# 07-2321-cr

*To Be Argued By*:
ANTHONY E. KAPLAN

==========

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 07-2321-cr**

---

UNITED STATES OF AMERICA,
*Appellee,*

-vs-

DEVINE ANTHONY HARRIS,
*Defendant-Appellant.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

==========

## BRIEF FOR THE UNITED STATES OF AMERICA

==========

NORA R. DANNEHY
*Acting United States Attorney*
*District of Connecticut*

ANTHONY E. KAPLAN
*Assistant United States Attorney*
PAUL A. MURPHY
WILLIAM J. NARDINI
*Assistant United States Attorneys (of counsel)*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

**STATUTES**

**RULES**



**GUIDELINES**



**OTHER AUTHORITIES**

## STATEMENT OF JURISDICTION

The district court (Robert N. Chatigny, C.U.S.D J.) had subject matter jurisdiction over this federal criminal case under 18 U.S.C. § 3231.

On May 21, 2007, Chief Judge Chatigny orally imposed sentence on Harris. Judgment entered on May 30, 2007. (A 28-30). The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) that same day. (JA 19, Doc. 140). This Court has appellate jurisdiction over the defendant's claims pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the admission of the tape recording of a prison call between the defendant and an unidentified speaker legally recorded by the Connecticut State Department of Corrections violated the Confrontation Clause where the statements made by the unidentified speaker were not testimonial in nature and where they were adoptive admissions of the defendant.

2. Whether the defendant is entitled to a limited sentencing remand in light of *Kimbrough* where he was sentenced under the guidelines applicable to career offenders and armed career criminals, not the quantity-based crack guidelines.

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 07-2321-cr**

---

UNITED STATES OF AMERICA,

*Appellee,*

-vs-

DEVINE ANTHONY HARRIS,

*Defendant-Appellant.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

---

## BRIEF OF THE UNITED STATES OF AMERICA

---

### Preliminary Statement

When New Haven Police Officers attempted to stop Devine Anthony Harris from speeding, Harris took off and sought to evade capture. After engaging police officers in a high-speed chase, Harris abandoned the car and its contents which included a bag containing 141 baggies of crack cocaine packaged for sale and a loaded semi-automatic pistol, all in the glove compartment. Police officers eventually located Harris who was hiding a short distance away. Harris, who had multiple convictions for

assault arising out of shootings, was arrested and charged with firearms and narcotics offenses.

Harris elected to proceed to trial. The evidence at that trial included the testimony of the police officers who chased and arrested Harris and recovered the evidence from the surrounding area and Harris' vehicle, and excerpts of several recordings of the defendant and others in prison calls overtly recorded by the Connecticut State Department of Corrections. One of those calls was of Harris speaking to an unidentified male, the admission of which, Harris claims, violates his right to confront the unidentified male. The district court rejected that argument, finding that the statements were not testimonial in nature and, in any event, the statements made by the male were adopted by Harris during the conversation. For the reasons that follow, this Court also should reject his argument, as well as his claim that he should be resentenced under the revised crack guidelines, and affirm the judgment and sentence imposed by the district court.

## Statement of the Case

On July 14, 2005, a grand jury seated in Bridgeport, Connecticut, returned a three-count superseding indictment ("Indictment") charging Devine Anthony Harris with possession with intent to distribute five or more grams of cocaine base/crack cocaine, in violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(B)(iii) ("Count One"); using and carrying a firearm during and in relation to a drug trafficking offense, in violation of Title 18, United States Code, Section

924(c)(1) ("Count Two"); and possessing a firearm as a prohibited person, in violation of Title 18, United States Code, Section 922(g)(1), and the Armed Career Criminal provision of Title 18, United States Code, Section 924(e)(1) ("Count Three") (A at 24-27).[1]

On August 8, 2005, the defendant moved to suppress evidence obtained as a result of a search of the vehicle. (A 7; docket entry 26-27).[2] On September 26, 2005, the trial court heard evidence on the defendant's suppression motion. (A 8; docket entry 32). By written unpublished ruling filed on November 10, 2005, Chief Judge Chatigny

---

[1] References to the Appendix in the appellant's brief are designated "A" followed by the cited page(s). References to the Government's Appendix are designated "GA" followed by the cited page(s). References to the trial transcript reflect the page(s) referred to. References to other proceedings reflect the date and the transcript page number(s). References to the Presentence Report are designated "PSR" and paragraph number of that report, which has been filed with the Court under seal.

[2] Harris had been initially charged in a one-count indictment returned on December 14, 2005, with possession of a firearm by a prohibited person. (A 5; docket entry 1). On July 14, 2005, the grand jury returned a superseding indictment adding the narcotics and using and carrying a firearm charges. (JA 20-23).

denied the defendant's motion to suppress. (A9; docket entry 40).[3]

On December 16, 2005, the Government filed and served an Information pursuant to Title 18, United States Code, Section 851, alleging that as the defendant had a prior conviction for a serious narcotics offense, he would be subject to a mandatory minimum sentence of 10 years and up to life upon a conviction on Count One of the Indictment. (A 9; docket entry 49).

On February 14, 2006, a jury was selected for trial. On February 15, 2006, the jury was sworn and the evidence commenced as to Counts One and Two, Count Three having been bifurcated. On February 17, 2006, the jury returned its verdicts, first finding Harris guilty on both Counts One and Two and then after evidence was introduced that Harris had been convicted of a felony offense and deliberating on Count Three, returning a guilty verdict on that count. (TT 428, 434).

On May 21, 2007, Chief Judge Chatigny imposed sentence. On Counts One and Three, Harris was sentenced to 240 months of imprisonment, which were ordered to run concurrently with each other. Chief Judge

---

[3] On or about April 16, 2008, the Government received what purported to be a "Supplemental Brief" signed by the defendant which challenged the suppression ruling. That *pro se* brief has not been docketed by this Court and appears to have been referred by this Court to Harris' appellate counsel on April 15, 2008.

