker of the record does not testify at trial.<sup>154</sup> Thus, even if the author of a disqualified record is dead or actually unavailable for some other valid reason, the prosecution will not be able to resort to the residual hearsay exception of rule 804(b)(5), which allows for the admission of hearsay evidence not falling within a particular exception if the declarant is unavailable to testify and the statement possesses sufficient "circumstantial guarantees of trustworthiness."<sup>155</sup> Resort to rule 804(b)(5) should be unavailing, in any event, since the type of record excluded by 803(8) would not satisfy rule 804(b)(5)'s requirement of trustworthiness.<sup>156</sup> An in-

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trial discovery and subpoena power over chemist counterbalance the disadvantage of prosecutor's failure to call the chemist). *Accord* *State v. Spikes*, 67 Ohio St. 2d 405, 413, 423 N.E.2d 1122, 1128 (1981), *appeal dismissed*, 454 U.S. 1131 (1982) (defendant could have subpoenaed persons who prepared hospital records of victim).

<sup>154</sup> A Senate proposal to create a separate hearsay exception for police reports in cases involving the unavailability of their authors was specifically rejected. *See supra* notes 50-53 and accompanying text. Although the legislative history is less certain as to inadmissible investigatory fact-findings, *see supra* notes 115-17 and accompanying text, the author's unavailability should not make a difference. *See infra* note 156.

<sup>155</sup> *See supra* note 52.

<sup>156</sup> *Cf. United States v. Love*, 592 F.2d 1022, 1025-26 (8th Cir. 1979) (statement not falling within exception for statement against penal interest also inadmissible under rule 804(b)(5) because it was not sufficiently reliable); *State v. Garvey*, 283 N.W.2d 153, 156-57 (N.D. 1979) (narcotics agent's memorandum written on bag containing alleged drugs inadmissible under state adaptations of rules 803(6), 803(8), and 804(b)(5)). An analogous issue which has divided the courts is whether the grand jury testimony of a witness who is unavailable for trial may be admitted pursuant to rule 804(b)(5). *Compare United States v. Gonzales*, 559 F.2d 1271 (5th Cir. 1977) (inadmissible because unreliable) *with United States v. West*, 574 F.2d 1131 (4th Cir. 1978) (admissible because testimony was corroborated). In dissenting from the Supreme Court's denial of certiorari in *United States v. Garner*, 574 F.2d 1141 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978), Justice Stewart expressed serious doubt that grand jury testimony was reliable enough to satisfy the requirements of either rule 804(b)(5) or the sixth amendment. 439 U.S. at 936-40 (dissenting opinion).

creased need for a report tainted by prosecutorial bias or highly subjective content does nothing to enhance its reliability, and the requirement of trustworthiness cannot constitutionally be set aside.<sup>157</sup>

Less certain is the extent to which a government report must be excluded if the official who made the report testifies at trial. In *United States v. Sawyer*,<sup>158</sup> the Seventh Circuit Court of Appeals permitted introduction of the contents of an IRS officer's memorandum of a phone conversation with the defendant under the exception of rule 803(5) for recorded recollections<sup>159</sup> because the IRS officer who testified at trial could not recall the particular conversation.<sup>160</sup> Under the business records exception, the same court, in *United States v. King*,<sup>161</sup> upheld the admission of investigatory reports prepared by agents of the Social Security Administration where the agents testified at trial, apparently without any showing of their inability to recall the transaction in issue.<sup>162</sup> In both cases the court reasoned that Congress intended rule 803(8) to prevent the admission of investigative reports as a "substitute" for live testimony,<sup>163</sup> and that such intent would not be frustrated if the author of the report

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<sup>157</sup> See *supra* notes 28-30 and accompanying text. But see Imwinkelried, *supra* note 134, at 648 (recognizing possibility of admitting evaluative laboratory reports if analyst is "absolutely unavailable and the scientific test could not be duplicated").

<sup>158</sup> 607 F.2d 1190 (7th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980).

<sup>159</sup> Federal Rule of Evidence 803(5) recognizes a hearsay exception for a memorandum or record written or adopted by a witness at a time when the matter was fresh in his memory but as to which he now has "insufficient recollection to enable him to testify fully and accurately." FED. R. EVID. 803(5).