Chatigny also sentenced Harris to 60 months of imprisonment on Count Two, to run consecutively to the 240-month sentences imposed on Counts One and Three, yielding an effective 300-month term of incarceration. The court described this as a non-guideline sentence, and it represented a 10-year variance from the advisory sentencing guidelines range. Harris was also sentenced to an eight-year term of supervised release and ordered to pay $300 in special assessments. (GA 1-7).

Judgment was entered on May 30, 2007, and a notice of appeal was timely filed on the same day. (GA 8). The defendant is serving his federal sentence.

## STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

### A. The evidence at trial

The following facts were adduced during the three-day trial before Judge Chatigny and the jury.

On December 3, 2004, shortly after 2 p.m., New Haven police officers Thomas Herbert and Brian Donnelly were conducting traffic enforcement on Ella T. Grasso Boulevard when Officer Herbert clocked a tan Nissan Maxima driven by the defendant going 52 miles an hour in a 35-mile-an-hour speed zone. (TT 29-30; 78-79). The defendant was sole occupant of the Maxima (TT 30, 79) which belonged to his sister, Shirley Brewer. (TT 212).

The officers decided to stop the Maxima, so they pulled up behind the defendant while he waited for the traffic light at Columbus Avenue. (TT 32, 79). Officer Herbert activated the overhead lights on his patrol car and used his public address system to instruct Harris to pull over when he crossed the intersection after the light turned to green. (TT 32). Office Herbert observed the defendant look at him in the rear-view mirror. (TT 33, 46). Once the light changed, the defendant moved his car toward the right at a low rate of speed and began to pull over but, rather than stopping, he fled. (TT 32-33, 46). As Officer Herbert followed the car through the intersection, he saw the defendant reaching down and toward the passenger side of the vehicle. (TT 33-34, 46-47, 50-51).

Officers Herbert and Donnelly followed the defendant's car at a safe distance as it raced north on Ella T. Grasso Boulevard, although they did not engage in a high-speed chase. (TT 34). The officers observed the defendant driving recklessly and violating numerous traffic restrictions. (TT 34, 80-81).

As it happened, off-duty New Haven Police Officer Phil McKnight was also driving on that same street at the time the defendant fled. (TT 65-67). When the car sped past him, Officer McKnight realized it was fleeing from the police so he decided to follow the car. (TT 67-68). He followed the defendant north on Ella T. Grasso Boulevard to Derby Avenue, where the defendant made a right and then another right on Mead Street. The defendant made a sharp turn into the driveway at 21 Mead Street, bailed out of the car and took off on foot. (TT 68-69).

The defendant left his car in the driveway at 21 Mead Street, ran away and jumped over two fences, ending up on a property with an abandoned convalescent home. Officer McKnight jumped out of his own car and chased the defendant on foot. (TT 69-70). He eventually found the defendant hiding inside the doorway of an abandoned building and ordered him to come out. (TT 71-72). The defendant, not realizing that Officer McKnight was a police officer, pleaded with McKnight to let him go. (TT 72, 75-76). Several uniformed officers eventually arrived and took custody of the defendant. (TT 72).

Officer Herbert took custody of the defendant and identified him as the driver of the Maxima. (TT 39-40). Officer Herbert then patted the defendant down to check for weapons and felt a large item in the defendant's pants pocket. (TT 40). On closer examination, it turned out to be a wad of $3,420 in cash in separate $100 bundles, each bundle folded over once, with all of them banded together. (TT 40, 84-87). The denominations were a single $100 bill, five $50 bills, 109 $20 bills, 54 $10 bills and 70 $5 bills. (TT 208-209). The large amount of money bundled in this manner was indicative of drug dealing, in particular, keeping money in $100 bundles to purchase additional drugs. (TT 285-286). An additional $142 was found in the defendant's wallet and strewn along his flight path. (TT 88).

Officer Herbert read the defendant his *Miranda* warnings. After doing so, he asked the defendant why he had fled the traffic stop. The defendant said he had been scared. Herbert also asked the defendant why he had

leaned forward and to the right when the police attempted to pull him over. The defendant responded: "I was going to open the glove box, ah forget about it, man." (TT 41, 56, 61-62).

Officer Herbert then drove the defendant back around the block to where the Maxima sat in the driveway of 21 Mead Street. (TT 41). Officer Donnelly had at some point searched the interior of the Maxima, but was unable to get into the glove compartment because it was locked. (TT 110-111). Sergeant Martin Tchakirides, who arrived on the scene, learned about the defendant's flight and apprehension, that he had been reaching for the glove box, and that he had a wad of cash in his pocket bundled in $100 increments. He also learned that the glove compartment was locked. (TT 123-125). Based upon his training and experience, he believed that narcotics were secreted inside the glove compartment. (TT145-146). The sergeant asked the defendant where the key to the car was. In response, the defendant motioned with his head in the direction of the path along which he had fled. (TT 126-127). The police followed the path where they found a ring of house keys, a black knit cap and some loose cash. (TT 126-127). A short distance from the cap, the police recovered a single car key. (*Id.*). Over one of the fences the defendant had vaulted, they also found the black cap he had been wearing and the key to the car. (TT 127).

The police eventually used the single car key they located to open the glove compartment. (TT 89, 112, 127-128). Inside, they found a large clear plastic bag containing smaller bags, inside which were smaller blue

ziplock bags of crack cocaine. The bag of drugs found inside the glove box was sitting on top of a loaded Browning Arms Company, Model Hi-Power, nine millimeter semi-automatic pistol with fourteen rounds of ammunition, including one round in the chamber. (TT 43, 90, 97, 178-180). The firearm was later test-fired without malfunction. (TT 307-308).

The net weight of the crack cocaine was 25.2 grams. (TT 96-97). The amount of crack and the manner in which it was packaged was consistent with street-level narcotics distribution. (TT 278-281). The drugs in the car were valued at approximately $2,800 (141 bags at $20 per bag) (TT 280-281), and the gun was worth approximately $400-$500. (TT 309-10).

Several telephone calls were played for the jury. It was stipulated that the calls were lawfully recorded and the parties to the conversations knew that the calls were being recorded. (TT 211).

They included calls in which the defendant spoke with an unidentified male about the defendant's belief that he had been set up and that he had fled from the police because he thought they were looking for a reason to search him. (GA 10-12). In this call, the defendant spoke about what he saw as a significant police presence on the day he was arrested and that when the police attempted to pull him over, he had to think what to do. The unidentified male noted that what the defendant was saying was that "somebody got on the horn," and that the defendant believed it was the guys he had "told was

private property." The defendant agreed with the unidentified male's statements, and the two went on to talk about how the unidentified male had previously warned the defendant that this would happen. In fact, one of the ways drug dealers protect their territory is, at times, by attempting to enlist law enforcement to take action against rival dealers. (TT 282-283).

The evidence also included a segment of a call with the defendant's sister, Shirley Brewer. In this segment, the defendant expressed deep concern when he learned that the police had asked his sister for consent to search her car for fingerprints. (Gov't Ex. 11-T-2). The call segment also revealed the defendant's relief upon hearing that his sister had refused to give the police consent to check her car for prints. Upon learning this, the defendant can be heard breathing an audible sigh of relief and saying to his sister, "Thank you, my god, thank you." (*Id.*).

The third call segment involved a call in which the defendant and Ms. Brewer had a conversation about the "money" he had kept at a third party's residence. His sister expressed concern about how to phrase what she wanted to say and asked if Nita "could . . . do it as eights or, you want her to… I don't know, break it down?" Harris replied, "Uh… oh, naah, Break it down." (Gov't Ex. 11-T-4).

"Eights" is common jargon for crack dealers and refers to an "eight-ball," which itself refers to an eighth of an ounce of crack. (TT 286). Additionally, the term "break[ing] it down" refers to what dealers do with large

quantities of crack to package them in smaller quantities ready for street sale. (TT 287).

**B. The sentencing**

A Presentence Report was prepared for sentencing. It determined that Harris was a career offender pursuant to U.S.S.G. § 4B1.1 based on six qualifying convictions. (PSR ¶ 28). Those convictions included accessory to assault in the first degree arising out of the shooting of a fourteen-year-old with a gun provided by the defendant (PSR ¶ 32); sale of cocaine (PSR ¶ 33); sexual assault in the second degree involving the rape of a thirteen-year-old (PSR ¶ 35); attempted assault in the second degree (PSR ¶ 38); assault in the first degree where the defendant shot his uncle (PSR ¶ 39); and assault in the second degree with a firearm, attempted robbery in the third degree and risk of injury involving Harris' attempted robbery and pistol-whipping of a fourteen-year-old victim (PSR ¶ 40).[4]

Since the offense level of 37 under the career offender guideline was greater than the offense level of 30 for possession of cocaine base and a firearm, his total offense level was 37. (*Id*.) Given that Harris had 17 criminal history points and was designated a career offender, he was placed in Criminal History Category VI. (PSR ¶ 41). Accordingly, with a Total Offense Level of 37 and a

---

[4] Harris was also convicted of carrying a pistol without a permit, arising out of an incident when he was shot and found to be in possession of a pistol when he arrived at the hospital. (PSR ¶ 36).

Criminal History Category VI, Harris' guideline range was 360 months to life on Count One, with a 60-month consecutive sentence on Count Two, yielding a guideline range of 420 months to lifetime imprisonment, and a mandatory minimum sentence of 20 years based on the fifteen-year mandatory minimum sentence on Count Three and the mandatory five-year consecutive sentence on Count Two. (PSR at ¶¶ 76-77).

The sentencing hearing began on March 6, 2007, continued on March 15, 2007, and concluded on May 21, 2007. Chief Judge Chatigny adopted the Presentence Report without change and concluded that the defendant's Total Offense Level was 37 and his Criminal History Category was VI, yielding an imprisonment range of 360 months to life on Counts One and Three, and a mandatory minimum consecutive term of incarceration of 60 months on Count Two. (GA 4). As the Court noted, "the applicable guideline range is 420 months to life. That's an extremely high range, one that I have not encountered before. It's composed of two elements, a minimum sentence as a career offender of 30 years followed by a mandatory consecutive sentence of five years." (5/21/07 Tr. 47). After considering "whether the advisory guideline sentence of 35 years is harsher than necessary to achieve the purposes of a criminal statute as set out in Section 3553" (*id*. 48), the court then imposed a non-guideline sentence of 240 months on Counts One and Three and a consecutive sentence of 60 months on Count Two, yielding a total effective sentence of 300 months. (*Id*. 55,

57-58). Chief Judge Chatigny explained the ten-year difference between the guidelines and his sentence as follows:

> The Court imposes a non-guidelines sentence for the following reasons. The career offender guideline produces a minimum guideline sentence of 420 months, which is much longer than the statutory mandatory minimum sentence of 240 months. A departure from the career offender guideline might well be justified in view of the large disparity between the minimum guideline sentence of 420 months and the total amount of time the defendant has previously served in prison as a result of prior sentences (approximately 120 months). *See United States v. Mishoe*, 241 F.3d 214 (2d Cir. 2001). However, the defendant did not request a departure under *Mishoe* [5] and urged the Court to impose a non-guideline sentence on the grounds that a sentence of 420 months is harsher then necessary to punish the defendant, deter him and others, and protect the public from further crimes of the defendant, considering the defendant's age, family ties, model conduct in prison, and ability to earn income as a licensed barber. The Court agrees that a sentence of 300

---

[5] At sentencing, the court noted that there did not seem a compelling argument for a *Mishoe* departure given, *inter alia*, his long and serious criminal record which included assaults with deadly weapons and drug dealing, some of which were of recent vintage. (5/21/07 Tr. 48-49).