<sup>160</sup> *United States v. Sawyer*, 607 F.2d at 1193. *Accord* *United States v. Marshall*, 532 F.2d 1279, 1285-86 (9th Cir. 1976) (in prosecution for possession of cocaine, chemist who had performed analysis of drug had no recollection, at trial, of tests performed).

<sup>161</sup> 613 F.2d 670 (7th Cir. 1980).

<sup>162</sup> *Id.* at 673-74. *United States v. Marshall*, 683 F.2d 1212 (8th Cir. 1982), similarly allowed reports by an investigative agent of the Department of Agriculture to accompany the agent's testimony in a prosecution for illegal redemption of food stamps. *Id.* at 1214-15. The alleged misconduct occurred in 1981, and the reports, which consisted of interviews with the defendant in 1976 and 1978, were offered on the issue of the defendant's prior knowledge that his conduct was illegal. *Id.* See FED. R. EVID. 404(b). The court found no problem with the 1978 report and described the 1976 report as "merely cumulative" of the agent's testimony. *United States v. Marshall*, 683 F.2d at 1215. In a footnote, the court stated "the report might arguably have been admissible under 803(8)." *Id.* at 1215 n.5. The dissent argued that the memoranda fell within the exclusion of rule 803(8)(B) and would be admissible, if at all, only on redirect examination to rehabilitate an attack on the agent's memory. *Id.* at 1217-18 (dissenting opinion). See *infra* note 177.

<sup>163</sup> *United States v. King*, 613 F.2d 670, 673 (7th Cir. 1980); *United States v. Sawyer*, 607 F.2d 1190, 1193 (7th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980). On the floor of Congress, criticism of the government-records hearsay exception centered upon the dangers of using police reports with "no other evidence being presented" or "in lieu of" the police officer's testimony. 120 CONG. REC. 2388 (1974). See *supra* note 45 and accompanying text.

appeared at trial and his credibility could thereby be tested in the presence of the factfinder.<sup>164</sup>

As suggested in *Sawyer*, if a law enforcement official is available to testify at trial but cannot recall the details of a transaction which was recorded by him when it was fresh in his memory, the proponent of the evidence should be permitted to lay a foundation under rule 803(5) for reading the report into evidence as a past recollection recorded.<sup>165</sup> Such use of law enforcement records offers a reasonable compromise between the prosecutorial need for evidence and the defendant's interests in confronting government agents. The author's presence will afford the defendant an opportunity to test the reliability of the report and the credibility of its maker, thus answering most confrontation challenges.<sup>166</sup> In addition, since the report itself cannot

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<sup>164</sup> *United States v. King*, 613 F.2d 670, 673 (7th Cir. 1980); *United States v. Sawyer*, 607 F.2d 1190, 1193 (7th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980).

<sup>165</sup> See *supra* notes 158-60 and accompanying text. The reliability of this hearsay exception is said to lie in the requirements that the witness testify under oath, that the record was accurate when made, and that the record was prepared closely in time to the event it records, when memory was fresh. 3 J. WIGMORE, *supra* note 2, § 736. Because the relative contemporaneity of the record may make it more reliable than subsequent oral testimony, a minority of courts have held that admissibility does not depend upon any showing of an impaired memory. See, e.g., *Jordan v. People*, 151 Colo. 133, 376 P.2d 699 (1962), *cert. denied*, 373 U.S. 944 (1963); see 3 J. WIGMORE, *supra* note 2, § 738. Rule 803(5) requires a showing of lapsed memory, however, in order to discourage the use of self-serving statements prepared for purposes of litigation. FED. R. EVID. 803(5) advisory committee note. This constraint is particularly appropriate in the case of reports falling within the exclusionary scope of rule 803(8).

Rule 803(5) does not require a total lack of recollection, only that memory be "insufficient" to enable full and accurate testimony. See *supra* note 159. Thus, if the witness' memory is only partial, the rule may be invoked to admit portions of the record in order to fill in gaps in the testimony. See 4 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 803(5)[01], at 803-138. If showing the report to the witness refreshes his recollection so as to enable him to testify fully from present memory, the report should not qualify for admission under rule 803(5). C. McCORMICK, *supra* note 1, § 715.

<sup>166</sup> *United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966), described a confrontation-based objection to the use of past recollection recorded as "[s]craping the bottom of the barrel." *Id.* at 770-71. Accord *United States v. Marshall*, 532 F.2d 1279, 1285 (9th Cir. 1976). In *California v. Green*, 399 U.S. 149 (1970), a case involving the substantive use of a prior inconsistent statement by a witness who became forgetful at trial, the Court held that the confrontation clause is not violated if a declarant testifies as a witness and is "subject to full and effective cross-examination." *Id.* at 158. In view of the longstanding acceptability of past recollection recorded as a hearsay exception, see 3 J. WIGMORE, *supra* note 2, § 736, it should be entitled, at minimum, to an inference of constitutionality. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); *supra* note 31 and accompanying text. Although the effectiveness of cross-examination would be questionable if the witness lacked total recollection, this shortcoming would probably not violate the confrontation clause. See, e.g., *California v. Green*, 399 U.S. 149, 188-89 (1970) (prosecutor's production of a witness satisfies confrontation clause regardless of lapsed memory) (Harlan, J., concurring); *United States v. Payne*, 492 F.2d 449, 454 (4th Cir. 1974) (confrontation not violated where witness who claimed total lack of recollection of statement was available for cross-examination on such matters as contemporaneous events and bias,

be admitted as an exhibit by the proponent, the danger is removed that the jury will give undue weight to the official document containing the witness' statement.<sup>167</sup>

The holding in *King*, which would appear to sanction the admissibility of a law enforcement report whenever the author testifies in person,<sup>168</sup> is more questionable. If a report is excludable hearsay under rule 803(8)(B) or (C), there is nothing in the author's appearance that should transform the report into an admissible business record under rule 803(6).<sup>169</sup> Although the discussions in Congress concerning the exclusionary language of rule 803(8) focused only upon disapproval of the introduction of police reports as the sole evidence against the accused,<sup>170</sup> there is no indication that Congress intended to sanction the use of such reports as corroboration of live testimony. If a government agent is able fully to recall and testify about an event,<sup>171</sup> his written report thereof should be treated as a prior consistent statement,<sup>172</sup> the admissibility of which should be denied during direct examination because of its doubtful probative value and unnecessarily cumulative effect.<sup>173</sup> Further, in some circumstances

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and jury had opportunity to observe demeanor), *cert. denied*, 419 U.S. 876 (1974); *cf. Morgan, supra* note 2, at 719-20 (despite absence of full cross-examination, witness' presence will afford sufficient basis for evaluation of his honesty and general capacities of perception, memory, and narration).

<sup>167</sup> Rule 803(5) provides: "If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party." A past recollection recorded becomes, in effect, the live testimony of the witness, a written version of which will not be seen by the jury under normal circumstances. *See* 4 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 803(5)[02], at 803-146.

<sup>168</sup> *See supra* notes 161-62 and accompanying text.

<sup>169</sup> *See supra* notes 121-22 and accompanying text.

<sup>170</sup> *See supra* notes 45 & 163 and accompanying text.

<sup>171</sup> Perhaps *King* could be read as endorsing the view that lapsed memory should not be a prerequisite for use of past recollection recorded. *See* 3 J. WIGMORE, *supra* note 2, § 387. This view, however, was obviously rejected by the draftsmen of rule 803(5). *See supra* note 165.

<sup>172</sup> A statement made out of court by a witness prior to trial and consistent with his trial testimony has been treated by modern courts as hearsay. *See* Graham, *Prior Consistent Statements: Rule 801(d)(1)(B) of the Federal Rules of Evidence, Critique and Proposal*, 30 HASTINGS L.J. 575, 577-78, 581-82 (1979). Thus, prior consistent statements are generally denied admissibility as affirmative evidence during a witness' direct testimony. *See, e.g.,* United States v. Weil, 561 F.2d 1109, 1111 & n.2 (4th Cir. 1977); United States v. Leggett, 312 F.2d 566, 572 (4th Cir. 1962). Use of prior consistent statements has generally been permitted only when the witness' trial testimony has been impeached in some manner. *See infra* note 177 and accompanying text.