> months is adequate to serve these purposes. In addition, a sentence of 300 months better promotes respect for law by reducing the size of the so-called "trial penalty" the defendant encountered as a result of his decision to try the case to a jury rather than plead guilty.

(GA 6).

Although the Government objected to the imposition of a non-guideline sentence, no cross-appeal was taken.

## SUMMARY OF ARGUMENT

The admission of the call between Harris and an unidentified male did not violate the Confrontation Clause of the United States Constitution because the call was not testimonial in nature, that is, it was not akin to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, or a police interrogation but, rather, was the product of an informal telephone call between two individuals. Further, the statements made by the unidentified male were affirmatively adopted by Harris. Finally, any error in the admission of this call was harmless.

In addition, there is no reason to remand the matter for resentencing under *Kimbrough* or the revised retroactive crack cocaine guidelines since Harris was sentenced under a different provision of the guidelines, namely, the career offender guideline.

## ARGUMENT

### I. The admission of the recorded prison call between the defendant and an unidentified male was proper

Harris contends that the district court erroneously admitted a recording of a conversation he had with an unidentified male which was recorded by the State of Connecticut Department of Corrections, in alleged violation of the Confrontation Clause as interpreted in *Crawford v. Washington*, 541 U.S. 36 (2004).

Harris' argument fails principally for two reasons. First, the recording was not "testimonial" as that term is used in *Crawford*. Second, the statements admitted as adoptive admissions and the portions of the recordings reflecting the unidentified male's statements were admissible to provide the necessary context for Harris' statements. In addition, to the extent that there was an error in the admission of the recording, it was harmless.

#### A. Factual background

The recording at issue is of a conversation between defendant Anthony Harris and an unidentified male while Harris was incarcerated shortly after his arrest in the present case. The two men discussed the day on which Harris was arrested and Harris' actions and mind-set when he was approached by police officers. It is clear from the content of the tape that the unidentified male was aware of Harris' involvement in narcotics and that the two men

believed that the reason Harris was stopped is because someone informed the police of his trafficking activities–in his words, got "on the horn." The unidentified male also refers to Harris' notifying the eventual informant about his "private property," which referred to the turf on which he operated as a drug dealer. As played to the jury, the recording was, in relevant part, as follows:[6]

* * *

> Harris: soon as I get to the corner, that's when I see all the jakes. Get to the other corner, I see jakes. I said, Oh shit. So I knew what time it was. I'm saying they were gonna pull me over on some bullshit...
>
> ***
>
> UM: Basically, basically what you actually saying is that somebody got on the horn?
>
> Harris: Yeah.
>
> ***

---

[6] The transcript of the recording 11-T-1, as played to the jury, appears at pages 10-12 of the Government's Appendix. The transcript of the recording which the Government originally offered to play prior to being ordered redacted by Chief Judge Chatigny appears at pages 13-16 of the Government's Appendix.

UM: Somebody got on the horn and then, that's how the whole shit, that's how that whole shit started transpiring.

Harris: Yeah.

UM: And you think it's the guys you told was private property (UI)?

Harris: Yeah.

UM: And that's what (UI) I told you the day before that, right?

Harris: Yeah, that's what we was talking–that's what we kept talking, you kept telling me like, yo, just think about it, and I was gonna do that–.

UM: Move that shit down.

Harris: Yeah.

UM: (UI) I know these cats, they're going to get on the horn.

Harris: Yeah, that–you was telling me all that shit and that's what, that's what happened.

* * *

The day prior to trial, February 14, Harris moved to preclude the Government from offering this recording, as

well as three others, between Harris and other persons made by the State of Connecticut Department of Corrections. (GA 17-22). With respect to the call raised as an issue on appeal, Harris argued that the call was not relevant, that the unidentified male was unavailable for cross-examination, and that the call references the fact that the defendant was detained. (GA 17-18).

That same day, the district court held a hearing on the motion in limine. The call contained on Gov't Exhibit 11-T-1 was played for the court, and the parties argued the probative value of the call, as well as the defendant's claim that the admission of the call would violate his confrontation rights. (GA 22-33). At the conclusion of the hearing, the district court found the probative value of the recording outweighed its prejudicial effect, but reserved decision until it had the opportunity to consider the Confrontation Clause issue. (GA 34-35).

During trial, the district court heard additional argument on the recordings and concluded that:

> it seems clear that the jury could find that the defendant does indeed adopt the statement of this unidentified individual within the meaning of the law governing adoptive admissions, more specifically listening to the recording, the jury could infer quite readily that the defendant heard what the other person said, understood what the other person said, and expressly agreed with the content of the statement. At a minimum, certainly,

> that would be a question for the jury, the evidence being sufficient to permit that finding.

(GA 38). The district court next asked the defense whether the statements by the unidentified person were "testimonial" or whether they were more akin to "an informal conversation between acquaintances," noting that "on its face it would seem to me the statements are not testimonial in that way." (GA 38-39). Defense counsel stated that she did not disagree with the court's characterization of the recording. (*Id*.).

The court then proceeded to examine line by line the statements made by the unidentified individual and the defendant's response to those statements on the recording to determine whether the defendant appeared, in fact, to be adopting the unidentified male's statement. (GA 41-44). Finding a portion of the recording "ambiguous" on this point, the court directed that the recording and transcript be edited so as to include only that portion of the conversation that could be viewed as an adoptive admission. (GA 44). The court then ruled that "the confrontation clause does not apply because [it's] not testimonial. I'm ruling that the adoptive admissions doctrine applies because the jury could find that the defendant adopted these statements." (GA 46). The court permitted the recording to be offered to establish the defendant's state of mind and why he fled from the police when they attempted to stop him. (*Id*.).

In its final instruction to the jury, without objection, the court instructed that "[o]ne of the recordings involves a

conversation between the defendant and an unidentified male. In addition to considering the content of the defendant's own statements on that recording, you may consider the content of the statements of unidentified male . . . . [i]f you find that the defendant heard the statements, understood them and agreed with them." (GA 47-48).