<sup>173</sup> The relevance of prior consistent statements on the issue of the witness' credibility is slight because repetition of a possible falsehood does not increase its veracity. 4 J. WIGMORE, *supra* note 2, § 1124. To the extent the prior consistency corroborates the witness' testimony, such corroboration is merely cumulative and wasteful of the court's time because it does not emanate from a truly independent source. *Id.*; Graham, *supra* note 172, at 578-81. *See* FED. R. EVID. 403 (relevant evidence may be excluded "if its probative value is substantially outweighed

admission of the report would constitute undue prejudice<sup>174</sup> if the format provided a summary of the prosecution's case in such a way as to create in the minds of the jurors an aura of authoritativeness.<sup>175</sup> Rejection of the *King* approach, however, would not necessarily preclude the admission of a law enforcement officer's report, under cautionary instructions, for the purpose either of resolving some collateral issue raised by the defendant<sup>176</sup> or of rebutting an attack on the credibility of the officer's courtroom testimony.<sup>177</sup>

Another issue related to the effect of live testimony on the admissibility of a government record is whether an expert for the prosecution may properly testify at trial on the basis of data contained in

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by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

<sup>174</sup> See FED. R. EVID. 403.

<sup>175</sup> See, e.g., *United States v. Ware*, 247 F.2d 698, 700-01 (7th Cir. 1957) (admission of envelopes on which undercover narcotics agents who testified at trial had noted the details of drug purchases held reversible error because the jury was allowed to see documents which offered "a neat condensation of the government's whole case against the defendant"); accord *United States v. Quinto*, 582 F.2d 224, 235-36 (2d Cir. 1978); *United States v. Brown*, 451 F.2d 1231, 1234 (5th Cir. 1971).

<sup>176</sup> See, e.g., *United States v. Coleman*, 631 F.2d 908, 912 (D.C. Cir. 1980) (citing rules 803(6) and 803(8), court admitted DEA forms and envelopes in which an undercover agent who testified at trial had placed suspected narcotics because defendant put the government to the burden of proving chain of custody); *United States v. Parker*, 491 F.2d 517, 522 & n.6a (8th Cir. 1973) (following narcotics agent's testimony, admission of lock-seal envelopes containing notations about drug purchase upheld because defendant attacked chain of custody), *cert. denied*, 416 U.S. 989 (1974).

<sup>177</sup> Federal Rule of Evidence 801(d)(1)(B) removes prior consistent statements from the definition of hearsay and permits their substantive use, i.e., their use for the truth of the matter asserted, to rebut an express or implied charge of "recent fabrication or improper influence or motive." It has been held that the making of the prior consistent statement must have preceded the time at which the motive to falsify arose. See, e.g., *United States v. Quinto*, 582 F.2d 224, 232-34 (2d Cir. 1978) (error to admit IRS agent's record of a conversation with defendant following an attack on the agent's prosecutorial bias because such bias would have been present at the time he made the report, thus negating the relevance of the prior consistencies). *But see United States v. Williams*, 573 F.2d 284, 289 n.3 (5th Cir. 1978) (prior consistent statement can be used to rebut charge of improper motive even though it was made after the alleged motive arose).

Courts have divided over the issue whether a prior consistent statement may be used for the non-hearsay purpose of rehabilitating the credibility of a witness whose testimony has been impeached on grounds other than those specified in rule 801(d)(1)(B), such as by a showing of inaccurate memory or prior inconsistencies. Compare *United States v. Quinto*, 582 F.2d 224, 233-35 (2d Cir. 1978) (the standards for substantive admissibility under rule 801(d)(1)(B) are the same as the standards for the more limited purpose of rehabilitation; general attack on credibility does not suffice) with *United States v. Coleman*, 631 F.2d 908, 914 (D.C. Cir. 1980) (imputation of inaccurate memory is sufficient to make prior consistent statements admissible) (dictum) and *United States v. Rubin*, 609 F.2d 51, 68-70 (2d Cir. 1979) (receipt of inconsistent statements for impeachment should result in allowance of consistent ones for rehabilitation without regard to whether "rigorous" standards of rule 801(d)(1)(B) have been met) (Friendly, J., concurring), *aff'd*, 449 U.S. 424 (1981).

government reports that are themselves inadmissible. Federal Rule of Evidence 703 provides, without limitation to civil actions, that the bases of opinion testimony by experts need not be admissible in evidence "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions."<sup>178</sup> If an expert on the stand merely relates the hearsay opinions of government agents, however, rule 703 could serve as a subterfuge for the presentation of "hearsay in disguise."<sup>179</sup> If the government officials are thereby insulated from cross-examination, the defendant's confrontation rights will be seriously jeopardized.<sup>180</sup>

*United States v. Lawson*<sup>181</sup> typifies the approach courts have taken in resolving this problem. Lawson, accused of extortion and assault, pleaded insanity.<sup>182</sup> Prior to trial he was examined for three months at a federal medical center where a Dr. Robert B. Sheldon was chief of psychiatry.<sup>183</sup> At the trial, Dr. Sheldon testified that in his opinion Lawson was sane at the time he committed the alleged offenses.<sup>184</sup> Dr. Sheldon's personal observations of Lawson consisted of informal conversations and participation at two staff interviews; he never interviewed him privately.<sup>185</sup> In forming his opinion, Dr. Sheldon also relied upon several other sources, none of which were introduced into evidence. These included reports received from two physicians at the medical center who spent several hours in private with Lawson; reports from staff members who observed Lawson; the results of tests administered at the medical center; information from the Marine Corps, of which Lawson had been a member; and reports from the FBI agents who apprehended Lawson.<sup>186</sup> The district court admitted Dr. Sheldon's opinion pursuant to rule 703, and the Seventh Circuit Court of Appeals affirmed.<sup>187</sup>

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<sup>178</sup> FED. R. EVID. 703. The rule marks a departure from common law practice, which permits an expert to base his opinion only on first-hand knowledge or evidence which has been admitted at trial. See C. McCORMICK, *supra* note 1, § 14, at 31, § 15, at 34. The theory of rule 703 is that the expert, because of his professional qualifications, should be able to judge for himself the reliability of the data upon which he bases his opinion. C. McCORMICK, *supra* note 1, § 15, at 35-36.

<sup>179</sup> See *United States v. Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971) (en banc) (expert whose testimony was in issue was not a mere "summary witness" who did no more than summarize the contents of hearsay sources), *cert. denied*, 405 U.S. 954 (1972).

<sup>180</sup> See 3 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 703[04], at 703-24.

<sup>181</sup> 653 F.2d 299 (7th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982).

<sup>182</sup> *Id.* at 301.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 300-01.

The court held that an expert's testimony based solely on hearsay reports would violate a defendant's right of confrontation.<sup>188</sup> Such right was not violated in this case, however, because "Dr. Sheldon had had at least *some* contact with Lawson himself."<sup>189</sup> Furthermore, effective cross-examination of Dr. Sheldon was assured because the defendant was given access in advance of trial to the hearsay information that Dr. Sheldon relied upon.<sup>190</sup> Like the court in *Lawson*, other courts upholding testimony by prosecution experts based on hearsay reports from government agents have done so only when the expert formed an independent opinion and relied only partially on inadmissible data.<sup>191</sup>

Such an approach is acceptable provided the trial court carefully scrutinizes the expert's opinion to be certain that it consists of an independent appraisal of the facts and that it is based, at least partially, on either first-hand knowledge or other admissible evidence.<sup>192</sup>

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<sup>188</sup> *Id.* at 302.

<sup>189</sup> *Id.* at 303 (emphasis in original).

<sup>190</sup> *Id.* at 302-03.

<sup>191</sup> See, e.g., *United States v. Arias*, 678 F.2d 1202, 1206 (4th Cir.) (expert's opinion that drugs were imported from Colombia was based on his own comparison with sample whose Colombian origins were based on government agent's report), *cert. denied sub nom. Faircloth v. United States*, 103 S. Ct. 218 (1982); *United States v. Genser* 582 F.2d 292, 298-99 (3d Cir. 1978) (expert's opinion that certain funds constituted unreported income was apparently based on personal review of books and records, and on audit conducted by government agents), *cert. denied*, 444 U.S. 928 (1979); *United States v. Morrison*, 531 F.2d 1089, 1094 (1st Cir.) (in gambling prosecution, expert's opinion regarding daily totals of wagers made in defendant's operation was based on review of analysis conducted in FBI laboratory, sample-checking of computations therein, and independent verification of number of persons involved), *cert. denied*, 429 U.S. 837 (1976); *United States v. Golden*, 532 F.2d 1244, 1247-48 (9th Cir.) (FBI agent's opinion of value of seized heroin was based on personal prior purchases and reports from other agents familiar with the market), *cert. denied*, 429 U.S. 842 (1976).