### B. Governing law

#### 1. Standard of review

This Court reviews the district court's determination that the Confrontation Clause was not implicated by admission of the recording *de novo* and its admissibility determination that the statements were adoptive admissions pursuant to Fed. R. Evid. 801(d)(2)(B) for abuse of discretion. *See United States v. Williams*, 506 F.3d 151, 155 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1329 (2008).

#### 2. Confrontation Clause

In *Crawford* v. *Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Sixth Amendment prohibits the admission of out-of-court testimonial statements by witnesses unless the declarant is available for cross-examination. Surveying its Sixth Amendment jurisprudence, the Court concluded that where "testimonial" hearsay statements are involved, the previously permitted approach of "[a]dmitting statements deemed reliable by a judge [was] fundamentally at odds with the right of confrontation." *Crawford*, 541 U.S. at 61.

The Court held that where the Government offers "testimonial" hearsay, the Confrontation Clause of the Sixth Amendment requires actual confrontation, i.e., cross-examination, regardless of how reliable the statement may be. *Id*. at 62. *Crawford* emphasized that, although the "ultimate goal" of the Confrontation Clause was clearly "to ensure reliability of evidence," the Clause did not confer a *substantive* guarantee of reliability, but rather a specific *procedure*—the right to cross-examine—for determining that reliability.

Accordingly, "where 'testimonial' statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id*. at 68-69. However, the *Crawford* Court carefully limited its holding to "testimonial" statements. *See id.* at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."). And even "testimonial" statements may be admitted without violating the Confrontation Clause if they are offered "for purposes other than establishing the truth of the matter asserted." *Id.* at 59 n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)). *See also United States v. Goldstein*, 442 F.3d 777, 785 (2d Cir. 2006) (same); *United States v. Stewart*, 433 F.3d 273, 291 (2d Cir. 2006) (same).

Although the Supreme Court did not specifically define the types of statements that are considered "testimonial" for Sixth Amendment purposes, it did state that the category includes "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and [] police interrogations," which are some of "the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 68. In *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004), this Court recognized that "the types of statements cited by the [Supreme] Court as testimonial share certain characteristics; all involve a declarant's knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings." *Id.* at 228. *Crawford* "at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial." *Id.*; *accord Goldstein*, 442 F.3d at 785. If the challenged statement is not testimonial, the Confrontation Clause is not implicated. *See Williams*, 506 F.3d at 157 (codefendant's admissions to third persons about his involvement in murder not testimonial).

**3. Adoptive admissions**

Furthermore, even statements deemed testimonial by the court must be admitted if they constitute "adoptive admissions" by the defendant. Rule 801(d)(2) excludes from the definition of hearsay any statement that "is

offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth . . . ." "Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule." Fed. R. Evid. 801(d)(2) advisory committee's note. As this Court has noted, "[t]he Advisory Committee thus recommends 'generous treatment of this avenue to admissibility.'" *Schering Corp. v. Pfizer, Inc.,* 189 F.3d 218, 238 (2d Cir. 1999). "When a statement is offered as an adoptive admission, the proponent must show evidence sufficient to support a finding that the party against whom the statement is offered heard, understood, and acquiesced in the statement." 5 *Weinstein's Federal Evidence* § 801.31[1] at 801-58 & n. 2 (2d ed. 2007) (citing *Schering Corp.*, 189 F.3d at 238-39). The Federal Rules of Evidence do not limit adoptive admissions to statements that incriminate the speaker or are otherwise against the speaker's interest. *See United States v. Shulman*, 624 F.2d 384, 390 (2d Cir. 1980). Further, the use of slang does not preclude a finding of an adoptive admission as long as the defendant understood the term used. *See United States v. Wiseman*, 814 F.2d 826, 828-29 (1st Cir. 1987) (per curiam).

The district court is responsible for making the initial determination under Fed. R. Evid. 104(b) that there is sufficient evidence that the statement being offered is an adoptive admission; the final decision whether or not the

statement is a adoptive admission is for the jury. *See United States v. Tocco*, 135 F.3d 116, 129 (2d Cir. 1998). The decision to admit statements as adoptive admissions is reviewed for an abuse of discretion. *Id*. at 128 (citing *United States v. Aponte*, 31 F.3d 86, 87 (2d Cir. 1994)).

**4. Harmless error**

The erroneous admission of evidence may nonetheless be harmless. Fed. R. Crim. P. 52(a). In evaluating whether the admission of the recording was harmless even if it violated the Confrontation Clause, the burden is on the government to show beyond a reasonable doubt that the error did not affect the jury's verdict. *See Chapman v. California*, 386 U.S. 18, 24 (1967). Any error in the admission of the recording as an adoptive admission would be harmless, as a non-constitutional evidentiary error, "if there is 'fair assurance' that the jury's 'judgment was not substantially swayed by the error.'" *See United States v. Yousef*, 327 F.3d 56, 121 (2d Cir. 2003) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)); *see also United States v. Harwood*, 998 F.2d 91, 99 (2d Cir. 1993) (noting distinction between two standards of review); *Klein v. Harris*, 667 F.2d 274, 290 n.10 (2d Cir. 1981) (same); *United States v. Evans*, 216 F.3d 80, 89-90 (D.C. Cir. 2000) (noting that "the distinction between constitutional and nonconstitutional error can be quite important, since the standards for testing whether such errors are harmless are different").

In undertaking a harmless error inquiry, the Court weighs various factors including: the strength of the

government's case; whether the evidence in question bears on an issue that is plainly critical to the jury's decision, for example, whether it goes to the defendant's credibility when his veracity is central to his defense; whether the evidence was emphasized in the government's presentation of its case and in its arguments to the jury; and whether the case was close. *See United States v. Jean-Baptiste*, 166 F.3d 102, 108-09 (2d Cir. 1999); *see also Delaware v. Van Arsdall,* 475 U.S. 673, 684 (1986) (in applying the harmless error doctrine in the context of Confrontation Clause violations, the reviewing court should consider a "host of factors" that include, the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case). "The strength of the government's case against the defendant is probably the most critical factor in determining whether an error affected the verdict." *United States v. Colombo,* 909 F.2d 711, 714 (2d Cir. 1990).