<sup>192</sup> A case demonstrating the degree to which courts may differ in drawing conclusions from such scrutiny is *State v. Reardon*, 172 Conn. 593, 376 A.2d 65 (1977), a narcotics prosecution in which the supervisor of a laboratory rendered an opinion at trial that the substance seized from the defendant was marijuana. *Id.* at 594, 376 A.2d at 66. He had not personally performed the tests on the substance in question, but he testified that he had delivered the substance to a chemist under his supervision at a desk twelve feet from his own and directed that the tests be performed; that he observed the chemist as she performed the tests, though he did not see each detail; that he personally observed the results of a chemical test and a thin-layer chromatography test (the latter being sufficient alone to establish the presence of marijuana); and that he did not see the results of a microscopic examination. *Id.* at 595-97, 376 A.2d at 66-67. The court, properly it seems, held that the supervisor's opinion was admissible because it was based in part on his personal observations and review of the results of routine tests and reports made under his supervision and upon which he could reasonably rely. *Id.* at 597-98, 376 A.2d at 67.

A federal district court, however, granted a writ of habeas corpus on the ground that the defendant's right of confrontation had been denied. *Reardon v. Manson*, 491 F. Supp. 982, 985-89 (D. Conn. 1980), *remanded*, 644 F.2d 122 (2d Cir. 1981). The federal court characterized the supervisor's testimony as a mere repetition of information provided by the chemist. *Id.* at 985.

If the only bases for the expert's opinion are statements or opinions in government reports which have not satisfied the reliability threshold for admissibility in their own right, the prosecution will be achieving indirectly what it cannot do directly, thus depriving the defendant of an opportunity to confront the witnesses against him. Assuming the expert who relies partially on hearsay in government records is permitted to render an opinion, the court should also ensure that the defendant has been given adequate opportunity to examine the data in advance in order to facilitate cross-examination and allow the defendant to prepare an attack on the weight of the expert's opinion.<sup>193</sup> Finally, careful jury instructions should be given, cautioning against acceptance of the hearsay data for its truth.<sup>194</sup>

### III. CONCLUSION

As a matter of effective trial advocacy, prosecutors in most cases would probably prefer to present the live testimony of a government officer over the dry, printed word of his official report. Particularly in a case involving scientific evidence, presentation through an expert witness with impressive credentials would likely have a more persuasive impact on the jury. Obviously, the appearance of live witnesses would minimize the risk of committing reversible error on hearsay or constitutional grounds. Nevertheless, if government employees are unavailable for trial or their appearance would be inconvenient, inefficient, or unnecessary from the prosecutor's perspective, their duly-prepared reports should be admissible if they meet a satisfactory threshold of reliability.

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As to the microscopic test, he had no personal knowledge, and as to the results of the other tests, he had no independent knowledge that the results thereof pertained to the substance that he had delivered for examination or that the tests had been properly performed. *Id.* The court drew extensively upon the standards for testing confrontation rights articulated in *United States v. Oates*, 560 F.2d 45, 80-83 (2d Cir. 1977). See *supra* note 120. The district court decision was remanded for reconsideration by the court of appeals because the district court judge had found facts substantially different from those found by the state court, without setting forth any reason as to why the state court's presumptively correct findings were erroneous. *Reardon v. Manson*, 644 F.2d 122, 127-130 (2d Cir. 1981). See 28 U.S.C. § 2254(d) (1976).

<sup>193</sup> See *United States v. Lawson*, 653 F.2d 299, 302-03 (7th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982). Pursuant to Federal Rule of Evidence 705, the judge may require advance disclosure of the facts or data upon which an expert renders an opinion. The defendant may also seek discovery pursuant to Federal Rule of Criminal Procedure 16. See 3 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 703[4], at 703-26 (problems relating to government's intent to use expert testimony based on hearsay and defendant's review of the data should be solved at a pretrial conference).

<sup>194</sup> See 3 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 703[4], at 703-27 to -28.