"Accordingly, a reviewing court may find that the admission of evidence was harmless 'where there is sufficient corroborating evidence to support the conviction.' The beneficiary of the alleged error bears the burden of establishing that such error was harmless. *See Chapman,* 386 U.S. at 24." *United States v. Dhinsa,* 243 F.3d 635, 649 (2d Cir. 2001) (quoting *Colombo,* 909 F.2d at 714).

### C. Discussion

#### 1. The tapes of Harris' prison calls were not "testimonial"

Chief Judge Chatigny's ruling that the recordings of Harris' prison calls were not "testimonial," as that term is used in *Crawford*, was not erroneous, and therefore they were properly admitted despite the defense's inability to question the unidentified male. Indeed, counsel below conceded that the statements were more akin to "an informal conversation between acquaintances" rather than "testimonial in that way." (GA 39).

As this Court recognized in *Saget*, the animating force behind the Supreme Court's conception of "testimonial" involves "a declarant's knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings." *Saget*, 377 F.3d at 228. Thus, *Saget* held that a coconspirator's statement to a confidential informant, whose true identity is unknown to the declarant, does not constitute testimony within the meaning of *Crawford*. 377 F.3d at 229. Conversations between two men over a prison telephone can hardly be considered "structured questioning in an investigative environment." Even had one of the participants been a Government informant, and thus actively seeking to obtain evidence to be used at a later trial, the statements would not have been "testimonial" under *Crawford*. *See id.* at 229-30 (noting that *Crawford* cited *Bourjaily v. United States*, 483 U.S.

171 (1987), with approval, and that *Bourjaily* approved admission of such recorded conversations over Confrontation Clause objections). *See also United States v. Feliz*, 467 F.3d 227, 232 (2d Cir. 2006) (noting *Crawford* distinction between "off-hand, overheard remarks" which are not testimonial and statements which involve governmental officers with an eye toward trial which would be testimonial citing *Crawford*, 541 U.S. at 51, 56 n.7), *cert. denied sub nom. Erbo v. United States*, 127 S. Ct. 1323 (2007). In this case, none of the participants was working for the Government, making the resulting statements even less "testimonial" than those at issue in *Saget*. *See also Feliz*, 467 F.3d at 236 (autopsy reports admitted as business records not testimonial).

Nor does it make any difference that the parties may have known that their conversations were being recorded. *Saget*'s recognition of the significance of "the declarant's awareness or expectation that his or her statements may later be used at a trial" does not mean that the possibility that the Government might make some later evidentiary use of the recordings transforms the conversation into a "testimonial" one. That factor relates to a declarant's subjective intent to provide information to investigators, either through responses to police questioning, sworn deposition, or complaint, that could foreseeably result in arrest or prosecution. *See Feliz*, 467 F.3d at 234-35.

This Court has further rejected the suggestion that any memorialized statements become "testimonial" simply because they might later be found to have evidentiary significance. In *United States v. Morgan*, 385 F.3d 196 (2d

Cir. 2004), the defendant complained that the admission of a co-defendant's letter to her boyfriend violated *Crawford*. This Court disagreed, noting that the letter

> was not in response to police questioning. It was not written in a coercive atmosphere. It was not addressed to law enforcement authorities. To the contrary, the letter was written by co-defendant Hester to an intimate acquaintance, a boyfriend . . ., in the privacy of her hotel room. She had no reason to expect that it would ever find its way into the hands of the police; she did not write it to curry favor with them or with anyone else.

*Id.* at 209. The Court recognized that the letter "was non-testimonial hearsay and thus is not subject to the rule enunciated in *Crawford*." *Id.* at 209 n.8.

*Davis v. Washington*, 547 U.S. 813 (2006), cited by Harris, does not suggest otherwise. Davis held that the statements made in response to questioning by the 911 dispatcher were not testimonial because the "primary purpose" of that questioning "was to enable police assistance to meet an ongoing emergency." 547 U.S. at 828. In the accompanying case, the Court found the interrogation "testimonial" since its "primary, if not indeed the sole, purpose . . . was to investigate a possible crime – which is, of course, precisely what the police officer *should* have done." *Id.* at 830. *See also Williams*, 506 F.3d at 155-57 (admission of out-of-court statements of defendant to witness did not violate the Confrontation Clause since not testimonial).

The present case does not concern an interrogation by law enforcement. Rather, as Chief Judge Chatigny stated and defense counsel agreed, the recording at issue was in the form of "an informal conversation between acquaintances, and on its face . . . the statements are not testimonial in that way." (GA 39). The conversation between Harris and the other individual regarding the former's arrest and activities was not intended by its participants for use by prosecutors or investigators, and so the statements were not "testimonial." Accordingly, the Confrontation Clause is not implicated by the admission of the recording.

**2. Even if construed as testimonial, such statements pose no violation of the Confrontation Clause because they constitute adoptive admissions by the defendant**

Even if Harris' statements are determined by this Court to be testimonial, they were properly admitted as "adoptive admissions" by the defendant – and hence not hearsay at all – reflecting his state of mind as to why he fled the police on December 3, 2004.

In this regard, Chief Judge Chatigny first examined the recording and found that the probative value of the recording outweighed its prejudicial effect. (GA 34-35). Next, he carefully and painstakingly reviewed the recording to ensure that the defendant, in fact, adopted the statements made by the unidentified male. (GA 41-44).

Having made this preliminary determination both as to relevance and as to their being adoptive admissions, the court left the ultimate determination to the jury (GA 38), and charged them accordingly. (GA 48-49).

Chief Judge Chatigny did not abuse his discretion in admitting certain of the recordings on this basis since there were sufficient foundational facts from which the jury could infer that the defendant heard, understood and acquiesced in the statements made by the unidentified male. In this regard, as the evidence established at trial, to a person involved in that trade, the statements made by the unidentified male about Harris' mind-set and activities are clear and unambiguous. So, too, are Harris' responses: "Yeah," "Yeah, that's what we was talking – that's what we kept talking, you kept talking, you kept telling me like, yo, just think about it, and I was gonna do that," "Yeah, that – you was telling me all that shit and that's what, that's what happened." (GA 11-12). Such responses by Harris to the unidentified male's statements clearly "manifested an adoption or belief in [their] truth," as required by the rules of evidence. Fed. R. Evid. 801(d)(2)(B). Indeed, Chief Judge Chatigny noted that "the adoption couldn't be more emphatic." (GA 43).

In *United States v. Shulman*, 624 F.2d 384, 389 (2d Cir. 1980), this Court upheld admission of a recording that contained both the defendant's own statements and statements made in the defendant's presence which the defendant expressly adopted either by responding "right" or by agreeing to them in some similar manner, or by failing to object and, as such, implicitly adopting them.

*See also United States v. DeJesus,* 806 F.2d 31, 35 (2d Cir. 1986) (supplier's comments, acknowledged by defendant, confirming that he had recently spoken to customer and was waiting to meet supplier to bring something to customer, were admissible as adoptive admission and to provide context for defendant's statements).

In fact, Chief Judge Chatigny ordered redacted from both the audio and the transcript those portions of the recording that he found ambiguous. (GA 44). Finally, he instructed the jury that, "in addition to considering the content of the defendant's own statements on that recording, you may consider the content of the statementsof unidentified male [] [i]f you find that the defendant heard the statements, understood them and agreed with them." (GA 47-48).

Accordingly, the recording reflected in Exhibit 11-T-1 was properly admitted as an adoptive admission.[7]

---

[7] In the district court, the Government cited *United States v. Lafferty*, 387 F. Supp.2d 500 (W.D. Pa. 2005). That case held that presenting the jury with an adoptive admission – in that case, the defendant's silence in the face of a co-defendant's incriminatory statement during a police interrogation – would not violate the Confrontation Clause. *See* 387 F. Supp.2d at 511. The district court's decision in *Lafferty* was subsequently reversed by the Third Circuit. *See United States v. Lafferty*, 503 F.3d 293 (3d Cir. 2007). That court found, on the adoptive admission issue, that the defendant had been advised of her right to remain silent and, having invoked that right, her silence could not be construed as an adoptive admission. 503 F.3d at (continued...)

### 3. Any hypothetical error in admitting the recording was harmless

Finally, even assuming that the introduction of the recording between Harris and the unidentified male was admitted in error, any such error would have been harmless.[8]

There was overwhelming evidence of the defendant's guilt. In this regard, the defendant was the only person in the car when he fled from a routine traffic stop and led the police on a high-speed chase. (TT 29-33, 78-79). As he fled, he was observed reaching toward the area of the glove compartment. (TT 33-34, 46-47, 50-51). Harris eventually abandoned the car and fled on foot in a vain attempt to avoid capture. (TT 68-69).

The drugs and gun found in the locked glove compartment were directly tied to the defendant through the over $3,400 in cash, mostly in small bills, carried in the manner of a drug dealer. (TT 40, 84-87). The

---

[7] (...continued)
305-07. Of course, in the present case, the statements were not made during an interrogation by the police, and the adoptive admissions were not in the form of silence in the face of statements which an innocent person would deny. Rather, they were affirmative adoptions of the unidentified male's statements.

[8] As the error was harmless beyond a reasonable doubt, there is a fair assurance that the jury's judgment was not substantially swayed by the claimed error.

defendant admitted to police that he was going to open the glove compartment when the police initially attempted to stop him. (TT 41, 56, 61-62). Indeed, the defendant discarded the very key that opened the car and glove compartment as he fled the scene on foot. (TT 126-28).

Moreover, the over $3,000 value of the drugs and gun negated the notion that some other violent drug dealer would have left them unattended in the glove compartment. (TT 280-81, 309-310). And the excerpts of other of the defendant's prison calls admitted at trial clearly showed that the defendant had a stash of drugs at his girlfriend's house and that he was extremely concerned about the police checking the vehicle for fingerprints. (11-T-2, 11-T-4).

While the Government acknowledges that the district court characterized 11-T-1 as "potentially the most significant because in the government's view it explains why the defendant behaved as he did," (TT 241), and the Government played the recording during its summation (TT 365-367, 391), the other abundant evidence introduced by the Government at trial as summarized above, established beyond a reasonable doubt the defendant's guilt on each of the charges contained in the superseding indictment.

## II. Since the defendant was sentenced under the career offender guideline, there is no reason to remand the matter pursuant to *Regalado*

Harris seeks to have the matter remanded to the district court for resentencing based on an amendment to the Sentencing Guidelines that lowers the applicable guideline levels for convictions related to cocaine base. A remand is not necessary since it was undisputed that Harris was a career offender as defined in U.S.S.G. § 4B1.1 and that he was sentenced under that provision – not pursuant to the crack cocaine guideline.