Federal Rule of Evidence 803(8), in its present form, adds a degree of certainty in measuring the threshold of reliability by excluding from use against criminal defendants matters observed by law enforcement personnel and findings of fact based on government investigations. The rule manifests the drafters' conclusion that such records are frequently unreliable because of their subjective, evaluative nature and their inherent potential for prosecutorial bias. Receiving into evidence reports actually possessing such qualities would undermine the goal of enhanced accuracy in fact-finding that society has demanded in criminal cases and would violate the defendant's right of confrontation.

Literal application of rule 803(8)'s exclusionary language, however, would often impose upon the prosecution the burden of producing available public officials whose appearance at trial would add little or nothing to the existing reliability of their written reports. Therefore, a number of appellate courts, acting in accordance with the underlying purposes of the rule's exclusions, have properly eschewed a literal reading in favor of an individualized evaluation of the content and purpose of the report in question, the circumstances under which it was prepared, and the manner and mode by which it was offered at trial. These courts have recognized that records prepared by government officials in routine, nonadversarial circumstances and describing matters that are essentially objective in nature may be sufficiently reliable to overcome generalized objections based on the motivational bias and subjectivity of their authors. Such reasoning is persuasive and should continue to be followed both by federal courts and state courts applying adaptations of rule 803(8).

In order to clarify the type of public records that may properly be used in criminal trials, however, it would be helpful if rule 803(8) were amended to read as follows:

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

. . . .  
(8) Public records and reports. Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, or (C) factual findings resulting from an investigation made pursuant to authority granted by law, unless *as to any of the foregoing* the sources of information or other circumstances indicate lack of trustworthiness. *Records and reports encompassed by subdivisions (B) and (C) may not be offered against the accused in a criminal case, however, except upon a showing by the government that the record or*

*report (1) was made at or near the time of occurrence of the recorded matter by, or from information transmitted by, a qualified person with knowledge, (2) consists of essentially objective and nonaccusatory matters, (3) was prepared under nonadversarial circumstances and (4) is otherwise circumstantially trustworthy.*

In accordance with the views advocated in this Article, the proposed language would treat reports of all government agents' observations and investigatory fact-findings as presumptively inadmissible in criminal cases. In addition it would shift to the prosecution the burden of establishing that a record is sufficiently reliable because of its relative contemporaneity to the events in question, its identifiable sources of information, its objective and nonaccusatory content, the nonadversarial circumstances of its preparation, and the absence of other untrustworthy circumstances.<sup>195</sup> A public record failing to satisfy the foregoing standards would be inadmissible as evidence in chief to prove an essential element of a crime in all cases in which the author does not testify at trial. Courts should retain sufficient flexibility, however, to allow the use of an otherwise disqualified record in conjunction with live testimony if the factfinder is afforded an adequate opportunity to weigh the reliability of the evidence. For example, a government agent's investigatory report might properly be used as a past recollection recorded, as a prior consistent statement, or as a partial basis for expert testimony, assuming the requirements of the pertinent rules are met and the evidence is accompanied by the court's cautionary instructions. In all cases, courts should exercise their discretion to prohibit a use of public records that would mislead or confuse, cause unfair prejudice, or result in unnecessary accumulation of evidence.

This Article has sought to show that the exclusion of reports of law enforcement officers and investigatory factfindings from the public records hearsay exception in criminal cases, although based on a justifiable concern for the accused's right of confrontation, should not

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<sup>195</sup> The revised version of rule 803(8) would eliminate the categorical exclusion of reports by "police officers and other law enforcement personnel," thereby focusing attention on the circumstantial reliability of the individual report. *See supra* note 71. The fact that the report was written by a law enforcement officer would be an important factor for the court to consider, but would not be determinative of admissibility. The revision would also make clear that the concluding trustworthiness proviso applies to all categories of reports under rule 803(8). *See supra* note 93. The requirement of identification of the source of information contained in the report would change the result of cases such as *United States v. Hudson*, 479 F.2d 251 (9th Cir. 1972), *see supra* note 71, holding that anonymous entries in government files are sufficient to satisfy the public records exception. *See United States v. Richardson*, 484 F.2d 1046, 1048-49 (9th Cir. 1973) (Hufstедler, J., dissenting), *vacated*, 415 U.S. 971 (1974).

be absolute. In the final analysis, courts should seek to ensure that criminal trials are decided on the basis of reliable evidence, not by mechanical application of statutory language.