On November 1, 2007, the Sentencing Commission amended the cocaine base guidelines in U.S.S.G. § 2D1.1(c). The amendment in question is Amendment 706, effective November 1, 2007, which reduced the base offense level for most crack cocaine offenses.[9] In Amendment 706, the Commission generally reduced by two the offense levels applicable to crack cocaine offenses. The Commission reasoned that, putting aside its stated criticism of the 100:1 ratio applied by Congress to powder cocaine and crack cocaine offenses in setting statutory mandatory minimum penalties, the Commission could respect those mandatory penalties while still reducing the offense levels for crack offenses. *See* U.S.S.G., Supplement to App. C, Amend. 706. Previously, the Commission had set the crack offense

---

[9] Amendment 706 was further amended in the technical and conforming amendments set forth in Amendment 711, also effective November 1, 2007.

levels in Section 2D1.1 above the range which included the mandatory minimum sentence. Under the amendment, the Commission has set the offense levels so that the resulting guideline range includes the mandatory minimum penalty triggered by that amount, and then set corresponding offense levels for quantities that fall below, between, or above quantities which trigger statutory mandatory minimum penalties. For example, a trafficking offense involving five grams of crack cocaine requires a statutory mandatory minimum sentence of five years of imprisonment. *See* 21 U.S.C. § 841(b)(1)(B). Therefore, the revised guideline applies an offense level of 24 to a quantity of crack cocaine of at least five grams but less than 20 grams; at criminal history category I, this level produces a range of 51-63 months (encompassing the 60-month mandatory minimum).

The final result of the amendment is a reduction of two levels for each of the ranges set in the guidelines for crack offenses. At the high end, the guideline previously applied offense level 38 to any quantity of crack of 1.5 kilograms or more. That offense level now applies to a quantity of 4.5 kilograms or more; a quantity of at least 1.5 kilograms but less than 4.5 kilograms falls in offense level 36. At the low end, the guideline previously assigned level 12 to a quantity of less than 250 milligrams. That offense level now applies to a quantity of less than 500 milligrams.

On December 11, 2007, the Commission added Amendment 706 to the list of amendments made retroactively applicable pursuant to Section 1B1.10(c), effective March 3, 2008.

In addition, in *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008), *opinion amended,* No. 05-5739-cr (2d Cir. May 9, 2008) (per curiam), this Court remanded a case for resentencing to allow the district court to determine whether it would have imposed a non-Guidelines sentence knowing that it had discretion under *Kimbrough v. United States*, 128 S. Ct. 558 (2007), to deviate from the crack Guidelines to serve the objectives of sentencing under 18 U.S.C. § 3553(a).

Unlike the defendant in *Regalado*, however, Harris' initial guideline sentencing range was not determined by a calculation of the quantity of controlled substances involved in his case. Rather, Harris' guideline range of 360 months to life based on his conviction on Count One charging possession of cocaine base with intent to distribute was determined solely by his undisputed status as a career offender, as his offense of conviction was a controlled substance offense, and he had the requisite two prior convictions. In fact, Harris had six prior qualifying felony convictions. His initial sentencing guidelines offense level of 37 was based solely on the authorized statutory maximum of life imprisonment for the offense of conviction. Accordingly, Harris' total offense level was 37. That level, combined with a criminal history category of VI, resulted in a guideline range of 360-life. Sixty months were added to this range based on Harris' onviction for possessing a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c).

Notwithstanding this range, the district court imposed a sentence of 240 months of imprisonment on the cocaine

base and armed career criminal counts, which were ordered to run concurrently with each other. Added to this was the mandatory consecutive 60-month sentence. The total effective sentence of 300 months represented a ten-year variance below the advisory sentencing guidelines range.

As the Court made clear in *Regalado*, a remand was appropriate in that case only because of the "unusual circumstance[]" that this Court had previously "tended to discourage district courts from deviating from the crack cocaine Guidelines." *Regalado*, No. 05-5739-cr, mem. op. at 7 (citing this Court's pre-*Kimbrough/Gall* decision in *United States v. Castillo*, 460 F.3d 337 (2d Cir. 2006)). The Court decided that a remand was appropriate in light of *Kimbrough* because there was an "unacceptable likelihood of error" given the fact that the district court would have been, "quite understandably, unaware of (or at least insecure as to) its discretion to consider that the 100-to-1 ratio might result in a sentence greater than necessary." *Regalado*, No. 05-5739-cr, mem. op. at 9.

In *United States v. Ogman*, 2008 WL 925320 (2d Cir. Apr. 7, 2008) (summary order), this Court declined to remand the matter for resentencing in the situation presented here, finding that *Regalado*

> does not counsel in favor of, much less require, a remand in this case. Unlike in *Regalado*, where we remanded to allow the district court to determine "whether it would have imposed a non-Guidelines sentence knowing that it had discretion to deviate

> from the [crack] *Guidelines* to serve [the objectives of sentencing under 18 U.S.C. § 3553(a)]," (emphasis added), the Guideline range applied to Ogman's case was not the result of the 100-to-1 powder to crack ratio, but rather resulted from his undisputed status as a career offender under U.S.S.G. § 4B1.1(a), coupled with the *statutory* maximum term of life imprisonment for his cocaine-base offense, 21 U.S.C. § 841(b)(1)(A)(iii). *See* U.S.S.G. § 4B1.1(b)(A).

2008 WL 925320 at *1 (citation omitted).[10]

---

[10] The United States has filed a motion asking this Court to publish *Ogman* as a precedential opinion. That motion remains pending.

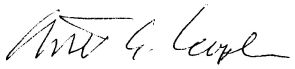
## Conclusion

Accordingly, the Government respectfully requests that the judgment of conviction and sentence be affirmed.

Dated: May 13, 2008

Respectfully submitted,

NORA R. DANNEHY
ACTING U.S.ATTORNEY



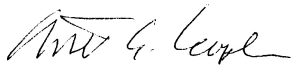
ANTHONY E. KAPLAN
ASSISTANT U.S. ATTORNEY

Paul A. Murphy
William J. Nardini
Assistant United States Attorneys (of counsel)

Jonathan Finer
Student Law Intern (on the brief)

**CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)**

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,080 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



ANTHONY E. KAPLAN
ASSISTANT U.S. ATTORNEY

# Addendum

**Sixth Amendment to the**
**Constitution of the United States**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## Federal Rules of Evidence Rule 801

The following definitions apply under this article:

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

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

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

**(d) Statements which are not hearsay.** A statement is not hearsay if--

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

**(2) Admission by party-opponent.** The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).